#79 5/31/77

Memorandum 77-39

Subject: Study 79 - Parol Evidence Rule

Background

The Commission was authorized in 1971 to make a study of "whether the parol evidence rule should be revised." The reason for this authorization is set out in the Commission's 1970 Annual Report. California's statutory formulation of the parol evidence rule was enacted in 1872, and, since that date, "has acquired a substantial judicial gloss, reflecting a variety of purposes and policies and resulting in a maze of conflicting tests and exceptions."

Unlike some of the fields in which the Commission has become involved, the parol evidence rule is the subject of an enormous outpouring of legal literature and analysis. The treatises and articles have dealt with the rule extensively and, as one commentator has noted, "The rule governing the admissibility of parol evidence in contract litigation is one of the most controversial rules in American law." Note, Chief Justice Traynor and The Parol Evidence Rule, 22 Stanford L. Rev. 547 (1970). Professor Sweet (Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036 (1968)) refers to the "ceaseless flow of parol evidence opinions," and one article observes:

> Any reader of advance sheets is well aware that most of the contract decisions reported do not involve offer and acceptance or other subjects usually explored in depth in a course in contracts but rather involve the parol evidence rule and questions of interpretation, topics given scant attention in most courses in contracts. [Calamari & Perillo, A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 Indiana L.J. 333 (1966).]

Because of the voluminous recent and very good literature and analysis in the area, this memorandum will be fairly succinct in its treatment of existing law, problems with existing law, and possible solutions. The memorandum will make reference to the more detailed discussions in the literature, where appropriate. The following materials are attached and will be referred to in the memorandum:

> Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036 (1968). This is an excellent treatment of the policies involved.

Note, Chief Justice Traynor and the Parol Evidence Rule, 22 Stanford L. Rev. 547 (1970). This is a good discussion of California law prior to the important Supreme Court decisions and an analysis of the decisions.

Jefferson, The Parol Evidence Rule, in California Evidence Benchbook (1972). This is the best statement of California law as it stands today.

Note, The Parol Evidence Rule: Is It Necessary?, 44 N.Y.U. L. Rev. 972 (1969). A good brief analysis of the rule, including a discussion of the California cases.

Existing Law

The common law parol evidence rule is simply enough stated. The rule provides that, where the terms of an agreement are reduced to writing, extrinsic evidence of a term agreed to prior to or contemporaneous with the written agreement is precluded. California statues have embodied the common law parol evidence rule in two spearate places in the codes. Code of Civil Procedure Section 1856 provides:

> 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
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> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
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> 2. Where the validity of the agreement is the fact in dispute.
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> But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Civil Code Section 1625 provides:

> 1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.

The policies behind the parol evidence rule are likewise quite evident. Reliance on the written agreement minimizes the opportunity for failing memories or perjury, enhances certainty in commercial dealings, and minimizes court time resolving disputes. It is an exclusionary rule of convenience. The policies (and the reasons for their inadequacy) are discussed in Sweet at 1047-1051 and N.Y.U. L. Rev. at 982-985.

The common law formulation (and the California statutory statement) of the parol evidence rule is not adequate since there are many cases where the terms of an agreement are reduced to writing, but there are other written or oral terms that the parties intended to be part of the agreement and which they simply did not include in the writing. For this reason, cases have continually eroded the rule, creating innumerable exceptions and finally evolving to the the point where the rule applies only to a written agreement that was intended by the parties as an integration of all the terms of the agreement. For discussions of these emendations of the parol evidence rule, see Sweet at 1037-1044 and Jefferson at 580-586.

The major controversy concerning the parol evidence rule today is the determination of whether the parties intended an integration of the written agreement. Generally speaking, California law prior to 1968 provided that the question whether an agreement is integrated is to be determined from the face of the document, extrinsic evidence on the point not being admissible. See discussion in Stanford L. Rev. at 548-553. The major exception to this generalization is the Uniform Commercial Code, which took effect in 1965, and which permits extrinsice evidence that does not contradict the terms of the agreement for the sale of goods. Uniform Commercial Code Section 2202 provides:

> 2202. Terms with respect to which the confirmatory memoranda of the parties agreee or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
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> (a) By course of dealing or usage of trade (Section 1205) or by course of performance (Section 2208): and
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> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The Official Comment to subdivision (b) states:

> Under paragraph (b) consistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact.

Then, in 1968, the California Supreme Court decided three cases, the major case being Masterson v. Sine, 68 Cal.2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968), which wiped out most of what was left of the parol evidence rule in California. The court held, "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence." 68 Cal.2d at 227. For analyses of Masterson and the companion cases, see Stanford L. Rev. at 553-563 and N.Y.U. L. Rev. at 977-982.

Where does this leave the parol evidence rule in California today? The existing law is laid out quite nicely by Jefferson at 565-579. Basically, after the Supreme Court cases, the parol evidence rule does two things: (1) It makes the judge the trier of fact on the question whether the parties intended the writing as an integrated agreement. If the judge determines that the agreement is integrated, the extrinsic evidence will be withheld from the jury. (2) Even if the judge finds that the agreement is not integrated, the extrinsic evidence will be withheld from the jury under the parol evidence rule if it contradicts an express provision of the agreement.

At least one very recent case, however, seems to assume that the parol evidence rule has disappeared completely in California. The court in National Computer Rental, Ltd. v. Gergen Brunswig Corp., 59 Cal. App.3d 58, 62 (1976) states somewhat ingenuously, "Since the oral agreement preceded the execution of the written contract, its admission did not violate the parol evidence rule." This statement draws a concurring opinion from Justice Jefferson, who comments:

> No authority is cited for this astounding principle. If this statement constitutes good law, the parol evidence rule is being abolished by judicial fiat contrary to the decisional law of our California Supreme Court. I cannot join in this method of disposing of the issue before us. 59 Cal. App.3d at 64.

Problems With Existing Law

The legal commentators have been nearly unanimous in their condemnation of the traditional parol evidence rule: because it is an exclusionary rule, it has tended to frustrate the clear intention of the parties, which is why there has been a continual process of judicial

liberalization of the rule. California has gone farther than most jurisdictions in minimizing the role of the parol evidence rule. However, even the limited role of the California rule--precluding contradictory evidence and making the judge the finder of fact on the question of integration--has been criticized.

If the collateral agreement contradicts the writing, evidence of the collateral agreement will be precluded, whether or not the writing was intended as an integration. The commentators believe that this aspect of the Supreme Court cases will not survive: The thrust of the cases is to permit evidence to effectuate the intent of the parties, absent a complete integration of the terms of the agreement. See Stanford L. Rev. at 561 and N.Y.U. L. Rev. at 980. So far, the commentators have proved wrong since subsequent cases have preserved the exclusionary rule for contradictory collateral agreements. See, e.g., American Nat'l Ins. Co. v. Continental Parking Corp., 42 Cal. App.3d 260, 265, 116 Cal. Rptr. 80, ___ (1974) (hearing denied):

> Both the most cursory and the most detailed examination of the lease reveal that the collateral agreement or understanding claimed by defendants flatly contradicts the terms of the lease, which obligates the lessor to do nothing at all with respect to repairs or rebuilding and obligates the lessee to pay $18,333 rent a month without any excuses whatsoever.
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> Thus, defendant's reliance on Masterson v. Sine, 68 Cal.2d 222 [436 P.2d 561, 65 Cal. Rptr. 545], is quite misplaced. Although Masterson, according to the dissenting opinion, just about abrogated the parol evidence rule (68 Cal.2d at p. 237 and fn. 7), the majority did not think so and even a most generous reading of the case would not permit extrinsic evidence here.

However, it seems to the staff that the commentators have a point. Why apply an arbitrary rule excluding evidence of a contradictory agreement if it can in fact be proved that the contradictory agreement was made and it was the intent of the parties that it be part of the bargain? The staff can see real problems caused by the rule in the area of consumer and adhesion contracts where the parties agree to something that contradicts the fine print contract that is subsequently signed.

The other aspect of the parol evidence rule in California--that integration is a judge and not a jury question--has likewise been reaffirmed in subsequent cases. See, e.g., Brawthen v. H & R Block, Inc.,

28 Cal. App.3d 131, 137-138, 104 Cal. Rptr. 486, ___ (1972), "Whether or not the writing constitutes an integrated agreement is a question of law for the court. . . . Where as in the instant case the trial is by jury, the proceedings on the integration issue will of course be heard out of their presence." See also Brawthen v. H & R Block, Inc., 52 Cal. App.3d 139, 124 Cal. Rptr. 845 (1975). At least one commentator has argued that the judge may play a useful role in preventing the jury from being misled by parol evidence, although he also acknowledges the weakness of this argument. See Stanford L. Rev. at 562-563. The other commentators argue, the staff believes persuasively, that the jury is quite capable of handling the fact questions involved in a determination of integration without being unduly prejudiced by the evidence. See N.Y.U. L. Rev. at 984-987 and Sweet at 1067-1068.

Possible Solutions

If anything is clear from the foregoing discussion, it should be that the present statutory statement of the parol evidence rule in California does not remotely resemble the actual law. In fact, the annotated codes contain well over 100 pages of annotations of cases and comment trying to explain, modify, or avoid the rule. The authors are fond of quoting Thayer on Evidence, "Few things are darker than this, or fuller of subtle difficulties." There appear to the staff four obvious approaches the Commission could take to the parol evidence problem.

(1) Codify existing law. The most modest solution would be to codify existing California law on the parol evidence rule. This could be easily done using Justice Jefferson's Benchbook statement of the rule. This would have the virtue of making the law clear so that the uninitiated would not have to search through the reports and treatises to find the law, and would not be misled by erroneous statements of the law in the statutes. Stanford L. Rev. at 563 says that, "It is time for the California state legislature to step in and rid the California Codes of the confusion for which they have become legendary. The provisions concerning parol evidence should either be rewritten or amended to conform to Chief Justice Traynor's three opinions." Sweet at 1061-1063 also notes that the parol evidence rule could be revised to reflect the actual state of the law and make minor improvements; he calls this

'Tinkering With the Rule: A Minor Overhaul,' and points out there would be a number of practical problems and questions of interpretation in trying to codify the rule and its myriad exceptions.

(2) Repeal the parol evidence rule. N.Y.U. L. Rev. at 987-988 concludes that the rule should be repealed in California, 'Since in California the parol evidence rule is codified by statute, no further court-initiated reform is possible.' Sweet at 1068 also concludes that the parol evidence rule should be limited to integrated writings; although he does not expressly argue for repeal of the rule, that is the natural outcome of his position since he would have the jury determine the question of integration and would only preclude extrinsic evidence in the case of a true integration. Repeal of the rule would rid California law of the two features left, both of which have been criticized--judge determination of integration and preclusion of contradictory evidence regardless of integration.

(3) Amend existing law in some way. It is fairly clear that the parol evidence rule cannot be amended to make the rule more restrictive--the history of the rule is one of a continual struggle towards liberalization. Short of repealing the rule, it could be amended to keep judge determination of integration while providing that, if an integration is not shown, all evidence is admissible, contradictory or not. This approach has some appeal although it may require an inordinate amount of tinkering with the statutes.

(4) Do nothing. It could be argued that the California cases have satisfactorily liberalized the rule, and no further work needs to be done. While this argument is generally sound, it does not speak to the problem of practicing lawyers having to deal with statutes that do not accurately state the law.

Conclusion

It should be clear that, of the foregoing approaches, the staff prefers that of outright repeal of the parol evidence rule. This is also the approach of the commentators, and the staff believes they make strong, reasoned arguments on sound policy grounds. The staff also has in its possession an ably done working paper (equivalent to one of our tentative recommendations) of the British Law Commission, whose conclusions may be summarized:

(1) The scope of the parol evidence rule has been so greatly reduced by exceptions as to lead to uncertainty in the existing law;

(2) The advantages that the rule may once have had of achieving certainty and finality have largely gone;

(3) The disadvantage of the rule, that it prevents the parties from proving the terms of their agreement, may still exist in some cases;

(4) Where there is a written agreement the rejection of evidence to add to, vary, contradict, or subtract from its terms should be justified not by the parol evidence rule but by the fact that the parties have agreed upon the writing as a record of all they wish to be bound by;

(5) The abolition of the rule would produce the same result in many cases but in some cases it might lead to a different and more just result;

(6) The parol evidence rule should be abolished.

The Ontario Law Reform Commission and the New Brunswick Law Reform Division have also reached similar conclusions. The staff has written to the Law Commission requesting information concerning the outcome of this project.

The staff recommends that the Commission prepare for distribution a tentative recommendation to repeal the parol evidence rule. We do not believe this would take a lot of resources of either the Commission or the staff; we could obtain permission to reprint Professor Sweet's article as a background study. We think this is a worthwhile project, and it will help get this item cleaned off our agenda.

Respectfully submitted,

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CONTRACT MAKING AND PAROL EVIDENCE: DIAGNOSIS AND TREATMENT OF A SICK RULE

Justin Sweet†

The parol evidence rule determines the provability of a prior or contemporaneous oral agreement when the parties have assented to a written agreement. Courts expect this apparently simple rule to accomplish many objectives. Doubting the trustworthiness of evidence concerning prior oral agreements, and fearful that fact-finders will not appreciate the need for stability and certainty in commercial dealings,[1] some courts expect the rule to improve the quality of judicial resolution of disputes.[2] This is done by precluding finders of fact, especially juries, from considering evidence of such "agreements." Other courts see the rule as insisting that agreements be expressed in proper form.[3] Finally, some see the rule as a method of protecting an intention to integrate a transaction into one final and complete repository.[4]

This "simple" rule is in fact a maze of conflicting tests, subrules, and exceptions adversely affecting both the counseling of clients and the litigation process. Whether the rule has played a significant role in inducing contracting parties to put their entire agreement into one final writing is, at best, doubtful.

The only proper function of the parol evidence rule is to protect truly integrated writings. To achieve this result, both bench and bar must be convinced that the present Rule can no longer be tolerated.

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1 *Cf.* G.L. Webster Co. v. Trinidad Bean & Elev. Co., 92 F.2d 177 (4th Cir. 1937); Jones v. Guilford Mortgage Co., 120 S.W.2d 1081 (Tex. Civ. App. 1938); Texas Midland R.R. v. Hurst, 262 S.W. 172 (Tex. Civ. App. 1924); Godbey & Sons Constr. Co. v. Deane, 39 Cal. 2d 429, 435, 256 P.2d 946, 950 (1952) (Schauer, J., dissenting).

2 *E.g.*, Masterson v. Sine, —— Cal. 2d ——, 436 P.2d 561, 65 Cal. Rptr. 545 (1968). *See also* UNIFORM COMMERCIAL CODE § 2-202, Comment 3 [hereinafter cited as UCC].

3 Jones v. Guilford Mortgage Co., 120 S.W.2d 1081 (Tex. Civ. App. 1938); Texas Midland R.R. v. Hurst, 262 S.W. 172 (Tex. Civ. App. 1924).

4 *E.g.*, United States v. Clementon Sewerage Auth., 365 F.2d 609 (3d Cir. 1966); Dunlop Tire & Rubber Corp. v. Thompson, 273 F.2d 396 (8th Cir. 1959); Baylor Univ. v. Carlander, 316 S.W.2d 277 (Tex. Civ. App. 1958).

Further, a set of guidelines must be provided that can assist the courts in determining whether a particular writing is truly integrated. Emphasis must be upon the contract-making and not the judicial process.

I

THE PAROL EVIDENCE RULE IN THE COURTS: SOME HIGHLIGHTS AND IMPRESSIONS

Though the complexity of the parol evidence rule makes thorough discussion impossible, even a brief look reveals the inconsistent character of the rule.

A. *Varying Tests for Determining Intention to Integrate*

Those cases stressing integration as the basis for the parol evidence rule use different tests to determine whether the parties intended to integrate their entire transaction into one final writing. Some decisions permit the trial judge to examine only the writing in determining whether it is integrated.[5] These courts look for apparent "completeness" in deciding whether they will admit any evidence of prior agreements. Other courts[6] and the Uniform Commercial Code[7] permit the judge to look beyond the writing to determine whether there was an intention to integrate.

Written contracts often contain provisions stating that the written agreement is a final integration or that the writing is the whole or entire contract between the parties. Such clauses usually control the question of intention to integrate, unless the writing itself is successfully attacked for fraud, duress, mistake or any other reason showing that no valid agreement had been formed.[8] Since these clauses are often part of a standardized, printed form contract with adhesion overtones, some decisions have refused to give them literal effect or have interpreted them narrowly.[9]

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5 *E.g.*, Seitz v. Brewers' Refrig. Co., 141 U.S. 510, 517 (1891); Anchor Cas. Co. v. Bird Is. Produce, Inc., 249 Minn. 137, 82 N.W.2d 48 (1957).

6 United States v. Clementon Sewerage Auth., 265 F.2d 609, 613-14 (3d Cir. 1966); Atlantic N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 96 A.2d 652 (1953).

7 UCC § 2-202, Comment 3.

8 *E.g.*, Rafferty v. Butler, 133 Md. 430, 105 A. 530 (1919); Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922); *see* 3 A. CORBIN, CONTRACTS § 578 (1960) [hereinafter cited as CORBIN].

9 *E.g.*, Luther Williams, Jr., Inc. v. Johnson, 229 A.2d 163 (D.C. Ct. App. 1967); International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 110 A.2d 186 (1955).

B. *Extent of Integration: Partial Integration and Consistent Collateral Agreements*

It is often possible to augment a writing despite the parol evidence rule and despite what appears to be a complete writing. Sometimes it can be contended successfully that only a part of the transaction has been integrated.[10]

Employing a rationale similar to that of the concept of partial integration, some courts permit a party to show evidence of a consistent prior or contemporaneous collateral agreement.[11] If such evidence is admitted and believed, the party, in effect, has been permitted to "add to" but not to "vary or contradict" the writing.

Application of the "consistency" test requires a difficult excursion into interpretation. Determining the *extent* of integration or what is "collateral" is equally difficult. In order for an agreement to be collateral, the Restatement requires a different subject matter and a separate consideration, or a prior agreement which might naturally have been made as a separate agreement.[12] Williston asks whether it would have been normal and natural for the parties to have made both oral and written agreements.[13] McCormick varies this slightly by suggesting that we look at whether it would be natural and normal for the parties to have included the asserted oral agreement in the writing had it been made and intended to stand.[14] The Uniform Commercial Code, in a comment, states the test to be whether "if agreed upon, [the parties] would certainly have . . . included [the alleged agreement] in the document."[15] Wigmore says that admissibility depends upon whether the particular subject was "dealt with" in the writing.[16] The varying tests and the difficulty of their application have resulted in uneven application of the consistent collateral and partial integration rules.[17]

Admissibility of evidence also may depend upon whether the prior "deal" was a warranty, a representation or a promise. Some courts seem

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10 *E.g.*, United States v. Clementon Sewerage Auth., 365 F.2d 609 (3d Cir. 1966); Henika v. Lange, 55 Cal. App. 336, 203 P. 798 (1921); *see* 3 CORBIN § 581.

11 *E.g.*, Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019 (1922); *see* 3 CORBIN § 583.

12 RESTATEMENT OF CONTRACTS § 240 (1932).

13 4 S. WILLISTON, CONTRACTS § 638 (3d ed. W. Jaeger 1961) [hereinafter cited as WILLISTON].

14 C. MCCORMICK, EVIDENCE § 216, at 441 (1954) [hereinafter cited as MCCORMICK].

15 UCC § 2-202, Comment 3.

16 9 J. WIGMORE, EVIDENCE § 2430, at 99 (3d ed. 1940) [hereinafter cited as WIGMORE].

17 *E.g.*, Dillon v. Sumner, 153 Cal. App. 2d 639, 315 P.2d 84 (1957); Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019 (1922).

more inclined to permit evidence of representations than promises.[18] The theory seems to be that parties do not normally integrate representations, but they do integrate promises. Put another way, we can expect parties to put promises in writing but even a prudent contracting party may not include representations. Warranties, much like promises in importance, seem harder to get into evidence, especially if there is an express warranty in the writing.[19]

With typical parol evidence rule inconsistency, some courts hold that implications of law are integrated and cannot be varied by parol evidence.[20] But even those courts which hold that implications of law cannot be "contradicted" sometimes admit evidence of a prior oral agreement to determine "reasonableness."[21]

C. *Parol Evidence Can Show No Valid Contract Made*

The parol evidence rule is predicated upon the assumption that the parties have entered into a valid agreement; a party is always permitted to show that no valid agreement was made.[22] Validity is attacked by allegations that consent was obtained through fraud, mistake, or duress, or that the writing was a sham and was never intended to constitute an enforceable agreement.[23] Also, the parties are permitted to show that there was no consideration for the contract.[24] The defect-in-formation cases have developed a complex set of subrules and exceptions that equals the parol evidence rule itself in unevenness of application and confusion.[25]

D. *Oral Agreements Relating to Delivery and Conditions*

Two well-known routes for avoiding the parol evidence rule are related to the defect-in-formation concept. They are *conditional delivery* and *oral conditions*. Conditional delivery usually relates to the manual

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18 Richard v. Baker, 141 Cal. App. 2d 857, 297 P.2d 674 (1956); Shyvers v. Mitchell, 133 Cal. App. 2d 569, 284 P.2d 826 (1955).

19 Thompson v. Libby, 34 Minn. 374, 26 N.W. 1 (1885); 4 WILLISTON § 643.

20 *See* 4 WILLISTON § 640.

21 *Id. But see* California Drilling & Mach. Co. v. Crowder, 58 Cal. App. 529, 209 P. 68 (1922).

22 3 CORBIN § 577.

23 *Id.* at § 580; *see* Thompson v. Price, —— Cal. App. 2d ——, 59 Cal. Rptr. 174 (1967), where parol evidence was admitted to show the defendant's elaborate scheme of fraud, rather than to invalidate the contract as written.

24 *E.g.* Penn Mut. Life Ins. Co. v. Utne, 207 F. Supp. 521 (D. Minn. 1962); Sweeney v. KANS, Inc., 247 Cal. App. 2d 475, 55 Cal. Rptr. 673 (1966); Strickland v. Hetherington, 353 P.2d 138 (Okla. 1960).

25 *See* Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877 (1961).

transfer of deeds or other formal instruments with an alleged oral condition to the delivery. In many jurisdictions, proof of such conditional delivery may be shown even if the instrument appears to be unconditional on its face.[26]

Sometimes evidence is permitted to prove an oral condition although that condition does not relate to delivery of an instrument. *Pym v. Campbell*[27] held that one party can by oral testimony show that a contract which appears complete is subject to an oral condition of approval by a third party.[28] The court stated that a party can show that no valid contract was ever made. Despite the "no contract" theory, a court usually will not admit evidence if the alleged oral condition is held to be inconsistent with the writing.[29] Also, if some conditions are expressed in the writing, courts sometimes refuse to permit evidence of an additional oral condition.[30]

E. *Doctrines Relating to Consideration*

The parol evidence rule does not preclude a showing of absence of consideration. Also, the existence of a separate consideration is one test for determining collateralness of a parol agreement. There are other methods of using consideration to avoid the parol evidence rule. Courts sometimes permit evidence concerning an antecedent or contemporaneous agreement by permitting a party to show the true consideration.[31] Usually these cases involve a fictitious purchase-price recital in a deed made for reasons of secrecy. Also, there may be a fictitious recital that money has changed hands for the purchase of an option in order to make the option irrevocable.[32] Other cases have allowed one party to show that what appears to be a deed is a mortgage.[33]

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[26] 3 CORBIN § 587. But in some states a deed absolute on its face cannot be shown to be subject to an oral condition after delivery is made to the grantee. 3 AMERICAN LAW OF PROPERTY § 12.66 (A. Casner ed. 1952).

[27] 6 El. & Bl. 370, 119 Eng. Rep. 903 (Q.B. 1856).

[28] Some courts distinguish between conditions precedent and conditions subsequent. Dunne Ford Sales, Inc. v. Continental Assur. Co., 221 F. Supp. 975 (D.R.I. 1963); Nutrena Mills, Inc. v. Yoder, 187 F. Supp. 415 (N.D. Iowa 1960), *aff'd*, 294 F.2d 505 (8th Cir. 1961). In Aetna Ins. Co. v. Newton, 274 F. Supp. 566 (D. Del. 1967) an oral condition was shown, but evidence thereon was not admitted because of an integration clause. *Contra*, Luther Williams, Jr., Inc. v. Johnson, 229 A.2d 163 (D.C. Ct. App. 1967). *See also* 3 CORBIN § 589.

[29] *E.g.*, Stafford v. Russell, 116 Cal. App. 2d 326, 255 P.2d 814 (1953).

[30] *E.g.*, United Eng'r & Contract. Co. v. Broadnax, 136 F. 351 (2d Cir.), *cert. denied*, 197 U.S. 624 (1905); Travers-Newton Chautauqua Sys. v. Naab, 196 Iowa 1313, 196 N.W. 36 (1923).

[31] *See* 3 CORBIN § 586; Equitable Trust Co. v. Gallagher, 34 Del. Ch. 249, 102 A.2d 538 (Sup. Ct. 1954); *contra*, Cassilly v. Cassilly, 57 Ohio St. 582, 49 N.E. 795 (1897).

[32] *E.g.*, Raymer v. Hobbs, 26 Cal. App. 298, 146 P. 906 (1915); Combs v. Turner, 304 Ky. 179, 200 S.W.2d 288 (1947).

[33] *E.g.*, Stambaugh v. Silverheels, 188 Kan. 124, 360 P.2d 1078 (1961); *cf.* Wadleigh v.

In separation agreements, legal issues may depend upon whether money payments are alimony or child support or part of a property settlement. Some courts have permitted a party to pierce a label while others have not.[34] Courts also sometimes confuse failure of consideration with lack of consideration, usually resulting in admission of evidence concerning a prior oral agreement.[35]

F. *Interpretation*

One of the principal ways of avoiding the parol evidence rule is to assert that evidence of the prior oral agreement should be received merely to interpret or explain a writing and that the evidence does not add to, vary, or contradict the written agreement.[36] Usually the party attempting to introduce such extrinsic evidence must first show that the writing is ambiguous and does not have a meaning "plain on its face."[37] If the court wishes to determine what the parties intended when they used certain language, evidence of an oral agreement relating to the crucial area can be very helpful. Although evidence of the parol agreement may be weighed with all other evidence relating to interpretation, if the agreement is admitted, it is likely to control the interpretation question. In this fashion, evidence of a prior agreement, if believed, could determine the obligation of the contracting parties.

"Private code" cases illustrate the narrow line between interpretation and integration. In such cases, one party attempts to show that there was a prior agreement that the terms in a written contract were to have a "private" and not a "usual" meaning. Some courts permit such private

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Phelps, 149 Cal. 627, 87 P. 93 (1906); Campbell v. Ohio Nat'l Life Ins. Co., 161 Neb. 653, 74 N.W.2d 546 (1956).

34 Egan v. Egan, —— Cal. App. 2d ——, 59 Cal. Rptr. 705 (1967) (holding labels not conclusive); Yarus v. Yarus, 178 Cal. App. 2d 190, 3 Cal. Rptr. 50 (1960) (holding that parties cannot go behind language to determine whether a discharge in bankruptcy was intended to provide alimony and support).

35 *E.g.*, Mihojevich v. Harrod, 214 Cal. App. 2d 360, 29 Cal. Rptr. 440, *cert. denied*, 375 U.S. 887 (1963). Pronzato v. Guerrina, 400 Pa. 521, 163 A.2d 297 (1960). *Lack* of consideration means the agreement was not binding. *Failure* of consideration means one party has not received the bargained-for exchange and can discharge his obligation to proceed further. In the *Mihojevich* case a grantee retransferred title to mining claims to the grantor. The grantee contended that it was agreed orally that in exchange for the retransfer and certain acts, the grantor would pay the grantee one-half of anything recovered in a condemnation action. The evidence was admitted "to prove such failure [of consideration]." 214 Cal. App. 2d at 363, 29 Cal. Rptr. at 442. This was a case of the failure of consideration being in the performance promised by the alleged oral agreement. It had nothing to do with the validity of the contract.

36 3 CORBIN § 579; MCCORMICK § 217.

37 MCCORMICK § 219.

codes and others do not.[38] When such evidence is admitted, the net result is that the writings are found to have contained only part of the agreement and not the entire agreement. Yet, the problem is usually treated as one of interpretation.

G. *Reformation*

Equity offers still another method of avoiding the parol evidence rule.[39] The expanding remedy of reformation permits the court to judicially correct the writing if, because of fraud or mistake, the final writing does not reflect the actual agreement of the parties. The fraud or mistake usually occurs in the process of reducing the agreement to writing, but in some cases it relates to the conduct of the parties during negotiations.[40] Reformation goes beyond the negative effect of denying the validity of the contract since it results in enforcement of the alleged oral agreement.

H. *Not Applicable to Modifications*

The parol evidence rule does not apply to agreements made subsequent to a writing. Only statutory[41] or contractual rules of form[42] relating to modification govern subsequent agreements. If a party can show that a parol agreement was renewed after the writing, he will not run into the parol evidence rule.[43]

I. *Some Unique Techniques Recently Observed*

New and unique methods of avoiding the parol evidence rule continually appear. One interesting technique is the unilateral contract concept. In a recent case, the purchaser of a car tried to enforce a car dealer's newspaper advertisement. The purchaser signed a written purchase agreement which did not include the terms of the advertisement but did contain an integration clause. The court held that when the buyer purchased the car he completed the act requested by the

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[38] *E.g.*, Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc., 135 Cal. App. 2d 40, 286 P.2d 825 (1955); Smith v. Wilson, 3 B. & Ad. 728, 110 Eng. Rep. 266 (K.B. 1832). *See* 3 CORBIN § 579 at 426.

[39] 3 CORBIN § 614; Palmer, *Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833 (1967).

[40] *E.g.*, Olson Constr. Co. v. United States, 75 F. Supp. 1014 (Ct. Cl. 1948); Hugo v. Erickson, 110 Neb. 602, 194 N.W. 723 (1923); Whipple v. Brown Bros., 225 N.Y. 237, 121 N.E. 748 (1919); Superior Distrib. Corp. v. Hargrove, 312 P.2d 893 (Okla. 1957). *See also* Palmer, *supra* note 39.

[41] *E.g.*, CAL. CIV. CODE § 1698 (West 1954).

[42] A statement in the contract that modifications must be in writing will be enforced if signed separately by the other party. UCC § 2-209(2).

[43] Most jurisdictions require consideration for modification.

advertisement.[44] The unilateral contract concept avoided having to deal with the integration clause and the parol evidence rule.

In another case, an antecedent oral agreement was admitted through introduction of the deposition of an employee of the opposing party.[45] In the deposition, the witness stated that the parties had agreed upon certain terms orally. It appeared that no objection based upon parol evidence was made, but the deposition was admitted under the admission-against-interest exception to the hearsay rule. By cloaking the testimony in the guise of an admission, the party was able to avoid the parol evidence rule.

J. *Procedural Problems*

The first procedural problem involving the parol evidence rule relates to choice of law. If the litigation is in federal court, should the court apply a federal choice of law rule relating to parol evidence, or should it apply the choice of law rule of the state in which the court sits? Once this determination is made, would the appropriate choice of law rule, state or federal, apply the parol evidence rule of the forum or that of the state where the agreement took place? If an action is brought in the state courts, should the forum apply its own parol evidence rule or that of some other state connected with the transaction? For these purposes, most decisions hold that the parol evidence rule relates to *substance* and not to *procedure*.[46] This means a federal court sitting in California will apply the California choice of law rule, which utilizes the law of the state where the transaction occurred.

Some courts hold, however, despite the supposed substantive nature of the rule for choice of law purposes, that failure to object waives any parol evidence issue being raised on appeal.[47] A recent case held that if one party testified to an asserted oral agreement, he could not later object to the other party testifying on the same matter.[48]

Statute of limitations problems can arise in the context of the parol evidence rule. In California there is a four-year period of limitations for obligations founded on a writing,[49] while other contractual

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44 Johnson v. Capital City Ford Co., 85 So. 2d 75 (La. Ct. App. 1955).

45 H. K. Porter Co. v. Wire Rope Corp. of America, 367 F.2d 653 (8th Cir. 1966).

46 *E.g.*, Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co., 242 Ore. 407, 408 P.2d 198 (1965); *see* H. GOODRICH & E. SCOLES, CONFLICT OF LAWS § 89 (1964); MCCORMICK § 213.

47 *E.g.*, Pao Ch'en Lee v. Gregoriou, 50 Cal. 2d 502, 326 P.2d 135 (1958); *see* MCCORMICK § 213, note 2; *but see* United States v. Croft-Mullins Elec. Co., 333 F.2d 772, 779 (5th Cir. 1964), *cert. denied*, 379 U.S. 968 (1965).

48 Carpenson v. Najarian, —— Cal. App. 2d ——, ——, 62 Cal. Rptr. 687, 697 (1967); *see* Bandy v. Myers, 227 N.E.2d 183, 187 (Ind. App. 1967).

49 CAL. CIV. PRO. CODE § 227 (West Supp. 1967).

obligations are subject to a two-year period of limitations.[50] Suppose one party is permitted to offer into evidence testimony of an antecedent oral agreement? The transaction is then partly oral and partly written. If the lawsuit is related to the failure to perform the oral agreement, does the two-year or the four-year period of limitations apply?

Finally, who decides whether the parties have integrated their entire transaction in a writing? Most courts and commentators state that this determination should be made by the trial court judge.[51] On the other hand, Corbin and a few decisions hold that the issue should be treated in the same way as any other issue of fact.[52]

K. *Hazards of Litigation Prediction*

Although there are many ways of avoiding the parol evidence rule, the rule is by no means dead. The techniques mentioned are not available for avoiding the parol evidence rule with equal ease in every jurisdiction.[53] Many cases deny admissibility of the agreement and phrase the rule in vigorous, absolute terms. However, precedents may be ignored or distinguished on insubstantial grounds, leading to parallel lines of authority. The different policies behind the rule have varying degrees of persuasiveness in different fact situations. The ceaseless flow of parol evidence opinions and the refusal of courts to give the real reasons for their decisions contribute to litigation prediction difficulties.

II

EFFECT OF THE RULE ON COUNSELING, LITIGATION AND CONTRACT MAKING

A. *Counseling Clients*

Clients frequently ask their attorneys:

1. Can I enforce a prior oral promise made by the other party if I

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50 *Id.* § 339.

51 *E.g.*, Charles A. Wright, Inc. v. F. D. Rich Co., 354 F.2d 710, 714-15 (1st Cir. 1966); Gibson v. United States, 268 F.2d 586, 588-89 (D.C. Cir. 1959); Yarus v. Yarus, 178 Cal. App. 2d 190, 197, 3 Cal. Rptr. 50, 55 (1960). *See* MCCORMICK § 219; 9 WIGMORE § 2430, at 98; 4 WILLISTON § 638, 639.

52 Brazil v. Dupree, 197 Ore. 581, 598, 254 P.2d 1041, 1045 (1953); Cobb v. Wallace, 45 Tenn. 539, 544 (1868); 3 CORBIN § 595.

53 *See* Chadbourn & McCormick, *The Parol Evidence Rule in North Carolina*, 9 N.C.L. REV. 151, 154 (1931); Degnan, *Parol Evidence—The Utah Version*, 5 UTAH L. REV. 158, 179 (1956); McDonough, *Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the Uniform Commercial Code*, 10 S.D.L. REV. 60, 61 (1965); Note, *Parol Evidence Rule; The Advent of the Uniform Commercial Code in Iowa*, 52 IOWA L. REV. 512 (1966); Note, *The Parol Evidence Rule in Missouri*, 27 MO. L. REV. 269 (1962); Note, *A Critique of the Parol Evidence Rule in Pennsylvania*, 100 U. PA. L. REV. 705 (1952).

didn't include it in the writing? What would be my chances in court? Would you advise a settlement?

2. Will the law enforce an oral promise which the other party claims I made when no such promise is in the written contract? What are my chances of winning if I am sued? Do you suggest settlement?
3. How can I protect myself from false claims of prior oral "agreements" when a written contract is made?
4. Can a printed paragraph in a contract stating that "this is the only agreement between the parties" shield a person when he has made a prior oral agreement that I have relied on?

Can a lawyer, by digging into the facts and reading some law come with reliable answers? The answer is clearly "no". The deceptive simplicity of the rule hides a bewildering network of subrules and exceptions. Naive attorneys read a few strong judicial pronouncements about the salutary nature of the rule and believe that parol evidence is not admissible to "add to, vary, or contradict a written agreement." They are unaware of cases critical of the rule and of ways of "handling" the rule. Many lawyers are slightly more sophisticated about the rule, having read many cases but not quite enough. They have seen the rule avoided so many times that they believe it is dead. Conscientious attorneys are often simply bewildered by the mass of conflicting decisions and variant statements of the rule. They may realize that they must develop the facts, but they do not know what are the critical facts since judicial opinions rarely state them. Many confuse the rule with the Statute of Frauds and the best evidence rule.

Intelligent attorneys should conclude that the proponent of the oral agreement will be permitted to prove it if the trial judge thinks it likely that the agreement was made and if there are no cogent reasons why it should not be enforced. If there is a well-drafted integration clause,[54] counsel should conclude that the oral agreement will not be provable unless:

(1) There is some formation defect which makes the entire writing unenforceable; or

(2) The writing has strong elements of adhesion or mistake *and* it appears the agreement was made and should be enforced.

Such conclusions are equivocal and often unsatisfactory to the client. But the conclusions are generally accurate. Unfortunately, many attorneys will be dogmatic and frequently wrong.

54 *See* 3 CORBIN § 578; Comment, *The "Merger Clause" and the Parol Evidence Rule*, 27 TEXAS L. REV. 361, 362-63 (1949).

B. *Litigation*

In addition to litigation prediction difficulties, there are other problems that the parol evidence rule has brought to the litigation process. A number of tactical problems are caused by the rule. In order to avoid a waiver, attorneys will object to any testimony concerning an asserted antecedent or contemporaneous agreement when the parties have assented to a writing. Such an objection often takes the form of stating that even *if* the agreement were made, it cannot be proved. If the objecting attorney loses on the question of admissibility, he often tries to prove that the agreement never took place. A jury may have difficulty making the transition from *assuming* the agreement made for purposes of admissibility to *deciding* that no agreement was ever made.

Also, the instinctive reaction of lawyers to object to such testimony often diffuses tactical energies which should be directed elsewhere. If the attorney has a very flimsy parol evidence argument he might better concentrate his efforts on persuading the jury that there never was an agreement, that it was not intended to be binding, that it was discharged by assent to the writing, or that the law should not enforce it even if it were made. If he is convinced the court will find *some* enforceable agreement, he should concentrate on interpretation. Too often his argument is based solely on admissibility, and he is not adequately prepared to handle these other issues.

The quality of judicial decision making suffers from poor handling of parol evidence issues. Attorneys with good facts for permitting proof of the prior oral agreement often do an inadequate job of presenting their case, while attorneys with good facts for denying proof of the agreement are often unable to present their contentions skillfully.

Although the outcome of a case is often correct because courts, as a rule, have a good sense of fairness, there are cases that simply come out wrong. There are non-result-oriented judges who mechanically follow cases phrasing the Rule in its traditional form. Other judges, believing the Rule expresses a sound judicial policy, may refuse to admit the testimony of the oral agreement even if they believe the agreement took place and was intended to stand.[55]

Thus, the judicial process will not look very good to the litigants or the attorneys in parol evidence cases. The by-product of almost every parol evidence dispute is a client who is angry either because he has not been given his day in court or because the opposing party has been permitted to prove an oral agreement that the client claims was not made and which his attorney assured him could not be proven.

[55] *See, e.g.*, McGamy v. General Elec. Supply Corp., 185 F.2d 944 (5th Cir. 1950); Mitterhausen v. South Wis. Conf. Ass'n, 245 Wis. 353, 14 N.W.2d 19 (1944).

The administration of justice also suffers because of the parol evidence rule. Almost every parol evidence case involves lengthy and often fruitless bickering on the part of the attorneys. Much time is spent trying to unravel the intricacies of the rule. In addition, because the rule is phrased in admissibility terms, there is a substantial chance of a reversal of trial court decisions because the rule is often as misunderstood by appellate courts as by trial courts.

C. *Contract Making*

Some of the parol evidence rule's adverse effect on counseling and litigation might be excusable if the rule caused contracting parties to put their entire agreement in the writing. But the rule has not had this effect. The volume of parol evidence cases in the appellate reports indicates that there are many part oral, part written agreements.[56] A recent unpublished study of architectural contracting practices shows that such agreements are quite common in transactions between architects and their clients.[57] Further studies would probably show a similar contract-making pattern in other types of transactions.

When parties do place their entire agreement in one final writing, they are more concerned with efficient contract administration and objective proof of the "deal" if a dispute arises than they are with the parol evidence rule.[58] The rule has adversely affected counseling and litigation without any evidence that it has induced parties to put their entire agreements in writing.

III

DIAGNOSIS: TOO MANY CONTROVERSIAL POLICIES FOR ONE "SIMPLE" RULE

The parol evidence rule is expected to achieve a number of debatable objectives that today are questionable.

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[56] In volumes 41-64 of the California Reporter, covering a period of slightly over three years, there were 33 cases involving integration aspects of the parol evidence rule.

[57] In a study by the author, 600 questionnaires were mailed to Northern California members of the American Institute of Architects, of whom 287 responded. Project costs are almost always discussed. Usually, there is a projected cost figure, varying in firmness. In 45% of the agreements the agreed figure was oral. Whether the figure is firm or soft, architects generally do not delete a cost disclaimer clause usually found in form contracts.

[58] A more strict and consistent exclusion of prior oral agreements *might* have channeled contract making into complete writings. But even this is doubtful.

A. *Failure of the Integration Concept as the Sole Rationale*

To Wigmore, the *only* proper function of the parol evidence rule is to give legal effect to an intention to make the writing the final and complete repository of the transaction.[59] But the traditional way of phrasing the rule shows that the integration concept has not preempted the parol evidence field. The admissibility of extrinsic evidence to interpret a contract is still labeled a parol evidence question.[60] Courts state that admission of prior agreements would *violate* the parol evidence rule,[61] and speak of the law *prohibiting* oral testimony to vary, add to, or contradict a written document.[62] This language, expressing the concept that such testimony is untrustworthy and must not be considered by the finders of fact, is inapposite to a rule dealing with integrating antecedent understands into one final repository.

There are other illustrations of reluctance to accept Wigmore's concept. Courts using the "face of the document" test manifest a distrust of evidence outside the writing. It is a strange concept that phrases a test in terms of intention and then proceeds to limit evidence of intention to the writing.[63] This refusal to permit the trial judge to venture beyond the writing shows a distrust of his ability to sift the wheat from the chaff. Why require collateral agreements to be "consistent"? Is the existence of the oral agreement doubtful? Do we distrust the jury? Why must the judge determine whether the prior oral agreement would have been normally and naturally included in the writing?[64] If it was not included in the writing when it is normal and natural to do so, is it because it must not have been made? Why do some courts refuse to permit evidence of an oral warranty when there is an express written warranty even if there is no inconsistency?[65] Why do courts refuse to listen to evidence of an oral condition if there are other written conditions?[66] Again, is it because they doubt the existence of such prior oral agreements or because they distrust jurors?

Even in the defect-in-formation exceptions there are signs of dis-

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59 9 WIGMORE § 2425.

60 *E.g.*, Godfrey v. United States Cas. Co., 167 F. Supp. 783, 789 (D. La. 1958); Lippman v. Sears Roebuck & Co., 44 Cal. 2d 136, 28 P.2d 775 (1955).

61 *E.g.*, Vezaldenos v. Keller, 254 Cal. App. 2d ——, 62 Cal. Rptr. 808 (1967).

62 *E.g.*, Carlesimo v. Schwebel, 87 Cal. App. 2d 482, 197 P.2d 167 (1948); Steinberger v. Steinberger, 60 Cal. App. 2d 116, 140 P.2d 31 (1943).

63 Calamari & Perillo, *Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333, 340 (1967).

64 *See* MCCORMICK § 216, at 441.

65 *See* p. 1039 & note 19 *supra*.

66 *See* p. 1040 & note 30 *supra*.

trust of the evidence. In some jurisdictions, even when fraud is alleged, it must be shown that the asserted oral agreement would not vary the writing.[67]

A survey of the bench and bar would probably reveal a deep-seated distrust of the ability of the judicial process to ferret out the truth when confronted with contradictory testimony relating to an asserted oral agreement. Lawyers rarely regard the rule as a device to protect an integrated agreement. There are other indications that the integration concept has not carried the day. Cases involving the parol evidence rule are still prominent in evidence casebooks and treatises, and are still classified under the evidence key number.[68] Wigmore spends 247 pages on the rule after he states emphatically that it is not a rule of evidence. Courts still refer to the parol evidence rule rather than some rule dealing with contract making and the process of integration.

Why did Wigmore, and more recently Corbin, fail to persuade bench and bar that integration should be the *sole* basis of the parol evidence rule? First, the term "integration" is foreign to the linguistic habits of most lawyers. Many draftsmen still label their integration clauses as "Entire Contract," "Whole Contract," or "Merger" clauses.

Second, the legal profession was not given a good model of the process of integration. Wigmore had a reasonably clear explanation, but it was buried in the midst of other confusing discussion.[69] Courts and scholars paid little attention to the contract-making process, the relative bargaining power of the contracting parties, and the emergence of standardized forms.

Third, the legal profession is conservative; it will not lightly discard language with which it is both familiar and comfortable. There is a biblical ring to the parol evidence rule when it is phrased in the traditional manner: *Parol evidence is not admissible to vary, add to, or contradict a written contract.* This certainly sounds more legalistic than the vague and the unfamiliar integration concept.

Fourth, lawyers have a strong distrust of the judicial process, especially the jury, as a means of ascertaining the truth. Fifth and finally, the profession has never faced up to the adverse effects of the parol evidence rule upon planning, counseling and litigating. To be sure, many lawyers knew of its complexities and inconsistencies, but they did

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[67] *E.g.*, Bank of America v. Pendergrass, 4 Cal. 2d 258, 48 P.2d 659 (1935) (parol evidence admissible to show fraud in inducement of instrument but not to "vary" the promises of the instrument itself).

[68] *See generally* McCORMICK §§ 210-22; M. LADD, CASES ON EVIDENCE 719-56 (1955).

[69] 9 WIGMORE § 2425.

not realize its less obvious deficiencies. Many still think the rule does some good.

B. *Other Objectives of the Parol Evidence Rule*

Generally, the Statute of Frauds controls the form in which contracts must be cast for affirmative enforcement.[70] Certain transactions require a sufficient memorandum signed by the party to be charged. When some courts phrase the parol evidence rule in the traditional manner, they are refusing enforcement of the parol agreement because the parties have not used the proper form.

The parol evidence rule is designed, in the view of some judges and lawyers, to promote justice in the courts. When one party relies upon a written contract and the other claims upon an asserted oral agreement varying the written contract, perhaps the finders of fact cannot be trusted to resolve the controversy. Oral testimony is viewed as untrustworthy,[71] and juries as either too soft or too gullible to give due weight to the written contract. They may favor the underdog who rarely has the writing on his side. They are too unsophisticated to appreciate the need for commercial certainty and stability which protection of writings should accomplish.

To a lesser degree, this view of the parol evidence rule manifests some distrust for trial judges. Casting the rule as one of admissibility gives an appellate court control over trial judges who might be as soft, gullible or unsophisticated as a jury. Deference to the trial court's determination of credibility is not as strong in parol evidence cases as in others.

The policy of protecting commercial writings is tied in with form and control over the trial process. Fact finders may be trusted in ordinary credibility cases, but not where there is a need to protect writings.

Much of the world's commerce is carried on through the use of writings. Businessmen want to know their rights and duties in order to plan rationally. Contracting organizations try to insure that those who conduct business on their behalf do not make commitments that exceed their authority. Very likely some parol evidence opinions take this into account when denying admissibility to prior oral agreements. Giving the writing special protection can control unauthorized commitments of agents and encourage third parties to make commitments based upon the apparent completeness of a writing.

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[70] I am excluding the use of consideration as form. *See generally* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

[71] Masterson v. Sine, —— Cal. 2d ——, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

Secrecy is often the reason a writing does not contain the entire agreement of the parties. There is judicial distaste for such secret agreements because of their propensity to harm third parties or the public.

There are a great many difficult issues that can be avoided by the simple expedient of ruling on the basis of the parol evidence rule. The authority of an agent, the vagueness of oral agreements, and the relevance of oral conditions are typical of the complicated questions that can be avoided by employing the rule. Also, if a trial judge doubts that an asserted agreement ever took place, ruling on the basis of the parol evidence rule avoids commenting on the evidence, instructing on the weight and burden of proof, or granting a new trial. It also avoids branding the witness a liar.

Many parol evidence cases involve difficult credibility questions. An exasperated judge can use the rule to achieve a "plague on both your houses" result. In effect the trial judge can state, "If you don't take the trouble to give some objective evidence and save me from this tough fact question, I just won't rule on it." Here the parol evidence rule gives the judge a means of avoiding an issue which he would rather not decide.

The rule is equally useful for attorneys approached by clients who claim an oral agreement when they have subsequently assented to a writing. If the attorney does not believe his client, or if the case is very shaky, it is easy to advise the client not to sue because he is barred by the parol evidence rule.

This plethora of objectives is at least partially responsible for the Rule's adverse effect on counseling and litigation. Because these objectives are not universally accepted today, and because they are looked upon with varying degrees of approval, they place additional strains on an already difficult rule.

IV

Why Preclude Proof of Prior Oral Agreements?

The parol evidence rule relates to claimed agreements. Whether the arbiter of a parol evidence dispute is a court, a commercial arbitrator, a precinct captain, or a respected member of the neighborhood, three basic issues emerge:

(*1*) Was the asserted agreement made?

(*2*) Is there any reason not to enforce it?

(*3*) If it should be enforced, how should it be interpreted?

Concerning the existence of the agreement, the nonjudicial dispute arbiter will consider the credibility of witnesses and any evidence relevant to that issue. He will consider the reasons why the subsequent writing did not contain the prior oral agreement and will determine whether the oral agreement is consistent with the written agreement. He will look at subsequent acts of the parties and will determine whether it is likely that parties situated as these were would have made the oral agreement. But he looks at these things *not* to determine whether he should consider the agreement, but to determine whether the agreement took place. If the written agreement states the price to be $1,000, it is not likely he will believe an asserted oral agreement that the price was to be $10,000 for the same goods or performance. Only if he is convinced by persuasive evidence or a good reason why the parties wrote the price as $1,000 when they really agreed to $10,000 would he believe that the asserted oral agreement was made.

If he believes there was an agreement, there may be adequate reasons not to enforce it. The parties may have intended to change or cancel their earlier agreement by assent to a subsequent writing. The person making the agreement may not have had the authority to make it. The dispute arbiter might not enforce the agreement because it is illegal or contrary to his sense of propriety. If made and enforceable, the arbiter will have to interpret the prior agreement and fit it into the subsequent written agreement.

This simple model of dispute resolution should be contrasted with a judicial resolution of such a dispute.

A. *Was the Asserted Agreement Made?*

Some courts consider the parol evidence rule a rule of form.[72] In determining whether the agreement was made, a court can look only at reliable evidence. Testimony concerning an asserted oral agreement

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[72] For convenience of discussion the Statute of Frauds has been classified as a "rule of form." For choice of law purposes it may be necessary to decide whether the Statute is substantive or procedural. Also, it may be necessary to decide whether compliance with the form specified in the Statute is required before *any* effect can be given to the transaction. In such cases it may be necessary to decide whether the Statute effects "validity" of the contract or merely relates to the method by which it can be "proved."

For choice of law purposes, the Statute is classified as substantive. *See* 2 CORBIN §§ 293-94. Yet an oral agreement of a type "required" to be evidenced by a sufficient memorandum creates certain legal relationships. It can be the basis for restitution and sometimes actions based upon reliance. Minsky's Follies, Inc. v. Sennes, 206 F.2d 1 (5th Cir. 1953). It can be used defensively. 2 CORBIN §§ 296-300. The Statute as a defense is waived unless pleaded. A subsequent memorandum can satisfy the Statute.

The term "rule of form" was chosen to describe a rule which sets forth some requirements of form before the entire legal range of protection will be given to a transaction.

cannot be considered because the agreement, if made, was not expressed in proper form.

This rationale for the parol evidence rule can be evaluated by an examination of the Statute of Frauds. Ideally, the Statute, as a rule of form, should reduce litigation by informing potential litigants of the legal enforceability of their contract, permit judicial resolution without a trial, and avoid lengthy and difficult trials which result when the existence of an agreement is disputed. In addition, the Statute was meant to improve the quality of judicial dispute resolution. Credibility questions could be kept from inexpert juries and softhearted or biased trial judges. A rule of form assumes that parties generally follow formal rules. The absence of proper form indicates it is unlikely that the agreement was made. Also, a rule of form assumes that witnesses will lie or forget facts if it is to their advantage to do so. Such a rule assumes people have poor memories and that litigation is an inefficient method of ascertaining facts.

Has this particular rule of form worked? The history of the Statute is well known. Legislatures strengthen and expand it,[73] while courts and attorneys develop innumerable methods of circumventing its provisions.[74] Statute of Frauds cases are too numerous to count.[75] Although the Statute may have channeled some contract making into written forms, there are certainly more cogent reasons why some contracts are expressed in writing. Parties may feel bound by such formality and be more likely to perform after signing a written contract. In this sense, getting the other party to sign is like receiving earnest money. Also, contract administration and performance should be smoother and more free of disputes if there is a writing. Commercial contracts are expressed in written form for record-keeping purposes. Further, the layman, without knowledge of the Statute of Frauds, manifests a lack of faith in the practical enforceability of an oral agreement by the expression that "it will be my word against yours." Contract making would probably not be much different if there were no Statute of Frauds. Lawyers generally would advise their clients to execute a written contract with or without a Statute of Frauds.[76]

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73 *See, e.g.*, the history of CAL. CIV. CODE § 1624(5) (West Supp. 1967) on brokerage agreements which have been progressively restricted in 1937, 1963, and 1967.

74 *See generally* 2 CORBIN § 279.

75 Corbin devoted one full volume out of what were then six volumes in his massive treatise on contracts to the Statute of Frauds. This volume consists of 793 pages plus, as of 1964, a 195-page supplement.

76 It would be interesting to see whether British contract practices have changed since 1954. At that time the Statute of Frauds was abolished for all transactions except those involving surety promises and land sales. Law Reform (Enforcement of Contracts) Act of 1954, 2 & 3 Eliz. 2, c. 34.

The Statute of Frauds teaches a lesson regarding the use of the parol evidence rule as a rule of form. Rules of form have a poor performance record in American law. To regard the parol evidence rule as a rule of form both invades and extends the scope of the Statute. Indeed, the Statute has never required the entire agreement to be expressed in the memorandum.[77] If there is an allegation of a prior oral agreement, the only rule of form applicable should be the Statute of Frauds. If the transaction is one required to be in writing, the question should be whether there was a sufficient memorandum. In parol evidence cases there usually is such a memorandum. The courts should abandon the "vary, add to, or contradict" manner of expressing the parol evidence rule. Fact finders should be permitted to look at all relevant evidence in determining whether an asserted prior oral agreement took place.[78] The failure of the writing to contain the asserted oral agreement may tend to show there was no prior agreement. But the fact that the prior agreement was oral should not preclude its proof.

Although the applicability of rules of form to a prior oral agreement is a crucial consideration, the determination of who decides whether the agreement was made is equally important. The use of the parol evidence rule as a jury control device must be reevaluated.

Jury control as a rationale for the rule must be viewed with skepticism because of the minor part juries play in deciding disputes.[79] Posing the rule in its traditional form carries it over to many non-jury dispute-resolving systems.

The rule is employed in such non-jury adjudicative processes as admiralty,[80] equity,[81] and federal contract litigation.[82] It is relevant to

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77 2 CORBIN § 499.

78 *See* p. 1067 *infra*.

79 There is a decreasing use of juries in civil actions. For the year July 1959 through June 1960, in federal court cases based on diversity jurisdiction, the use of juries in contract cases contrasted strikingly with that in tort cases. In the contested tort cases actually going to trial, approximately one-fifth of the judgments were after court trial, three-quarters were after jury verdict, and the remaining were rendered by the court during trial. In the contested contract cases actually going to trial, however, nearly two-thirds of the judgments were after court trial. Based on figures in U.S. JUDIC. CONF. & DIR. OF ADMIN. OFF. OF U.S. CTS., ANN. REP. 250-51 (1960).

80 *E.g.*, The Delaware, 81 U.S. 579 (1871).

> Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms, or to affect its construction, as all such verbal agreements are considered as merged in the written contract.

Id. at 603-04 (footnote omitted). For English law, see generally 2 BRITISH SHIPPING LAWS §§ 509-10 (Colinvaux ed. 1963).

81 *E.g.*, Marron v. Scarbrough, 44 Tenn. App. 414, 314 S.W.2d 165 (1958).

82 The following cases represent government contracts disputes decided in federal

dispute resolution by administrative appeals boards.[83] It is involved in trials in which the jury is waived.[84] In England, the parol evidence rule is employed despite the virtual abolition of the jury system in civil cases.[85]

Our system allocates to the jury the function of determining credibility of witnesses. Yet, jury control is given as a rationale for the parol evidence rule. What makes parol evidence cases more difficult for the jury than construction accidents, consumer injuries or gift tax cases? In these areas the jury has been given great control.[86] Why in commercial contracts cases do we strip them of their normal credibility-determining function? Is the jury unable to tell the honest witness from the dishonest? Is it hoodwinked by crafty lawyers? Does it decide the case based upon emotion rather than the evidence and the instructions of the judge? Does it stick the stronger party although it doubts that the agreement claimed by the weaker party was made? Does it disregard language in the contract? Does the jury expect too high a degree of formality from contract makers? How do trial judges compare on these issues?

The answers to these questions rest upon legal folklore and little else. Much depends upon individual jurors, the judge, the parties and the particular issues involved. There is little reliable data on any of these questions. To justify the complex and confusing parol evidence rule on unproven and doubtful assumptions makes no sense.

And is the parol evidence rule the only mechanism with which to

courts: United States v. Croft-Mullins Elec. Co., 333 F.2d 772 (5th Cir. 1964), *cert. denied*, 379 U.S. 968 (1965); Commodity Credit Corp. v. Rosenberg Bros., 243 F.2d 504 (9th Cir. 1957); United States v. Bethlehem Steel Co., 215 F. Supp. 62 (D. Md. 1962); Baggett Transp. Co., 319 F.2d 864 (Ct. Cl. 1963).

[83] *E.g.*, Pan American Overseas Corp. 65-1 CCH Bd. Cont. App. Dec. ¶ 4802 (1965). "However, even if there had been such an oral agreement (which there was not), such a contemporaneous oral agreement could not be effective to vary the terms of the written contract." *Id.* at 22,798. Reeves SoundCraft Corp., 1964 CCH Bd. Cont. App. Dec. ¶ 4317, at 20,877-78 (parol evidence rules used to exclude express warranty in sale of goods).

[84] *E.g.*, DuFrene v. Kaiser Steel Corp., 231 Cal. App. 2d 452, 41 Cal. Rptr. 834 (1964) (*semble*); Mangini v. Wolfschmidt, Ltd., 165 Cal. App. 2d 192, 331 P.2d 723 (1958).

[85] *E.g.*, Hutton v. Watling, [1948] Ch. 398, 404; Campbell Discount Co. v. Gall, [1961] 1 Q.B. 431, 439 (C.A.).

[86] Construction accidents: For a discussion of the fast disappearing privity defense for architects see Comment, *Architect Tort Liability in Preparation of Plans and Specifications*, 55 CALIF. L. REV. 1361, 1379 (1967). The abolition of privity in products liability cases, W. PROSSER & Y. SMITH, CASES ON TORTS 844-922 (3d ed. 1962), has effectively given more control to the jury by getting rid of the judge-controlled privity rule. For a discussion of Federal Employers Liability Act, see Comment, *The FELA and Trial by Jury*, 21 OHIO L.J. 422 (1960). Tax cases: Commissioner v. Duberstein, 363 U.S. 278 (1960). The *Duberstein* case was decided initially in the tax court, but the rule articulated would also apply where the tax payer is requesting a refund. Such a case be brought in the district courts (with juries) and the courts of claims.

control juries? A trial judge who wishes to protect the litigants and the judicial system can accomplish a reasonable amount of jury control without such a rule.

In the federal courts and in some state courts, the judge can comment on the evidence. His power to comment can materially control the jury. Also, cross examination is a potent weapon for probing testimony of questionable credibility. By giving an attorney wide latitude, a judge can affect the jury decision in such matters. Further, a judge can exert some control over the jury by his instructions on credibility. The way he phrases instructions on burden of proof can, to a degree, control the jury. If the judge makes it clear that the party asserting the oral agreement must by a preponderance of the evidence convince them that the agreement occurred, the party with weaker evidence will often lose.

A judge who is firmly convinced that the jury was wrong can control them to a substantial degree by his power to grant a motion for a new trial. Often, ordering a new trial causes a settlement or abandonment of the action.

Finally, there may be many situations in which a judge need not submit a fact question to the jury because an agreement would not be enforceable for other reasons even if it had been made. This is the basis for the integration theory of the parol evidence rule. Whether the agreement was made need not be considered because, even if made, it has been superseded by the later written agreement.

Jury control should not be the basis for the parol evidence rule. Even if the jury must be controlled in parol evidence cases, which is doubtful, there are other methods which are less costly to the litigation system.

A third pertinent consideration concerning the existence of a prior agreement is the degree of security that should be afforded writings. How clear is the need to protect writings from gullible or softhearted juries or judges? In an era dominated by adhesion contracts, inequality of bargaining power and the pervasive use of liability limitations and exculpations, such commercial certainty should be subordinate to the protection of reasonable expectations. The law should be more concerned with protecting the *actual* agreement of the parties than with protecting written agreement that *appears* to constitute the entire agreement. Parties at least should be given a chance to prove an alleged oral agreement.

Finally, what about convenience as a rationale for the rule? It enables judges to avoid calling clients and litigants liars. It allows the

judge to avoid deciding difficult issues which he does not wish to decide. But what do we pay for this convenience? Proper issues may be missed or ignored, and the real reasons for the decision may not be given. Convenience should not be a justification for the parol evidence rule.

B. *Is There any Reason Not To Enforce the Agreement?*

Even if there is a prior agreement, there may be reasons why the law should not enforce it. First, have the requirements of a valid contract other than "agreement" been established? Did the parties intend to be bound? Was the prior agreement definite enough to be enforced? Was consent free of fraud, mistake, or duress? Was there consideration or something else sufficient to make the promise enforceable? If there is a required *form* set by law or contract, was it present? If the required form was not present, does justice require that we disregard its absence? Did the persons who made the prior agreement have authority to do so?

The rule may be used to protect a principal from unauthorized acts of his agent. A contract maker wants to rationally plan and perform his contracts. He wants to be certain that his representatives do not make unauthorized commitments. The contracting organization can plan and operate more efficiently if it can assume that the writing passed among the various units of the contracting party contains the entire commitment. From a legal standpoint, the primary means of shielding principals from unauthorized commitments of their agents was to give principals the legal defense that their agent or employee lacked authority to make the commitment. But the law began to protect the reasonable expectations of persons who dealt with these agents. As a result, lack of authority protection became subservient to apparent authority and estoppel.[87] In order to counterattack, principals went to contract law, and frequently included provisions in their contracts that negated their agents' authority to make any commitment not expressed in writing. They also included integration clauses designed to preclude assertion of any prior oral agreements.[88] Principals could then assert the parol evidence rule as a defense when confronted with prior oral representations made by their agents.[89] Although it is difficult to quarrel with rational planning or operational efficiency as desirable objectives, the parol evidence rule cannot be justified as a vehicle to accomplish these goals.

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[87] *See* RESTATEMENT (SECOND) OF AGENCY §§ 8, 8B (1957).

[88] *E.g.*, Holland Furnace Co. v. Williams, 179 Kan. 321, 295 P.2d 672 (1956).

[89] *E.g.*, Watson-Warren Constr. Co., 65-1 CCH Bd. Cont. App. Dec. ¶ 4867, at 23,026 (1965). *In re* Atlantic Times, Inc., 259 F. Supp. 820, 825 (N.D. Ga. 1966).

First, assuming that an authority issue is present, the best method to accomplish rational planning and operational efficiency is to make certain that agents do not make unauthorized statements. Providing the principal with a shield against liability may in many instances inhibit or discourage internal control of agents.

Second, hiding an agency question under the garment of the parol evidence rule obscures the central issue. This has been one of the principal vices of the rule and has been used consciously or unconsciously as a means of avoiding other legal issues.

Third, many prior oral agreements are made and intended to survive subsequent assent to a writing. The parol evidence rule should not be used to frustrate the reasonable expectations of contracting parties. Nor should it be a surrogate for a weakening lack of authority defense.

There may be other reasons not to enforce a prior oral agreement. The Statute of Frauds can be classified as a rule affecting the *validity* of the agreement. If a writing is needed to make the agreement valid, the law will not enforce the agreement even if made. When this drastic step is taken, it is done to channel contract making into written form, to impress upon the contracting parties the seriousness of their actions and to avoid enforcement of impulsive promises.

However, the tendency in Statute of Frauds cases is to enforce those oral agreements that appear to have been made despite failure to comply with formal rules. Many techniques designed to avoid the Statute, such as part performance and estoppel, are premised on the idea that they provide evidence that the parties made an agreement. Under the Uniform Commercial Code, there is enforceability of oral agreements to the extent of any admission by either party in the course of litigation.[90] In most jurisdictions failure to assert the Statute as a defense is a waiver. The parol evidence rule should not be considered as relating to validity of the prior oral agreement.

There are other more important reasons why it may be desirable not to enforce agreements that parties have made. Here we have a true recognition of the need for commercial certainty. In commercial paper disputes the maker of a negotiable note is not allowed to assert many defenses against a holder in due course. Lenders and financing companies may be entitled to rely upon a writing as a complete expression of the entire contract. When there has been reasonable reliance by third parties upon the apparent completeness of a written agreement, estoppel may preclude assertion of the prior oral agreement.

[90] UCC § 2-201, Comment 7.

Still other reasons exist. Clearly the prior oral agreement would not be enforced if it were illegal. However, there are many less odious types of prior oral agreements.[91] Secrecy is often a reason for the written document not incorporating the entire agreement, but the immortality or shadiness of secrecy varies greatly. A secret oral agreement made to avoid letting other salesmen know what commission was to be paid to a particular salesman may not be offensive.[92]

An inflated contract price in a building contract meant to deceive a construction lender is more offensive. The important thing is to recognize that these are issues that should not concern the parol evidence rule.[93] If these agreements are not to be enforced, it is because the law does not wish to lend its assistance to shady or immoral deals; it has nothing to do with the parol evidence rule.[94]

Even if made, and even if the requisite elements of a valid contract are present, have the contracting parties done anything to change or discharge the prior oral agreement? In parol evidence cases this usually means an inquiry into the effect of any subsequent writing between the parties. This determination is the basis of the integration concept.

Professor Corbin suggested that the rule could be characterized as one which permits contracting parties to change or discharge a prior agreement by subsequent acts.[95] The rule, however, has existed so long that its total abandonment is not likely even if it could be shown that it is not needed. The most recent codification of the rule, the Uniform Commercial Code, corrected some of the worst features but did not abolish it. If the rule must be lived with, it should be limited to a generally accepted and desirable objective—the protection of truly integrated writings. If the parol evidence rule is limited solely to protecting integrated agreements, many difficult parol evidence issues

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91 *E.g.*, Sweeny v. KANS, Inc., 247 Cal. App. 2d 475, 55 Cal. Rptr. 673 (1966).

92 Brandwein v. Provident Mut. Life Ins. Co., 3 N.Y.2d 491, 146 N.E.2d 693, 168 N.Y.S.2d 964 (1957).

93 In an illegal contract, whether the law will take any role may depend upon the relative culpability of the parties. If both are equally guilty, the law may simply refuse to intervene. Some relief may be given if one party is less guilty than the other. If the construction contract price is expressed as $125,000 where the real agreement is for $100,000, refusal to listen to evidence of the prior oral agreement because of the parol evidence rule would result in the contractor having a valid claim for the additional $25,000. If the problem is treated as one of illegality, the success of any action brought by the contractor for the $25,000 or any action brought by the owner to recover the full contract price paid should depend upon comparative guilt and unjust enrichment.

94 *See, e.g.*, Note, *Taxpayer Held Bound by his Contractual Allocation of Value of Covenant Not to Complete*, 42 N.Y.U.L. REV. 991 (1967). This note treated tax questions only, without any need to discuss the parol evidence rule.

95 3 CORBIN § 574.

and subissues will disappear. There will be no need to wrestle with consistent collateral agreements, oral conditions, oral delivery, fraud, sham, true consideration and the like as devices to avoid the rule.

C. *If the Agreement Should Be Enforced, How Should It Be Interpreted?*

Once it is decided that it is desirable to enforce the prior oral agreement, it must be interpreted in light of the subsequent written contract. Normally, this will be an attempt to fit the two of them together, but if there is a conflict, the later expression will be preferred.

This raises the problem of subsequent written agreements expressly contradicting prior oral agreements. The more the oral varies from the written, the more convincing the evidence will have to be that the prior agreement was not discharged by the subsequent agreement. But the variation *itself* should not effect the *provability* of the prior oral agreement.

D. *A Rule To Protect Truly Integrated Writings*

The parol evidence rule should not be:

(*1*) A rule of form;
(*2*) A manifestation of distrust of the credibility of the evidence;
(*3*) A method to control inefficient or irrational fact finders in the judicial system;
(*4*) A device to protect those who deal with written contracts and rely upon their completeness; or
(*5*) A tool to protect principals from unauthorized representations of their agents.

The rule should be limited to protecting truly integrated writings.

V

Proposals for Improving the Parol Evidence Rule

The methods will be suggested for improving the rule. The first is a series of proposals for tinkering with the rule which can avoid some of its worst aspects. The second, a less modest suggestion, proposes a substantial overhaul of the rule with a view toward limiting it to the protection of truly integrated writings.

A. *Tinkering with the Rule: A Minor Overhaul*

Improvement can be made within the existing structure. First, the face of the document test for determining intention to integrate should be abandoned. This has been done in the Uniform Commercial Code[96] and has been suggested by Professors Calamari and Perillo.[97] Even with the assistance of the consistent collateral rule, the face of the document test is simply not acceptable. A rule cannot be tolerated that almost conclusively presumes that the mere act of assent to a subsequent writing discharges every earlier agreement unless the earlier agreement can be fitted neatly into the later. Too many agreements are partly oral and partly written for such a rule to prevail.

Second, courts might be convinced to draw a line between prior agreements contradicting and those adding to a written agreement, provided that an addition or augmentation to a truly integrated writing is not permitted. This proposal would simply mean elimination of the various tests for collateralness. It would be as if the rule were phrased, "We will not listen to parol evidence of a prior oral agreement if it will directly contradict a subsequent written contract."

Third, courts might be convinced to draw a line between prior and contemporaneous agreements. Perhaps agreements made at or about the time the written agreement is executed could be admitted. This proposal would recognize that such changes or additions often may not be integrated into the writing.

Fourth, as has been suggested by Professor Palmer,[98] the equitable remedy of reformation could be expanded to include not only fraud and mistake in reducing an agreement to writing, but also the fraud and mistake that induced a party to make an agreement. Expansion would permit reformation where there has been a conscious omission from the writing, subject to the "clean hands" rule.

Fifth, a rule could be suggested that would require the proponent of an oral agreement to establish it by clear and convincing evidence, rather than by a mere preponderance of the evidence. This would be desirable only if the rule is no longer used as a method of prohibiting testimony that may be untrustworthy, nor as a tool to enable courts to avoid deciding difficult credibility questions.

Sixth, courts could begin to recognize *overtly* that some transactions are typically not integrated while others are typically integrated. A recent study of architectural contracting practices showed that costs

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[96] UCC § 2-202, Comment 1a; *but see id.*, Comment 3.

[97] *See* Calamari & Perillo, *supra* note 63.

[98] *See* Palmer, *supra* note 39.

are almost always discussed in advance, but agreements on costs are commonly not included in the written contract.[99] Even clauses which are contradictory to some of the actual agreements may not be deleted from the contract. If this is the case, a court should not apply any parol evidence rule to an architect-client contract, unless one of the parties can show that this was not a typical contract and that the agreement in question was truly integrated. Other studies of contracting practices could furnish similar information which could be the basis for presumption of integration or non-integration.

B. *A Major Overhaul*

The above proposals would help, but they would be halfway measures adding other uncertainties to the already muddled parol evidence rule. A line between antecedent and contemporaneous agreements would have to be drawn. The line between adding to and contradicting an agreement is a difficult one to draw. It is not certain whether fact finders pay attention to burden of proof instructions. Abolition of the face of the document test helps, but guidelines are needed to determine intention to integrate. Classification according to type of transaction would help, but it would take much time and research to make meaningful classifications.[100] Increased use of refor-

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[99] *See* note 57 *supra*.

[100] What is needed is a method of convincing the trial court that the mere showing that the transaction is, *e.g.*, an architect-employment contract, means that prior oral side agreements are to be considered, subject to a showing that there was not true integration. Many trial judges will want to be able to point to statutes, precedents or perhaps secondary authority, before they will take this step.

What about a possible legislative solution? It would be possible to break transactions down into those typically concluded by integrated writings and those which are not. The contract formation key facts, *see* pp. 1065-67 *infra*, would assist in this determination. Such classifications could be accomplished by empirical studies made by legislative committees or law revision commissions. However, legislatures traditionally have not taken an active role in solving these types of problems. Only where certain types of transactions have proved particularly troublesome has there been comprehensive legislative reform. Opposition by interested trade groups and preoccupation with more pressing problems would militate against an active legislative role. At best, only a few legislatures might take such a course and this would not be enough. If emphasis on type of transaction is to make any real mark on American law, it must be made by the courts.

It is not likely that an attorney in specific litigation will try to introduce evidence of type of transaction at the trial level. Such evidence is expensive and difficult to collect. Also, most trial judges would consider such evidence irrelevant. If a trial court did admit it, there would be a strong possibility of reversal on appeal. Finally it is easier to introduce evidence relating to the particular transaction in question rather than evidence of typicality.

The impetus for, and approval of, a transactional approach must come directly from the appellate courts. Overt judicial recognition of this concept will require that:

(*1*) Legal scholars and attorneys must probe into reported appellate cases and demonstrate that, in fact, courts treat different transactions differently. Examples are cases in-

mation would be desirable, but the right to a jury trial would be lost to the party seeking relief.

Any or all of these minor overhauls could help. However, what is really needed is a recognition that true integration should be the only basis for any rule that limits provability of prior oral agreements. The desirable objectives now sought through the parol evidence rule can be accomplished more directly through other accepted legal doctrines. To make the integration concept work, however, there is a need for workable and realistic methods of recognizing the objective trappings of a true integration. A model of a truly integrated contract should be created and criteria developed for identification of truly integrated writings.

C. *A Model of a Truly Integrated Contract*

The hallmark of a truly integrated contract is that it is put together carefully and methodically. In this sense it resembles the creation of a statute or a treaty. A good deal has occurred before the act of integration. The person preparing the integration, usually the attorney, gathers all the evidence of what has transpired in order to prepare a draft. He will look at letters, wires, memoranda, agreements, contracts and any other data relevant to the final document. Drafts are reviewed by negotiators, tax advisors, patent and insurance counselors, and technical personnel. The attorney will then prepare a draft for submission to the other party or parties. Drafts are exchanged and revised. Provisions are traded, eliminated or modified. Each party uses its persuasiveness to support inclusion or deletion of specific clauses. Language is reviewed carefully with a view toward achieving phraseology satisfactory to both parties. Usually, a clause stating that the writing covers the entire transaction is included. Attorneys look over the final draft and confer with the top negotiators in order to iron out final details. The final draft is prepared and the date set for exe-

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volving bank notes, insurance, deeds, and separation agreements. *See* cases cited note 18 *supra;* Egan v. Egan, — Cal. App. 2d —, 59 Cal. Rptr. 705 (1967); Degnan, *supra* note 53, at 174.

(2) Using factors such as the key formation facts, empirical studies must be made to examine particularly troublesome transactions, with a view toward determining whether such transactions are normally culminated by integrated writings.

(3) Judges must be willing to consider these research efforts and frame their opinions in type-of-transaction language.

(4) Even without these research efforts, judges must be willing to use their own knowledge and experience to draw conclusions as to transactional typicality, and to frame their opinions in appropriate terms.

(5) The courts must recognize the unmistakable and desirable trend in contract law to develop variant legal rules for different types of transactions.

cution. Top executives of the contracting parties and other interested persons gather to sign or to witness the execution of the agreement. Each party receives copies of the contract for distribution. The originals are kept in vaults of the contracting parties.

Obviously, the percentage of contracts made in this manner is small. It can be argued that if we protect only true integrations of this sort, we are in effect abolishing the parol evidence rule. But these are the only types of written agreements which can confidently be assumed to integrate the entire transaction in one repository.

The model presumes a large corporate contractor, but a group of physicians, a small or medium-sized business, or a wealthy couple about to separate might make a similar integrated contract without the review of tax, insurance, engineering, patent and legal departments. It is the care and deliberation that point to an integrated agreement.

Even a contract put together in a manner suggested by the above model would not invariably integrate everything relating to the transaction. Contracts which appear to be integrated contracts *may* not contain everything. Oral agreements may be made simultaneously with the execution of a complete and final-looking written agreement, and may nevertheless be enforceable.

D. *Criteria for Determining Integration*

With the model in mind, what are realistic and workable guides that can be used to find truly integrated writings so that the parol evidence rule can be limited to its proper function?[101]

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101 Professor McCormick has suggested that the judge should listen to testimony of an alleged oral agreement, consider evidence which might tend to substantiate the agreement, and compare the alleged oral agreement with the writing. The judge should then decide whether the asserted oral agreement is one which parties situated as these were would *normally* and *naturally* have recited in the writing itself, had they made it and intended it to stand. McCormick § 216, at 441. If the judge decides that had such an oral agreement been made and intended to stand, the parties normally and naturally would have placed it in the writing, he should deny admissibility. He should not give the jury or himself a chance to determine whether the agreement took place. If he decides that had the agreement been made and intended to stand, and it would *not* have normally and naturally been set forth in the writing, he should admit the evidence to the finder of fact, whether it be judge or jury, who will decide the issue of the existence of the agreement.

Putting aside issues of lack of guidelines and of when oral agreements are normally and naturally included in the writing, this test would probably be applied as follows: When a witness testifies as to an asserted oral agreement, the opposing attorney will interpose an immediate objection based upon the parol evidence rule. The judge would reserve ruling until he hears the testimony, considers the possible substantiating evidence and compares the testimony to the writing. At this point, his views as to the existence of the agreement can run the following range of possibilities:

(*1*) A *firm conviction* that the agreement took place;

In many parol evidence cases certain key facts have played significant roles in determining how the parol evidence issue was resolved. Evaluation of these facts will aid in spotting the objective trappings of a truly integrated contract. Such key facts in determining integration are:

(*1*) *Subject matter of the transaction.* The more important, the more complex, and the more extraordinary a transaction, the greater the likelihood that it was concluded by an integrated writing.[102]

(*2*) *Length of the negotiations.* The longer the negotiations, the greater the likelihood that the transaction was concluded by an integrated writing.

(*3*) *Adequacy of time to make the writing conform to the oral agreement.* If the asserted oral agreement is made after the final contract is prepared for execution, the transaction is less likely to have been concluded by an integrated writing.

(*4*) *Business experience of the parties.* The greater the business experience, the greater the likelihood that the transaction was concluded by an integrated writing.[103]

(*2*) A *firm conviction* that it did not;

(*3*) A belief in the *likelihood* that the agreement took place;

(*4*) A belief in the *likelihood* that it did not;

(*5*) No opinion either way on whether the agreement took place.

Let us first assume that the judge believes that it is *unlikely* that the asserted oral agreement did occur or that the story of the party asserting the agreement is not plausible. Putting aside his doubts, if the judge decides that it would *not* be normal and natural to include it in the writing, he should admit the evidence. But if he doubts that the agreement took place, he is more likely to find that normally and naturally such an agreement would have been included in the writing and thus deny admissibility. An honest application of a "normal and natural" test is most unlikely where he doubts the existence of the agreement.

Now let us assume that the judge has no feelings one way or the other regarding the existence of the agreement. Here we may get an honest application of the test. However, the judge is more likely to deny admissibility in close cases if he applies this test. This is due to the frequent judicial impatience with informality in contract making and a judicial attitude which often holds contracting parties to an unreasonably high level of formality. Also, the way the test is framed will often constitute a tie-breaker against admissibility in close cases.

The McCormick test creates a standard for contract formation which is difficult to apply, penalizes parties who do not rigidly conform to the standards of normal and natural contract making and emphasizes the credibility of the testimony rather than the contract making process.

102 However, even in very important transactions, prior oral agreements are often made and intended to be given effect. H.K. Porter Co. v. Wire Rope Corp. of America, 367 F.2d 653 (8th Cir. 1966) (purchase of $3,000,000 business); Hunt Foods & Indus., Inc. v. Doliner, 49 Misc. 2d 246, 267 N.Y.S.2d 364 (Sup. Ct. 1966).

103 *E.g.*, TSS Sportwear, Ltd. v. Swank Shop, Inc., 380 F.2d 512 (9th Cir. 1967). The

(5) *Participation in the negotiations by an attorney or other experienced contract negotiators.* The more active the participation by an attorney or other experienced party, the greater the likelihood that the transaction was concluded by an integrated writing.[104]

(6) *The bargaining situation.* The greater the onesidedness of the bargaining situation, the less likely it is that the bargain was concluded by an integrated writing.

(7) *The degree of standardization of the writing.* The greater the standardization of the writing, the less likely that the transaction was concluded by an integrated writing.

(8) *The presence of an integration clause.* The presence of an integration clause makes it more likely that the transaction was concluded by an integrated writing. The likelihood is strengthened if the clause was prominent, was called to the attention of the party who did not prepare the writing, or was not part of a printed boiler plate.

(9) *Type of transaction.* If the transaction in question can be classified as typically concluded by an integrated writing, this determination is conclusive unless the other party can show a contrary intention in the making of the specific written agreement.

These key facts emphasize the methods contracting parties use to put their transactions together. Three principal objections can be made to the key-facts approach. First, this technique goes into elements which are normally considered irrelevant, such as representation by counsel, use of form contracts, type of transaction, and business experience. Yet, courts have frequently considered these elements whether or not they have so stated in their opinions. The law is beginning to awaken to the realities of the contract-formation process.

Second, the effectiveness of integration clauses is downgraded. But making a validly-created integration clause conclusive elevates these clauses to a stature they do not deserve. Many times integration clauses are buried in boiler plate. In many transactions the integration clause will not be pointed out or discussed. There are too many instances where oral side agreements are made and intended to be effective, despite the presence of integration clauses. The presence of such a clause may be quite significant, but it should not be conclusive.

Third, the use of variable key facts makes application and prediction uncertain. But factors such as those discussed are the only way

court said that the complainant was a businesswoman inexperienced in legal matters. *See* Sweet, *supra* note 25, at 905 n.150.

104 *See* Holm v. Shilensky, 269 F. Supp. 359 (S.D.N.Y. 1967); Leyse v. Leyse, —— Cal. App. 2d —, 59 Cal. Rptr. 680 (1967).

of predicting parol evidence cases. It is necessary to keep in mind that the test is still *intention to integrate*. The key facts merely assist the court in resolving this difficult question, and a proper evaluation of the facts should *improve* predictability. And, if the type-of-transaction factor is developed, some of the present case-by-case uncertainty can be eliminated.

E. *Extent of Integration*

Even if only true integrations are protected by the parol evidence rule, occasionally it may be necessary to determine the extent of the integration. A manufacturer may be dealing with an oil supplier who would like to supply oil to two different plants of the manufacturer. That same manufacturer may be dealing with a car dealer for the supply of a fleet of cars and for a fleet of trucks. The fact that the negotiations for the oil for one plant or for the supply of the fleet of cars are concluded by a truly integrated writing does not necessarily preclude either party from showing a prior or simultaneous oral agreement for the supply of oil for the other plant or the sale of a fleet of trucks. There may be reasons why such oral agreements will not be enforced, but it is not because of any parol evidence rule. Just as the parol evidence rule does not require that all aspects of one transaction be integrated, it does not require that all transactions between two parties be integrated when one transaction is concluded by an integrated writing. The function of the parol evidence rule does not include telling parties how to make their contracts.

Because truly integrated contracts are made infrequently, extent-of-integration questions will be rare. The troublesome cases have always been the one transaction, one subject matter arrangements. Where extent of integration is an issue, the court should apply a subject matter or transaction test. Where there is a true integration, all aspects of the deal pertaining to the subject matter expressed in the writing or to the transaction referred to in the writing will be integrated. Whatever difficulties there are relating to extent of integration can be eliminated if the draftsmen of the integration clause in a truly integrated contract delineate the scope of the integration.

F. *Judge and Jury*

If distrust of the fact finders' ability to evaluate evidence and to make a finding in accordance with its evaluation is eliminated as a factor, and if it is realized that all writings do not merit special protection, then there is no need to treat the parol evidence rule more

reverently than any other trial issue. In most cases, the jury, properly instructed, should decide whether an asserted agreement took place. On the question of integration, the jury should decide, after proper instructions, whether the evidence indicates that the parties intended a writing to be a final and complete repository.[105] However, if the facts are so clear that reasonable men cannot differ, the judge should apply the parol evidence rule. If he finds that the contract clearly was integrated, he should not submit the making of the agreement to the jury.

There is some difficulty in judge-jury relationships because the integration issue is based upon intention. But it is likely that the intention question will be resolved on the basis of an evaluation of the surrounding facts and circumstances and not upon statements of intention by the contracting parties or the negotiators. Generally, intention to integrate will *not* involve credibility, and the judge should be able to decide the question unless what happened during the negotiations is in dispute.

CONCLUSION

We can no longer ignore the evils of the parol evidence rule. The rule must not be expected to achieve a number of controversial objectives. Where these objectives are desired, they can be attained by other legal doctrines. The rule must be limited to the protection of truly integrated writings. These writings can be identified if focus is placed upon the contract making process and not the judicial process.

[105] *Cf.* Meyers v. Selznick Co., 373 F.2d 218 (2d Cir. 1966).

NOTES

Chief Justice Traynor and the Parol Evidence Rule

The rule governing the admissibility of parol evidence in contract litigation is one of the most controversial rules in American law. According to the rule, once the parties have reduced all aspects of their agreement to a final writing, evidence of a prior or contemporaneous oral agreement or a prior written agreement will not be admitted to vary the written instrument.[1] The fundamental controversy focuses on the question of whether the parties have reduced all aspects of their agreement to a final writing. The difficulty is to decide the amount of extrinsic evidence that should be admitted to resolve this question. The standards used to determine how much evidence is admissible vary considerably. Some standards allow no extrinsic evidence to be considered in deciding the threshold question;[2] others are less restrictive.[3] The general trend has been toward admitting more extrinsic evidence for the judge to consider in resolving the underlying integration questions.[4]

A second problem is the relationship between the parol evidence rule and interpretation. The rule was not conceived to apply to situations where evidence is submitted to interpret the writing.[5] However, some judges have by crude analogy to the rule excluded extrinsic evidence in interpretation cases.[6]

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1. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." 3 A. CORBIN, CONTRACTS § 573, at 357 (2d ed. 1960) [hereinafter cited as CORBIN]. Williston defines the rule as requiring, ". . . in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing." 4 S. WILLISTON, CONTRACTS § 631, at 948 (3d ed. 1961) [hereinafter cited as WILLISTON].

2. *See, e.g.*, Harrison v. McCormick, 89 Cal. 327, 26 P. 830 (1891).

3. *See, e.g.*, Lindsay v. Mack, 5 Cal. App. 2d 491, 43 P.2d 350 (4th Dist. 1935).

4. 9 J. WIGMORE, EVIDENCE § 2461, at 187 (1940) [hereinafter cited as WIGMORE]. *See also* Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation*, 42 IND. L.J. 333 (1967); Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965); Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQUESNE L. REV. 337 (1965–66); Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule*, 53 CORNELL L. REV. 1036 (1968).

5. "[A] significant cause of confusion is the failure to distinguish between the parol evidence rule on the one hand, and interpretation on the other. The parol evidence machinery will determine only one question: whether the parties intended their final writing to be integrated. No matter how this question is decided, the meaning of the writing does not automatically become unambiguous. The confusion of the rule with the process of interpretation is traceable to a period when courts were inclined to deal with written words as if they had a clear meaning apart from any particular usage and when men were held to that meaning regardless of how far it may have differed from their known intent." Murray, *supra* note 4, at 343.

6. *See* McBaine, *The Rule Against Disturbing Plain Meaning of Writings*, 31 CALIF. L. REV. 145 (1943). *See also* 3 CORBIN § 542, at 104; 9 WIGMORE § 2461, at 188.

In three landmark decisions[7] in 1968, Chief Justice Traynor attempted to make the California law on the parol evidence rule comprehensible. He also placed California in the mainstream of the trend toward liberalizing the rule. He rejected highly restrictive limitations that had been applied in integration[8] and interpretation[9] cases. He indicated that a full range of extrinsic evidence should be considered by the judge to resolve questions in both areas. He also posited standards that the judge could use to control the flow of extrinsic evidence.

This Note will attempt to demonstrate that Justice Traynor's decisions represent a much needed clarification of how the parol evidence rule applies to the litigation of integration and interpretation questions. The Note will document the confusion that existed in this area and the manner in which California law reflected this uncertainty. Finally, the Note will attempt to evaluate the implications of Justice Traynor's decisions and to analyze the merit of the arguments posited by those who dissented from his opinions.

I. Integration Questions

Although it is generally recognized that the parol evidence rule protects an integrated agreement, there is little consensus about the effect of the rule on the question of whether a writing is integrated. A statement of the rule itself does not aid the court in answering two important questions. First, who determines whether the parties have assented to the writing as an integration? Second, what kind of evidence is used to decide whether the written instrument is an integration?

The answer to the first question seems to be that the judge, not the jury, determines whether the parties intended a specific writing to be a complete and accurate integration of the terms of their contract, even though that finding involves determinations of fact.[10] To decide this first question is not necessarily to decide whether the oral agreement actually took place. That is a separate question of fact to be decided by the jury in the event the judge finds that the parties did not assent to the written instrument as a complete embodiment of their agreements.[11]

A. *The Debate over the Parol Evidence Standard*

The second question is the more troublesome one: Assuming that the court must decide whether the writing is an integration, what standards

7. Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968); Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

8. Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

9. Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968); Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968).

10. *See* 3 Corbin § 595, at 571; 9 Wigmore § 2430, at 98; 4 Williston § 638, at 1042.

11. *See* 9 Wigmore § 2430, at 98.

should it employ to make the determination? A number of different standards have been proposed and applied from time to time, and all of them embody some combination of two important variables: first, the amount of extrinsic evidence that the judge considers in making this determination, and second, the allocation of the burden of persuasion between the party who wants extrinsic evidence admitted and the party who opposes its admission.

1. *Amount of extrinsic evidence.*

The most restrictive standard is the "four corners" or "facially complete" test.[12] According to this standard, if the written instrument on its face appears to state a complete agreement between the parties, then extrinsic evidence may not be considered by the judge to determine whether the writing is an integration.[13]

A less restrictive standard is embodied by the *Restatement*[14] and approved by Williston in his treatise.[15] Under this standard whether the written instrument is integrated will normally be determined by an inspection of the face of the document.[16] An exception from this general rule exists, however: A collateral agreement that is not inconsistent with the written contract and that parties, situated as were the parties to the written agreement, might naturally have made as a separate agreement may also be considered as evidence bearing on the existence of an integration.[17]

But what evidence, if any, does the judge consider to find this exception? Both Williston and the *Restatement* imply that the judge should admit extrinsic evidence to make this determination.[18] But Williston is careful to point out that the inquiry is not purely subjective: "The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so."[19] This passage and others strongly suggest that the proper inquiry is really whether a "reasonable man" would have made the collateral agreement.[20] In applying

12. *Id.*

13. *See, e.g.*, Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P. 319 (1908).

14. *See* RESTATEMENT OF CONTRACTS § 240(1)(b) (1932).

15. *See* 4 WILLISTON § 638, at 1040–42.

16. "It is generally held that the contract must appear on its face to be incomplete in order to permit parol evidence of additional terms." *Id.* at 1014.

17. *See* RESTATEMENT OF CONTRACTS § 240(1)(b) (1932).

18. Both Williston and the Restatement refer to parties "situated as were the parties to the written contract." This statement implies that the judge must consider extrinsic evidence to determine what the "situation" of the parties was. Neither the written instrument nor the alleged collateral agreement, for example, will reveal to the judge the business experience of the parties. He must consider additional extrinsic evidence to make this determination. *See* 4 WILLISTON § 638, at 1042; RESTATEMENT OF CONTRACTS § 240(1)(b) (1932).

19. 4 WILLISTON § 638, at 1041.

20. "Whether under the rule, as ordinarily expressed, a collateral agreement tends to contradict the implications of the writing or under the suggested improvement thereon relates to a 'particular element' dealt with in the writing will depend in large measure on the question whether a *reasonable person* making such an agreement as is set up in the writing and in the proffered parol evidence might naturally have separated the matters into two parts." *Id.* at 1051 (emphasis added). *Accord*, 3 CORBIN § 584, at 480; Murray, *supra* note 4, at 340.

the *Restatement* standard as a reasonable-man standard, a number of courts have limited their consideration of extrinsic evidence to the collateral agreement itself. If, in the judge's mind, the collateral agreement is one that the parties might "reasonably" have made as a separate agreement, then evidence of it is admissible.[21] Thus, if litigated in this manner, no extrinsic evidence besides the collateral agreement itself is actually considered by the judge to determine the "naturalness" of the collateral agreement.

Section 2-202 of the Uniform Commercial Code[22] reflects a further retreat from the "four corners" test. Under the UCC, evidence of an agreement not in the written instrument will be excluded only if it contradicts the written instrument and ". . . the court finds the writing to have been intended . . . as a complete and exclusive statement of the terms of the agreement."[23] The standard used to determine this intent is whether the parties would "certainly" have included the additional agreement in the writing had they in fact agreed upon it.[24] If the party who wants the extrinsic evidence excluded sustains his burden of persuasion in showing that the parties would have included the additional agreement in the writing, then according to this test, evidence of the additional term must be kept from the trier of fact.[25] This inquiry is resolved by ". . . considering the writing, the proffered evidence, and other extrinsic evidence."[26]

Finally, the test favored by both Corbin and Wigmore abandons the "four corners" restriction entirely. Those writers believe it is impossible to decide whether the written instrument is an integration by looking only to the writing itself.[27] Extrinsic evidence, according to these commentators, must necessarily be considered in making this determination.[28] Corbin and Wigmore, however, differ over the standard to be used by the judge in resolving the integration question. Wigmore considers the most satisfactory index to be "whether . . . the particular element of the alleged extrinsic negotiation is dealt with at all in the writing."[29] Corbin, on the other hand, appears to use "credibility" of the evidence as the judge's chief guideline.

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21. *See, e.g.*, Pellissier v. Hunter, 209 Cal. App. 2d 306, 25 Cal. Rptr. 779 (4th Dist. 1962).

22. UNIFORM COMMERCIAL CODE § 2-202 (1968 version).

23. *Id.*

24. "[C]onsistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all the terms. If the additional terms are such that, if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." UNIFORM COMMERCIAL CODE § 2-202, Comment 3 (1968 version).

25. *Id.*

26. Note, *Parol Evidence: First New York Construction of UCC* § 2-202, 66 COLUM. L. REV. 1370, 1373 (1966).

27. *See* 3 CORBIN § 573, at 360; 9 WIGMORE § 2430, at 98.

28. "No written document is sufficient, standing alone, to determine [whether the parties have assented to a particular writing as the complete and accurate integration of that contract]." 3 CORBIN § 573, at 360. "This intent must be sought where always intent must be sought . . . namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice." 9 WIGMORE § 2430, at 98 (emphasis omitted).

29. 9 WIGMORE § 2430, at 98-99 (emphasis omitted).

Corbin indicates that if the extrinsic evidence ". . . is flimsy and improbable and motivated by a wish that an agreement actually made had been different and more advantageous, the court can disregard it as untrue, and may properly direct a verdict in spite of it."[30] He flatly rejects any exclusion of extrinsic evidence based on such criteria as whether the separate agreement would "naturally" be made separately,[31] or whether the extrinsic evidence is "inconsistent with" or appears to "contradict" the terms of the written agreement.[32]

2. *Burden of persuasion.*

A second important variable affecting the litigation of an integration question is the allocation of burden of persuasion between the parties. The *Restatement* and the UCC tests for admissibility of extrinsic evidence distribute the burden of persuasion differently. In the *Restatement* the burden of proof is on the party who wants extrinsic evidence admitted. He must show by a preponderance that the collateral agreement is one that parties would naturally make as a separate agreement.[33] On the other hand, the UCC test has been interpreted to shift the burden of persuasion to the party who opposes admitting the extrinsic evidence.[34] That party must prove by a preponderance that the additional term is one that the parties would certainly have included in the written instrument had they agreed upon it. Finally, another commentator has proposed that the court indulge ". . . a strong presumption in favor of the accuracy of the writing . . . [and provide] that this presumption be overcome by 'the most clear and convincing proofs.' "[35]

B. *Prior California Law*

California law concerning integration questions represents a confusing combination of the standards and tests mentioned above. The California statutes seem to embody the "four corners" or "facially complete" standard.[36] Nevertheless, two conflicting lines of case authority have developed. The first line adopts the "facially complete" test:[37] "Whether an agreement con-

30. 3 CORBIN § 583, at 469.
31. *Id.* § 584, at 480.
32. *Id.* § 583, at 469.
33. *See* RESTATEMENT OF CONTRACTS § 240(1)(b), Comment (1932).
34. "The *Code* . . . casts the burden of establishing intent on the party seeking to prevent admission of parol evidence." Note, *supra* note 26, at 1373.
35. Hale, *The Parole Evidence Rule*, 4 ORE. L. REV. 91, 122 (1925).
36. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing . . . ." CAL. CODE CIV. PRO. § 1856 (West 1955). "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." CAL. CIV. CODE § 1625 (West 1955).
37. Germain Fruit Co. v. J. K. Armsby Co., 153 Cal. 585, 96 P. 319 (1908); Gardiner v. McDonogh, 147 Cal. 313, 81 P. 964 (1905); Harrison v. McCormick, 89 Cal. 327, 26 P. 830 (1891).

tains language importing a complete contract is a question of law for the court, and is to be determined from an inspection of the face of the agreement."[38] The second line of cases holds that when in light of the circumstances the parties have not incorporated into the writing all of the terms of their agreement, evidence of an oral agreement that is not inconsistent with the written instrument's terms and covers a matter upon which the writing is silent will not be excluded by the parol evidence rule.[39] It is clear that more extrinsic evidence may be admissible under the second line than under the first.

It is not clear that the older cases in the second line of authority represent a conceptual break with the "facially complete" test. The initial question in these cases is whether the parties have incorporated all the terms of their agreement in the written instrument.[40] These cases do not indicate precisely how the judges resolved this threshold question, but it does not appear that extrinsic evidence was used to determine the answer. Neither *Guidery v. Green*[41] nor *Sivers v. Sivers*,[42] for example, indicates that the court should consider any kind of extrinsic evidence to make this determination. In these two cases, moreover, the matters on which the writings were silent involved the kinds of omissions that would normally render a contract incomplete on its face.[43] Thus, while these early cases differ in language from those in the first line of authority, they do not differ in outcome.

The language of the older cases, however, provided the basis for later innovation by California courts interested in avoiding the rigid restraints of the "four corners" test. The case of *Mangini v. Wolfschmidt, Ltd.*[44] is a good example. This decision, which purports to state the rule embodied in *Sivers*, holds that the parol evidence rule does not ". . . render inadmissible proof of contemporaneous oral agreements collateral to, and not inconsistent with, a written contract where the latter is either incomplete or silent on the subject, and the circumstances justify an inference that it was not intended to constitute a final inclusive statement of the transaction."[45]

Two important aspects of *Mangini* deserve mention. First, whether the writing fully embodies the parties' agreements is to be determined, according to *Mangini*, by making inferences from "circumstances."[46] The implication is that the judge will consider not only the writing and the

38. Gardiner v. McDonogh, 147 Cal. 313, 319, 81 P. 964, 965–66 (1905).
39. *See, e.g.*, American Indus. Sales Corp. v. Airscope, Inc., 44 Cal. 2d 393, 282 P.2d 504 (1955).
40. *See, e.g.*, Sivers v. Sivers, 97 Cal. 518, 521, 32 P. 571, 572 (1893).
41. 95 Cal. 630, 30 P. 786 (1892).
42. 97 Cal. 518, 32 P. 571 (1893).
43. In *Guidery* there was no mention of the nature of the consideration, and in *Sivers* the time of payment was omitted by the contracting parties.
44. 165 Cal. App. 2d 192, 331 P.2d 728 (2d Dist. 1958).
45. *Id.* at 198–99, 331 P.2d at 731.
46. *Id.* at 199–200, 331 P.2d at 731–32.

alleged collateral agreement, but also extrinsic evidence of the circumstances. Second, *Mangini* states that extrinsic evidence of a collateral agreement is admissible whenever the written contract is "incomplete" or "silent" on the subject-matter of the collateral agreement.[47] Thus "silence" need not be equivalent to "incompleteness." Indeed, in some California cases the matter on which the written instrument was silent was clearly not a term whose absence from a writing would render the instrument incomplete on its face.[48] Thus, the language in cases like *Sivers* has been used by later courts to evade the "facially complete" or "four corners" test.

C. *Masterson v. Sine*

In *Masterson v. Sine*[49] Chief Justice Traynor has attempted to clarify California case law by explicitly rejecting the first line of cases and by providing a rationale for the second line of cases. In this case Dallas Masterson and his wife had conveyed property to Medora and Lu Sine by a grant deed in which the grantors reserved for themselves an option to purchase the property within 10 years from the date of conveyance. Some years later Masterson was adjudged bankrupt. When his trustee in bankruptcy sought to enforce the option, the grantor, Masterson, attempted to offer extrinsic evidence of a parol agreement that the option was personal to the grantor and therefore could not be enforced by the trustee. The trial court refused to admit the evidence and entered judgment for the trustee. The California supreme court reversed the decision because of the trial court's refusal to admit the parol evidence.[50]

After acknowledging that the crucial issue is "whether the parties intended their writing to serve as the exclusive embodiment of their agreement,"[51] Chief Justice Traynor indicates what evidence the trial judge should consider to resolve the integration question. First, the instrument itself may help resolve the issue.[52] Second, the alleged collateral agreement itself must be "examined . . . to determine whether the parties intended the subjects of negotiation it deals with to be included in, excluded from, or otherwise affected by the writing."[53] Finally, "circumstances at the time of the writing may also aid in the determination of such integration."[54]

The crux of Justice Traynor's opinion is that "evidence of oral collateral agreements should be excluded only when the fact finder is likely to be mis-

47. *Id.*
48. *See, e.g.*, Stockburger v. Dolan, 14 Cal. 2d 313, 94 P.2d 33 (1939).
49. 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).
50. *Id.* at 224, 436 P.2d at 567, 65 Cal. Rptr. at 551.
51. *Id.* at 225, 436 P.2d at 563, 65 Cal. Rptr. at 547.
52. *Id.*
53. *Id.* at 226, 436 P.2d at 563, 65 Cal. Rptr. at 547.
54. *Id.*

led."[55] "The rule," he indicates, "must therefore be based on the credibility of the evidence."[56] As standards for "credible" evidence, he posits the *Restatement* and the UCC. Since, Justice Traynor concludes, "[t]his case is one . . . in which it can be said that a collateral agreement such as that alleged 'might naturally be made as a separate agreement'. . . [then] [*a*] *fortiori* the case is not one in which the parties 'would certainly' have included the collateral agreement in the deed."[57] On the narrowest reading of *Masterson*, Justice Traynor has adopted the orthodox and rather conservative *Restatement* standard for the litigation of integration cases. According to his holding, any extrinsic evidence that conforms to the *Restatement* standard is "credible" and should be admitted. However, the implications of the opinion as a whole are far broader than the narrow bounds of the *Restatement*.

First, Traynor does not use the *Restatement* test as a reasonable-man standard. He uses it to determine whether the parties involved in the case before the court in fact intended to integrate all aspects of their agreement in the written instrument. An example of this concern is his description of Dallas Masterson and his wife. He observes that "[t]here is nothing in the record to indicate that the parties to this family transaction, through experience in land transactions or otherwise, had any warning of the disadvantages of failing to put the whole agreement in the deed."[58] He is interested not in what the "reasonable man" would have intended in this situation, but rather, what Dallas Masterson actually intended.

Second, Justice Traynor's holding implies that the critical question is whether the extrinsic evidence is "credible," not whether it conforms to the objective *Restatement* standard. "Credible evidence" may be different from evidence conforming to the objective standard posited by Justice Traynor. Evidence can be "credible"—that is, believable—and yet tend to prove a collateral agreement that the parties would not "naturally" have made as a separate agreement. One of Justice Traynor's footnotes strongly implies that all "credible" evidence is admissible: "Corbin suggests that, even in situations where the court concludes that it would not have been natural for the parties to make the alleged collateral oral agreement, parol evidence of such an agreement should nevertheless be permitted if the court is convinced that the unnatural actually happened in the case being adjudicated."[59]

The litigation process that emerges from Justice Traynor's vision of the parol evidence rule seems to be this: The judge examines each piece of evidence as it is introduced and determines whether the evidence tends to prove that the agreement is not integrated. He does this in light of all the other evi-

55. *Id.* at 227, 436 P.2d at 564, 65 Cal. Rptr. at 548.
56. *Id.*
57. *Id.* at 228–29, 436 P.2d at 565, 65 Cal. Rptr. at 549.
58. *Id.*
59. *Id.* at 228 n.1, 436 P.2d at 565 n.1, 65 Cal. Rptr. at 549 n.1.

dence that has been introduced on this point and all the evidence he believes will follow. If and when he concludes that the proffered evidence is not believable and will not be made so by any further evidence, he should order all the evidence going to the integration question stricken and direct a verdict on that point for the party relying on the written contract.

As this description demonstrates, Chief Justice Traynor has greatly expanded the amount of extrinsic evidence admissible under the parol evidence rule. The judge will probably not make his ultimate decision on the integration question until much, if not most, of the extrinsic evidence has been at least provisionally admitted. Thus Justice Traynor's opinion posits a decisional process more akin to that advocated by Corbin than to that of the *Restatement*. As a result little, if anything, remains of the parol evidence rule in California.

II. Interpretation Questions

"Interpretation" and "integration" questions actually involve discrete considerations, though they are frequently confused with one another.[60] Numerous difficulties could be avoided if the two questions were treated separately. The parol evidence rule is concerned only with the integration question: whether the parties have assented to the writing as the final embodiment of their agreements. The outcome on this question has no effect on the meaning the parties attributed to the writing.

Commentators agree on two important points concerning interpretation. First, the parol evidence rule should have nothing whatever to do with extrinsic evidence offered for the purpose of interpreting a written instrument. Wigmore, for example, declares emphatically that "all the circumstances must be considered which go to make clear the sense of the words."[61] Second, the jury should have a role in the interpretation process. Whether the meaning of a word in the writing is ambiguous is normally a question left to the judge.[62] But "[w]here the meaning of a writing is uncertain or ambiguous, and parol evidence is introduced in aid of its interpretation, the question of its meaning should be left to the jury."[63] In other words, once the court has decided that a particular word or phrase in the writing is ambiguous, the jury then determines which meaning will prevail.

Despite the agreement among commentators that the parol evidence rule

60. *See* C. McCormick, Handbook of the Law of Evidence 442 (1954).

61. 9 Wigmore § 2470, at 227. Corbin indicates that a court which excludes extrinsic evidence offered for the purpose of interpretation is "substituting its own linguistic education and experience for that of the contracting parties." 3 Corbin § 542, at 111. Even Williston cautiously admits that "although it is no doubt desirable that words have a fixed and ascertained meaning, precedent invariably attaching such a meaning often results in a rigidity which does violence to the intent of the parties; it sets at naught and even defeats the oft-iterated . . . rule that 'the intention of the parties' is 'the polestar' of interpretation." 4 Williston § 614, at 585–87.

62. *See* 3 Corbin § 554, at 222; 4 Williston § 616, at 648.

63. 4 Williston § 616, at 652.

has nothing to do with interpretation, the rule has nevertheless influenced the litigation of interpretation questions. A crude parallelism exists between the "facially complete" test in integration questions and the "plain meaning" or "ambiguity" standard in interpretation questions. Just as the "facially complete" test restricts the judge to the four corners of the written instrument in determining whether the parties intended the writing to be an integration, so the "plain meaning" standard confines the judge to the written instrument in determining how the parties intended the document to be interpreted.[64]

A. *California Law*

Despite both the urgings of commentators and the express words of a California statute, California courts have frequently used only the written instrument to resolve interpretation questions.[65] Some courts openly question this stand;[66] others blatantly evade the "plain meaning" doctrine.[67]

A California statute explicitly provides that "[f]or the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret."[68] The legislative mandate seems clear, especially since this statute expressly modifies the provision embodying the "facially complete" test for the parol evidence rule.[69] Interpretation, according to this statute, is to be based upon evidence of all the circumstances; the parol evidence rule should not apply.

Despite the statute a number of California decisions hold that "when

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64. "[I]t is insisted that . . . when the meaning is 'plain'—that is, plain by the standard of the community and of the ordinary reader—no deviation can be permitted." 9 WIGMORE § 2461, at 190 (emphasis omitted.) "It is sometimes said that if the words of a contract are plain and clear, evidence of surrounding circumstances to aid interpretation is not admissible." 3 CORBIN § 542, at 100.

65. *See, e.g.*, Wechsler v. Capitol Trailer Sales, Inc., 220 Cal. App. 2d 252, 33 Cal. Rptr. 680 (3d Dist. 1963).

66. *See, e.g.*, Wells v. Wells, 74 Cal. App. 2d 449, 169 P.2d 23 (1st Dist. 1946).

67. *See, e.g.*, Schmidt v. Macco Constr. Co., 119 Cal. App. 2d 717, 260 P.2d 230 (1st Dist. 1953).

68. CAL. CODE CIV. PRO. § 1860 (West 1955).

69. CAL. CODE CIV. PRO. § 1856 (West 1955), which embodies the "facially complete" theory of the parol evidence rule, states, "[T]his section does not exclude . . . evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860 . . . ."

This exception to section 1856 has been the subject of extended commentary and criticism: "Section 1860 lays down a broad rule for interpretation of written instruments . . . . No distinction is made . . . between writings that are plain on the face and those which are not. The distinction is not expressly made; it is not impliedly made. It is not even hinted or suggested. It has been incorporated in the code sections by judicial decisions, probably influenced by California cases before 1872 [the year in which the California Code of Civil Procedure was passed] and by decisions from other jurisdictions, where similar statutes did not exist. The code sections are as plain as a pike staff." McBaine, *supra* note 6, at 164. "In California the Code language . . . seems to be radically misunderstood in its present bearing. It provides unqualifiedly that 'the circumstances under which the instrument was made' may be shown, for construing it. But this rule, it is now said, 'can be invoked to explain an ambiguity which appears upon the face of the document itself' . . . . The above limitation on the Code provision involves so radical a misapplication of distinct principles that only confusion can result in this State." 9 WIGMORE § 2470, at 227 n.11 (emphasis omitted).

language used in a written contract is fairly susceptible to one of two constructions, extrinsic evidence may be considered to aid the court in ascertaining the true intent of the parties . . . ."[70] These decisions imply that the ambiguity must precede the extrinsic evidence; the court must find an ambiguity on the face of the instrument before it may consider extrinsic evidence for the purpose of interpretation.

This judicially made "plain meaning" rule is not consistently applied. Some decisions openly question it. "Much can be said," one case declares, "in support of the rule that parol evidence is not only admissible to explain an ambiguity appearing on the face of the document but is also admissible to show that what appears to be a perfectly clear agreement, in fact meant something entirely different to the parties."[71] Other courts avoid the "plain meaning" doctrine with little attempt to rationalize their decisions. In one case the party who had opposed admitting extrinsic evidence in the trial court argued on appeal that the trial court had not expressly found the contract ambiguous before it admitted extrinsic evidence. "The complete answer to this argument," replied the appellate court, "is that the law does not provide how the trial court shall make the required determination of ambiguity."[72] Apparently a trial court has the choice of making the determination either by looking only to the written instrument or by considering extrinsic evidence before actually ruling that the writing is ambiguous.[73] Such decisions as this have led to a jumble of confused opinions. The law in California prior to 1968 could hardly be called law at all.

B. *Chief Justice Traynor: Pre-1968 Decisions*

In a number of concurring and dissenting opinions Chief Justice Traynor made his position on interpretation questions clear soon after he joined the California supreme court. Rejecting the premise that extrinsic evidence is admissible only after the contract is found ambiguous on its face,[74] he argued that the main purpose of interpretation is to give effect to the intention

70. Collins v. Home Sav. & Loan Ass'n, 205 Cal. App. 2d 86, 96, 22 Cal. Rptr. 817, 823 (2d Dist. 1962).

71. Wells v. Wells, 74 Cal. App. 449, 456, 169 P.2d 23, 27 (1st Dist. 1946).

72. Schmidt v. Macco Constr. Co., 119 Cal. App. 2d 717, 730, 260 P.2d 230, 238 (1st Dist. 1953).

73. McBaine believes that courts frequently evade the "plain meaning" or "ambiguity" test in the following way: "Slight ingenuity by counsel will suffice to give almost all words a 'suggested meaning' which will create an ambiguity on the face of the writing. No doubt counsel contending for the interpretation his client has given the writing has in mind the extrinsic facts which he seeks to show by parol evidence. With these facts in mind he 'suggests' the meaning of the writing. The 'suggestion' seems reasonable to the court and then the conclusion is reached that an ambiguity exists. An ambiguity having arisen, the way is open for the reception of parol evidence—evidence of the facts which produced the 'suggestion.' " McBaine, *supra* note 6, at 155.

74. Laux v. Freed, 53 Cal. 2d 512, 348 P.2d 873, 2 Cal. Rptr. 265 (1960) (concurring opinion); Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665 (1942) (concurring opinion). In each of these cases the majority held that extrinsic evidence should be admitted only because there is an ambiguity on the face of the instrument. Justice Traynor concurred in the result reached by the majority, but did not join in their reasoning.

of the parties at the time of contracting and that this cannot be achieved by looking only to the face of the instrument.[75] He asserted that to determine the meaning the contracting parties had attributed to the words, a judge must consider the circumstances[76] in which the written instrument was made. To do this the judge must consider extrinsic evidence. If the judge does not, Chief Justice Traynor reasoned, he might attribute a meaning to the written instrument that was never intended by the parties.[77]

When he could not gather a majority to concur in his attack on the "plain meaning" test, Justice Traynor undercut the standard by pointing out that the rule which says ". . . extrinsic facts are admissible only when a written instrument is ambiguous, simply means that the language used by the parties must be susceptible to the meaning claimed to have been intended by the parties."[78]

The phrase, "susceptible to different meanings," had appeared frequently in earlier California cases. For example, an 1895 decision had held that if "the language employed be fairly susceptible of either one of . . . two interpretations contended for . . . then an ambiguity arises, which extrinsic evidence may be resorted to for the purpose of explaining."[79] When it used the phrase, however, the court in *Balfour v. Fresno Canal & Irrigation Co.*[80] envisioned a procedure different from Chief Justice Traynor's. In *Balfour* the court stated that only the written instrument should be considered to determine whether the words of the writing are susceptible to different interpretations.[81] If the judge finds the language of the instrument susceptible to more than one meaning, he may admit extrinsic evidence on the point. This procedure is obviously at odds with Justice Traynor's conception of interpretation.[82] For him the meanings to which the language of a writing is "susceptible" cannot be determined without considering extrinsic evidence.

Justice Traynor's views were made even clearer when, writing for the court in 1964, he argued that the question is not what meaning appears from the face of the instrument alone, but rather whether the pleaded mean-

75. *In re* Estate of Rule, 25 Cal. 2d 1, 152 P.2d 1003 (1944) (dissenting opinion).

76. *See* Corbin, *supra* note 4, at 162, describing the "circumstances" as "the character of the subject matter, the nature of the business, the antecedent offers and counter offers and the communications of the parties with each other in the process of negotiation, the purposes of the parties which they expect to realize in the performance of the contract."

77. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665 (1942) (concurring opinion).

78. *In re* Estate of Rule, 25 Cal. 2d at 22, 152 P.2d at 1013 (dissenting opinion).

79. Balfour v. Fresno Canal & Irrigation Co., 109 Cal. 221, 225, 41 P. 876, 877 (1895).

80. *Id.* at 221, 41 P. at 876.

81. *Id.* at 225, 41 P. at 877.

82. In *Reid v. Overland Machined Products*, 55 Cal. 2d 203, 359 P.2d 251, 10 Cal. Rptr. 819 (1961), Justice Traynor used *Balfour*'s formulation of "susceptibility," but he did not state whether, in deciding if the written instrument is fairly susceptible to two different interpretations, the judge need only examine the written instrument or must admit extrinsic evidence for the purpose. He muddled the meaning of the phrase and brought the majority closer to his point of view.

ing is one to which the instrument is reasonably susceptible.[83] Extrinsic evidence must be admitted before this determination can be made, and the court will consider the pleaded meanings in light of the extrinsic evidence. If the court decides the words of the instrument are reasonably susceptible to different meanings, the finder of fact must then determine which meaning is to prevail.[84]

C. *Chief Justice Traynor's 1968 Opinions*

In *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*[85] and *Delta Dynamics, Inc. v. Arioto*[86] Chief Justice Traynor reemphasizes points contained in earlier decisions and adds a new dimension to the litigation of interpretation cases. *Pacific Gas & Electric* involved a contract for repair work on the plaintiff's steam turbine. The defendant had agreed in the contract to indemnify plaintiff "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract." The plaintiff sued to recover damages to the turbine itself caused by the defendant. At the trial defendant offered extrinsic evidence, consisting primarily of prior agreements between the two parties, to prove that the indemnity clause was intended to cover only injury to the property of third parties and not injury to the plaintiff's property. The trial court stated the contract had a "plain and clear" meaning and refused to admit the evidence. The supreme court reversed the decision.[87]

In *Delta Dynamics* the defendants had agreed to distribute a safety device for firearms that was manufactured by plaintiff. The contract contained a clause stating, "Should [the defendant] fail to distribute in any one year the minimum number of devices to be distributed by it . . . this agreement shall be subject to termination" by Delta on 30 days' notice. The defendant failed to fulfill the terms of the contract and Delta canceled the contract and brought suit for damages. At trial the defendant attempted to offer extrinsic evidence to prove that the parties intended the cancellation clause to be the sole remedy for failure to perform the contract. The trial court refused to admit the evidence, and the supreme court reversed.[88]

In these cases, virtually indistinguishable as they relate to extrinsic interpretive evidence, Justice Traynor begins by stating the standard for interpretation questions: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to

83. Coast Bank v. Minderhout, 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).
84. *In re* Estate of Rule, 25 Cal. 2d at 18, 152 P.2d at 1011 (dissenting opinion).
85. 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968).
86. 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968).
87. 69 Cal. 2d at 36, 442 P.2d at 648, 69 Cal. Rptr. at 568.
88. 69 Cal. 2d at 526, 446 P.2d at 788, 72 Cal. Rptr. at 788.

be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."[89] If the trial judge uses the former standard, Justice Traynor continues, "[he] . . . reflects a judicial belief in the possibility of perfect verbal precision. . . . This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words."[90] Proper interpretation, he concludes, requires that the judge consider extrinsic evidence offered by the parties.

Chief Justice Traynor also indicates that "rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intentions of the parties."[91] This statement poses precisely the same problem that a similar statement in *Masterson v. Sine* presented. "Credible evidence" is not equivalent to evidence that conforms to the objective standard which Justice Traynor posits. Extrinsic evidence may be credible, yet tend to prove a meaning to which the language of the instrument is not "reasonably" susceptible. The parties may simply have attributed an unorthodox meaning to a word or phrase in the contract.

In a footnote to *Pacific Gas and Electric*,[92] Chief Justice Traynor states that a trial court should admit, at least provisionally, all credible evidence. He implies that the objective standard he posits is actually a mechanism to be used by the court to exclude extrinsic evidence that is unbelievable:

> When objection is made to any particular item of evidence offered to prove the intention of the parties, the trial court may not yet be in a position to determine whether in the light of all of the offered evidence, the item objected to will turn out to be admissible . . . or inadmissible. . . . In such case the court may admit the evidence conditionally by either reserving its ruling on the objection or by admitting the evidence subject to a motion to strike.[93]

Here, as in *Masterson*, "credibility," rather than an objective standard, appears to be the real criterion for admissibility. However, in *Pacific Gas & Electric* and *Delta Dynamics* the implication of Justice Traynor's language in *Masterson* is made explicit: All credible evidence must be at least provisionally admitted.

III. The Impact of Chief Justice Traynor's Decisions

A. *Limitations on the Admissibility of Extrinsic Evidence*

What limitations, if any, has Chief Justice Traynor imposed on the admissibility of extrinsic evidence in contract cases? Although he stated in

89. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d at 37, 442 P.2d at 644, 69 Cal. Rptr. at 564.

90. *Id.* at 37, 442 P.2d at 643, 69 Cal. Rptr. at 563.

91. *Id.* at 39, 442 P.2d at 645, 69 Cal. Rptr. at 565.

92. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d at 40 n.7, 442 P.2d at 645 n.7, 69 Cal. Rptr. at 565 n.7.

93. *Id.*

Masterson that no evidence contradicting the written instrument would be admitted, the fact that he found no contradiction in that case[94] suggests that this limitation will be narrowly applied. The parol agreement that the grantor's option should remain personal to the Masterson family seemed clearly to "contradict" the provisions of the written instrument as those provisions are interpreted under California law.[95] Chief Justice Traynor's desire to discover the intentions of the parties before the court in *Masterson* appears to have overridden the restrictions of the test formulated in that very case.

Justice Traynor's reasonably-susceptible-meaning standard for interpretation questions has been used in the past by California courts to exclude extrinsic evidence,[96] but his use of the phrase "credible evidence" in *Pacific Gas & Electric* and *Delta Dynamics* clouds the holdings of the older cases. If, as Justice Traynor indicates, the criterion should be whether the evidence is credible, then whether it conforms to the former standard becomes a secondary matter.

There may be other ways, as suggested by commentators, in which restraints might be placed on the admissibility of extrinsic evidence. In integration cases the court may indulge a presumption, rebuttable only by "clear and convincing" proof, in favor of the written instrument.[97] Alternatively, an integration clause in a written instrument may be found to raise a presumption in favor of the writing as the final embodiment of the parties' agreements.[98] These modifications, however, are potentially subversive of what appears to be Justice Traynor's primary concern: In integration and interpretation cases the actual intentions of the parties should be protected. An automatic application of any standard or test restricting the admissibility of extrinsic evidence makes this objective difficult to achieve.

B. *The Dissents: A Conflicting Set of Values*

The dissents to *Masterson* and *Delta Dynamics* embody a different set of values from those espoused by Justice Traynor. Although the dissents address themselves to different questions—integration in *Masterson* and interpretation in *Delta Dynamics*—their objections to the respective majority opinions are very similar. First, the dissenters point out that commercial certainty is at the very center of both the "facially complete" standard for the parol evidence rule and the "clear meaning" test for interpretation. They

94. Masterson v. Sine, 68 Cal. 2d at 228, 436 P.2d at 565, 65 Cal. Rptr. at 549.

95. "[In California] the right of transferability applies to an option to purchase, unless there are words of limitation in the option forbidding its assignment or showing that it was given because of a peculiar trust or confidence reposed in the optionee." *Id.* at 234, 436 P.2d at 564, 65 Cal. Rptr. at 553 (dissenting opinion).

96. *See, e.g.*, Imbach v. Schultz, 58 Cal. 2d 858, 377 P.2d 272, 27 Cal. Rptr. 160 (1962).

97. *See* Hale, *supra* note 35, at 122.

98. For a discussion of this suggestion see Sweet, *supra* note 4, at 1060–65.

then argue that Justice Traynor's standards threaten commercial certainty,[99] because lawyers for the contracting parties will not know when they have a written agreement that will stand up in court[100] and will therefore be hindered in advising clients.[101] Second, the dissenters contend that the influx of extrinsic evidence increases the chances that the jury will be misled by fraudulent testimony or a witness's failing memory.[102]

These assertions ignore some important points. First, it is far from clear that commercial certainty is better protected by the "facially complete" and "plain meaning" standards and by the exceptions appended to both these tests than by a more flexible approach designed primarily to discover what in fact the parties intended. In California the exceptions to the two rules are so numerous and so confusing that contracting parties often have little idea how the written instrument will fare in court.[103] Lawyers are frequently unable to predict accurately how these rules will affect a client, because the rules' past applications have been so inconsistent.[104] The net effect of all this is a high volume of litigation on these questions.[105]

Second, although a jury may well be misled by fraudulent testimony or by a witness's failing memory, this argument is unconvincing. Under Chief Justice Traynor's formulation the judge is given great discretion in determining what evidence reaches the jury. The judge can and should use his discretion to exclude evidence that seems fraudulent or obviously unreliable, and to strike such evidence already provisionally admitted.[106] In addition to ruling on the admissibility of evidence, the court possesses the power to direct a verdict even after the extrinsic evidence has been admitted[107] or to enter a judgment notwithstanding the verdict. Those who criticize the jury rarely find comparable fault with the judge.[108]

Furthermore, it is not clear that the jury is as easily misled as the dissenters suggest. The jury in any case must weigh the credibility of witnesses, and there is little empirical evidence to support the charge that these fact finders are gullible.[109]

Finally, even if the "facially complete" or "plain meaning" standards

99. Masterson v. Sine, 68 Cal. 2d at 231, 436 P.2d at 567, 65 Cal. Rptr. at 551 (dissenting opinion).

100. Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d at 532, 446 P.2d at 789, 72 Cal. Rptr. at 789 (dissenting opinion).

101. *Id.*

102. Masterson v. Sine, 68 Cal. 2d at 237, 436 P.2d at 571, 65 Cal. Rptr. at 555 (dissenting opinion).

103. *See* Sweet, *supra* note 4, at 1046–47.

104. *Id.*

105. *See id.* at 1047.

106. *See* text accompanying note 93 *supra.*

107. *See* 3 CORBIN § 582, at 456–57.

108. "If the parties were allowed to put in averments extraneous to the writing, it must go to the jury, and there was no telling what the jury might do; but if the judges took exclusive charge, they could better control the situation." 9 WIGMORE § 2426, at 86.

109. *See* Sweet, *supra* note 4, at 1055.

do promote commercial certainty, the costs of commercial certainty may be unacceptably high. In an era dominated by contracts of adhesion, unequal bargaining strengths, and a profusion of liability-limitation clauses, the results of a mechanistic protection of the written instrument are often harsh and unjust.[110]

Thus, the dissenters' objections to the Traynor opinions are unconvincing. Judges, according to Chief Justice Traynor's formulation, will play a critical role in controlling the impact of extrinsic evidence. Judges, historically, have not been insensitive to the need for a measure of stability and certainty in commercial transactions. Even if the entire litigation of integration and interpretation cases were placed before the jury, it is hardly clear that such an event would precipitate the demise of commercial certainty.

IV. Conclusion

Chief Justice Traynor has significantly narrowed the scope of the parol evidence rule's operation while leaving a considerable amount of control in the hands of the judge. In integration cases the judge determines whether the written instrument is an integration of the parties' agreement; in interpretation cases he decides whether, in view of the extrinsic evidence, terms in the written instrument are susceptible to more than one meaning. In either case the judge's measure of control, together with his power to direct a verdict, is ample to protect the legitimate interests of "commercial certainty."

The thrust of Justice Traynor's opinions is clear. He wants the intentions of the contracting parties to be protected. The decisions, however, represent the outer limits of what the California supreme court can do. It is time for the California state legislature to step in and rid the California Codes of the confusion for which they have become legendary. The provisions concerning parol evidence should either be rewritten or amended to conform to Chief Justice Traynor's three opinions.

W. Richard West, Jr.

110. *Id.* at 1056.

32

The Parol Evidence Rule

§32.1. Parol Evidence Rule—Its Meaning in General

RULE: The parol evidence rule makes inadmissible extrinsic evidence, oral or written, offered to affect a written instrument, such as a contract, deed, or will, if

(a) the written instrument has become integrated by the parties having intended to supersede all other prior or contemporaneous negotiations and understandings, and to constitute the written instrument as the final, complete, and exclusive embodiment of their agreement; and

(b) the extrinsic evidence will vary, add to, or contradict the terms of the written instrument.

AUTHORITY: *Weisenburg v Thomas* (1970) 9 CA3d 961, 89 CR 113; *Exchequer Acceptance Corp. v Alexander* (1969) 271 CA2d 1, 76 CR 328.

COMMENT: Parol evidence rule one of substantive law. The parol evidence rule makes inadmissible extrinsic oral or written evidence that will vary, add to, or contradict a written instrument that the parties have adopted as their final, integrated agreement. This is not a rule of evidence, but is a rule of substantive law. It is not a rule of evidence, because it is not concerned with methods of proving contested issues of fact. It is a rule of law, because the written instrument is held as a matter of substantive law to be the agreement of the parties. Extrinsic evidence is excluded by the parol evidence rule as being legally irrelevant.

Parol evidence rule applies only to integrated, finalized, written instrument or instruments. The parol evidence rule comes into play only when the parties have adopted a writing or writings as their final and complete agreement. An integration is the writing or writings so adopted. It follows that once such integration occurs, the parol evidence rule bars any evidence from a party to the agreement that would contradict, add to, or vary the written instrument as the parties' agreement.

Parol evidence rule limited to contractual type documents. The essence of the parol evidence rule is that two or more parties have put their agreement into a final writing. Writings not contractual in nature, such as receipts, informal memoranda, or letters, are obviously not designed to constitute the final embodiment of an agreement. The rule does, however, apply to a will as a formal document, although noncontractual in nature.

Illustrations:

(1) (*Written agreement for a new corporation to have an option to purchase defendant's property—parol evidence offered to prove that individuals, rather than corporation, were to have the option*) A sues X for breach of contract. The contract is a written, land-development, joint venture agreement that provided that A and X were each to purchase $5000 worth of stock in a corporation to be formed, and that the corporation would be granted an option to purchase land owned by X. A introduces oral testimony that A and X had agreed at the time the joint venture agreement was signed that X's land was to be conveyed to A and X as individuals instead of to a corporation and that A and X would each contribute one-half of whatever the joint venture might require, instead of the $5000 stock purchase. X moves to strike A's oral testimony after having first made a parol-evidence-rule objection. X's motion should be granted and A's oral testimony stricken. (See *Weisenburg v Thomas, supra.*)

Illustration (1) is a typical example of the operation of the parol evidence rule. The parties have signed a formal, joint venture, land-development contract. A's testimony as to the oral agreement varies with and contradicts the written instrument in two particulars. The alleged oral agreement that A and X as individuals were to be the purchasers of X's land contradicts the written term that a corporation was to purchase the land. Also, the alleged oral agreement that A and X each would contribute one half of whatever the joint venture required contradicts and varies the written term that A and X each would contribute $5000 by purchasing stock in the corporation to be formed.

In *Weisenburg v Thomas, supra,* from which Illustration (1) is taken, the trial judge admitted the oral testimony, holding that the parties had contracted in accordance with the oral testimony. The appellate court held this to be error, because the extrinsic evidence clearly varied and contradicted the terms of the written agreement, in violation of the parol evidence rule. The *Weisenburg* case, decided in 1970, is significant because it is a good demonstration of the fact that the parol evidence rule still has vitality, in spite of recent decisions that will be considered in subsequent sections of this chapter.

(2) (*Parol evidence rule held applicable to make a declaration insufficient to prevent a summary judgment*) A, X, Y, and Z open an escrow with an escrow company and sign separate instructions, providing that A will purchase for $20,000 an unsecured note with a balance of $22,000 owed to X from B, and that Y and Z agree to include as security for the note being purchased by A second trust deeds on the homes of Y and Z. The second trust deeds are deposited in escrow and A deposits $20,000 and consents to a disbursal on conditions that are subsequently violated. The escrow never closes. Y and Z seek return of their documents. A sues X, Y, and Z for specific performance and for declaratory relief that the two trust deeds in escrow be delivered to him as security for the unsecured note he bought. A files a motion for summary judgment and Y and Z file declarations in opposition, stating that they had no intention of guaranteeing B's note with their trust deeds and that A had not made a purchase of this note but had made a loan of $20,000 to X. A moves to strike the declarations of Y and Z as being precluded by the parol evidence rule. The declarations should be stricken and A's motion for summary judgment granted. (See *Exchequer Acceptance Corp. v Alexander, supra.*)

Illustration (2) is another classic example of application of the parol evidence rule. Here, instead of one written instrument, there are several. But an integration may consist of several writings instead of one. A transaction that involves an escrow and execution of escrow instructions frequently results in several documents, because each party may

sign a separate escrow instruction. In the illustration, Y and Z seek to controvert the express terms of the escrow instructions by declaring that they had intentions to the contrary. In *Exchequer Acceptance Corp.*, from which Illustration (2) is taken, the court held that such a declaration created no triable issue, because it was in violation of the parol evidence rule and, hence, the purchaser of the note was entitled to summary judgment.

§32.2. Extrinsic Evidence of Collateral Term or Agreement—Admissibility Dependent on Whether Written Instrument Constitutes an Integration—Test of Integration

RULE: Extrinsic evidence of a term or agreement collateral or additional to, but not contradictory of, an express provision of a written instrument, is not made inadmissible by the parol evidence rule if it is shown that the written instrument was not intended by the parties to constitute an integration or final complete expression of their agreement, in that such collateral or additional term or agreement

(a) is one that might naturally be made as a separate agreement by parties situated as were those executing the written instrument; or

(b) is not one that, if made, would certainly have been included in the written instrument.

AUTHORITY: *Masterson v Sine* (1968) 68 C2d 222, 65 CR 545; *Birsner v Bolles* (1971) 20 CA3d 635, 97 CR 846; *Coast Bank v Holmes* (1971) 19 CA3d 581, 97 CR 30; *Salyer Grain & Milling Co. v Henson* (1970) 13 CA3d 493, 91 CR 847.

COMMENT: Difficulty in determining whether parties have intended a writing to constitute an integration that will bar extrinsic proof of additional or collateral terms or agreements. The essence of the parol evidence rule is that the parties have adopted a written instrument as the final and complete expression of their agreement. An integration is the instrument adopted. If they have not so adopted the writing, there is not an integration and the parol evidence rule does not come into play to bar extrinsic

evidence of prior or contemporaneous additional or collateral agreements that vary, alter, or add to a written instrument.

When one party to a written instrument is claiming an integration and the other is disavowing it, what test is the trial judge to apply to determine the question of integration, in order to rule whether the parol evidence rule is applicable? This is still a plaguing and somewhat unclear area of the law.

At one time the courts applied a "face-of-the-document" test, which emphasized looking solely at the writing itself for the answer to the question. In *Masterson v Sine, supra*, the California Supreme Court turned away from this narrow, artificial doctrine and adopted a broader rule based on trustworthiness of the evidence. In turning away from the face-of-the-document test, *Masterson* follows an underlying theory that evidence of oral collateral agreements should not be excluded if there is no real danger that the trier of fact is likely to be misled.

The Restatement of Contracts test and the Uniform Commercial Code test. The *Masterson* case applied two tests for determining trustworthiness of evidence as to an integration. One test is from the Restatement of Contracts, which permits evidence of an oral collateral or additional agreement if it is the kind of agreement that might *naturally* be made as a separate agreement by parties situated as were those to the written instrument. See RESTATEMENT OF CONTRACTS, §240(1)(b).

The second test, from the Uniform Commercial Code, would exclude extrinsic evidence of an additional or collateral agreement only if the agreement is the kind that, if agreed upon, would *certainly* have been included in the written instrument. See Com C §2202.

Masterson *rule permits proof of oral collateral agreement that contradicts a term of a written instrument which is presumed or implied by law.* The two tests set forth in *Masterson* are not broad enough to permit proof of an oral agreement that contradicts an *express* provision of a written agreement. Since this result seems obvious, there is no rational basis for the hue and cry that *Masterson* has done away with the parol evidence rule.

However, in *Masterson*, the court did hold that under the tests adopted, evidence of an oral additional agreement could be introduced to contradict a term of a written instrument which is *implied or presumed* by law. In *Masterson*, a deed contained a reservation of an option to the grantor to purchase the property. The law presumes the existence of a term making such an option assignable. The parol evidence rule was held *not* to preclude evidence of a collateral oral agreement that the option was to be nonassignable, even though this rebutted a term that the law would otherwise presume.

Factors to be considered in applying the Masterson v Sine *tests for absence*

of integration. There are no definitive guidelines to make simple the process of determining the absence of integration under the *Masterson* rules. Each case must be decided on its own factual situation. Certain principles, however, are emphasized in *Masterson.* One is that the more formal the written instrument, the more likely it is that collateral terms would be made separately. Certain formal documents, such as deeds, do not lend themselves to incorporation of additional terms. A second principle is that in a family transaction it would be more natural to make collateral agreements outside of a written instrument than it would be in an arm's-length transaction between strangers.

Evidence that the trial judge should examine in determining the question of integration. Masterson indicates that the judge cannot limit himself to examination of the written instrument in order to determine whether the parties have intended an integration. The judge must look at three elements: (1) the written instrument, (2) facts and circumstances surrounding the preparation and execution of the written instrument, and (3) evidence of the collateral agreement.

Caveat: *No magic path to correct ruling in applying* Masterson *tests to determine whether a written instrument does, or does not, constitute an integration.* The Restatement of Contracts test and the Uniform Commercial Code test, adopted by *Masterson* in place of the face-of-the-document test for deciding whether a written instrument constitutes an integration, still do not provide the trial judge with a magic formula to ensure a nonreversible ruling on application of the parol evidence rule. A judge may believe that an oral collateral agreement is one that the parties might naturally make as a separate agreement, to cause the parol evidence rule to be inapplicable, but the appellate court may disagree. The *Masterson* formula is one on which reasonable minds may well differ in its application to the same facts. Hence, the trial judge must simply attempt to use sound and reasonable judgment.

Illustrations:

(1) (*A written hauling contract imposed a duty on defendant to maintain certain types of insurance—defendant seeks to prove oral agreement by plaintiff to carry an additional type of insurance*) A, a farmer, and X, a trucker, entered into a written contract under which X was to haul potatoes for A in semitrailers furnished by A. X was to use his truck-tractor equipment with A's semitrailers. The contract provided that X was to carry public liability and property damage insurance in stated amounts and workmen's compensation insurance. Y, X's employee, was hauling a load of A's potatoes and had an accident due to his own negligence. The accident caused damage to A's semitrailer and its load of potatoes. A sues X for this damage. X introduces evidence that, at the time of execution of the written contract,

A orally agreed to carry at his expense insurance for any damage to his vehicles or their contents, and not seek to hold X responsible for any such damage due to negligence on the part of X or his employees. A moves to strike X's evidence after having made a parol-evidence-rule objection. A's motion should be granted and X's evidence stricken. (See *Salyer Grain & Milling Co. v Henson, supra.*)

In Illustration (1), X seeks to prove an additional oral agreement between him and A, which would be a good defense to A's lawsuit. Using the *Masterson* formula, is evidence of the oral agreement precluded by the parol evidence rule? Is the oral agreement proffered by X one that A and X might naturally make under the circumstances? The answer seems clearly to be "*no.*" The written contract covered three types of insurance—public liability, property damage, and workmen's compensation. Since insurance was a subject treated in detail in the written contract, it would not have been natural for the parties to have made a separate, oral agreement pertaining to another type of insurance.

Under the Uniform Commercial Code test, the oral agreement, if made, is one that would *certainly* have been placed in the written contract. Applying the *Masterson* formula, A and X intended their written contract to be a final expression of their agreement. Hence, the contract constitutes an integration, and the parol evidence rule bars proof of an oral agreement that would add to the terms of the written contract. This was the holding on substantially similar facts in *Salyer Grain & Milling Co., supra.*

(2) (*Maker of promissory note seeks to prove that payee orally promised to cancel the note if the maker lost his security on a note payable to him*) B owes A and X $5000 each on past due, unsecured loans. X executes a promissory note to A for $5000, payable one year from date. X's note to A is accepted by A in payment of B's indebtedness to A. B executes a $10,000 note to X to cover his indebtedness to X, and executes in X's favor a second trust deed on commercial property to secure the $10,000 note to X. At the time of this three-way transaction between A, B, and X, B was attempting to sell the commercial property to pay off his indebtedness to both A and X. When X's note to A becomes due by its terms, the first trust deed holder has foreclosed on B's property and wiped out X's second trust deed security. A sues X to recover on X's note to A. As a defense, X introduces evidence that at the time he executed his note to A, A orally agreed that he would demand payment on X's note only if B was able to sell his property for enough to pay off the $10,000 note to X, and that A would cancel X's note if the first trust deed holder foreclosed on B's property and wiped out

X's second trust deed. A moves to strike X's evidence, after having first made a parol-evidence-rule objection. A's motion should be granted and X's evidence stricken. (See *Coast Bank v Holmes, supra.*)

In Illustration (2), by applying the *Masterson* formula, is there proof of a *nonintegration* to permit evidence of a collateral or additional agreement along with the promissory note? There is a formal instrument—a promissory note—that does not lend itself to inclusion of collateral terms, such as X seeks to prove. But in the *Coast Bank* case, from which Illustration (2) is drawn, the court held that none of the *Masterson* court's observations should be considered a disapproval of the long-settled rule that, in the absence of fraud, mistake, lack or failure of consideration, or nonoccurrence of a condition precedent, a prior or contemporaneous oral agreement that a promissory note is not to be payable according to its terms, is barred from proof by the parol evidence rule. In Illustration (2), the note called for payment one year from its date. The proffered oral agreement of no payment at all, required on the happening of a condition subsequent, contradicts an *express* term of the note. The *Coast Bank* court is correct in holding that the *Masterson* formula for determining whether the parties have made their writing an integration was not intended to abolish the parol evidence rule by permitting proof of an oral agreement that contradicts an *express* term of a written instrument.

(3) (*Evidence offered of an oral agreement for a payment date of a promissory note which contradicts a payment date contained in the note through implication of law*) A, a brother of X, lends X $5000, and X executes a promissory note in A's favor for this sum. The note is a printed form note with a blank space for insertion of the payment date. No payment date is inserted in the note. A sues X for nonpayment of the note two years after the date of its execution, having made a demand for payment prior to filing suit. X introduces evidence that at the time of the loan and note transaction, B, the father of A and X, was seriously ill and not expected to live for more than six months; that A and X were B's only heirs; that A and X orally agreed that X would not be obligated to pay this note until B died and X received his share from B's estate; and that B had recovered from his illness and was still alive. A moves to strike X's evidence after having first made a parol-evidence-rule objection. A's motion should be denied and his parol-evidence-rule objection overruled. (See *Birsner v Bolles, supra.*)

Can Illustration (3) be distinguished from Illustration (2)? *Yes.* In Illustration (2), the payment date of the note is *expressly* set forth. In Illustration (3), no payment date is stated in the note, but in such a case the law implies a term of payment on demand. The

proffered evidence in Illustration (3) contradicts an *implied* term of the written instrument rather than an *express* term, which is the case in Illustration (2). How can this produce a different result, insofar as the parol evidence rule is concerned?

In *Sapin v Security First Nat'l Bank* (1966) 243 CA2d 201, 52 CR 254, the court held that "payment on demand," as a term of a note implied by law, could not be contradicted by evidence of an oral agreement by reason of the parol evidence rule. But in *Birsner v Bolles, supra,* the court held that *Masterson* had impliedly overruled the *Sapin* case and that evidence was admissible to establish that such a promissory note was not intended to constitute an integration and, hence, evidence of a collateral oral agreement fixing a date for payment contradictory of the demand term implied by law was not barred by the parol evidence rule.

In *Birsner,* in which the facts are substantially similar to the hypothetical facts in Illustration (3), the court emphasizes the facts of a family transaction in place of a commercial or arm's-length deal, and a formal document—a note—that does not lend itself to inclusion of collateral agreements. The court concludes that the facts are similar to those in *Masterson,* and that the collateral agreement proffered in evidence is the kind that might *naturally* be made in a separate agreement by parties situated as were those to the loan and written instrument—the note—and that the case is *not* one in which the parties would *certainly* have included the collateral agreement in such note.

§32.3. Extrinsic Evidence To Interpret or Explain Meaning of a Written Instrument—Test of Admissibility

RULE: Extrinsic evidence offered to interpret or explain the meaning of a written instrument is not made inadmissible by the parol evidence rule if

(a) the wording of the written instrument, in light of all the circumstances shown by such extrinsic evidence, is reasonably susceptible to the meaning or interpretation contended for by the party-proponent of the extrinsic evidence; and

(b) even though on its face the written instrument appears not to lend itself to the meaning contended for by the party-proponent of the extrinsic evidence,

because of its seemingly plain and unambiguous language.

AUTHORITY: *Estate of Cohen* (1971) 4 C3d 41, 92 CR 684; *Tahoe Nat'l Bank v Phillips* (1971) 4 C3d 11, 92 CR 704; *Gribaldo, Jacobs, Jones & Associates v Agrippina Versicherunges A. G.* (1970) 3 C3d 434, 91 CR 6; *Delta Dynamics, Inc. v Arioto* (1968) 69 C2d 525, 72 CR 785; *Estate of Russell* (1968) 69 C2d 200, 70 CR 561; *PG&E v G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 69 CR 561; *Aetna Life Ins. Co. v Carter* (1969) 269 CA2d 28, 74 CR 667.

COMMENT: Parol evidence rule not a bar to extrinsic evidence offered to explain or interpret the meaning of a written instrument, even though trial judge considers the instrument to be plain and unambiguous on its face. The California Supreme Court has embarked on a more liberal approach to the parol evidence rule in a second type of situation, exemplified by the *PG&E* case, *supra.* There the court lays down the rule that the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the trial judge to be plain and unambiguous on its face, but whether the extrinsic evidence is relevant to prove a meaning to which the instrument's wording is reasonably susceptible. This doctrine of admissibility of extrinsic evidence to explain the meaning of words in a written instrument attempts to give effect to the meaning intended by the parties, although the average person would not expect such words to have such a special meaning. And this principle of interpretation is not limited to words in an instrument that by trade usage have a particular meaning.

Extrinsic evidence to explain meaning of wording of an instrument applicable when such wording is fairly susceptible to two different interpretations. The parol-evidence-rule problem arises because each of the parties to an instrument is contending for a different interpretation or meaning of the same words. One party will contend for an interpretation that appears to follow from the seemingly unambiguous wording. The other party, who seeks to prove a different meaning through introduction of extrinsic evidence, will contend that the parties intended a *special* meaning in using the same seemingly unambiguous wording. The *PG&E* rule thus comes into play whenever the wording of the written instrument, considered in light of all the circumstances shown by such extrinsic evidence, is *reasonably* susceptible to each of the two interpretations contended for by the parties.

Illustrations:

(1) (*Evidence of conversations at the time a distribution sales contract was negotiated—offered to prove that a termination clause was intended to mean that seller's right to terminate contract was seller's*

exclusive remedy) A developed a trigger lock for use in firearms and entered into a written, five-year distribution contract with X. The contract provided that X was to sell not less than 50,000 units the first year and 100,000 units in each of the four succeeding years, and that if X failed to sell the quantity specified in any year, A could terminate the contract on 30 days' notice. X sells only 15,000 units the first year and A terminates the contract by giving the requisite notice. A then sues X for damages for X's failure to meet the first year's quota. X introduces evidence of conversations between A and X, at the time the contract was negotiated, to establish that the parties intended the termination clause to mean that A's right to terminate the contract was his exclusive remedy for X's failure to meet the annual quota. A moves to strike X's evidence, after having made a parol-evidence-rule objection. A's motion to strike should be denied. (See *Delta Dynamics, Inc. v Arioto, supra.*)

In *Delta Dynamics,* from which Illustration (1) is drawn, the trial judge had sustained a parol-evidence-rule objection to defendant's proffered evidence. This was held to be error under the *PG&E* rule, the court expressing the view that the termination clause was reasonably susceptible of the meaning contended for by plaintiff—that it simply excused plaintiff from further performance under the contract—but that it was also reasonably susceptible of the meaning contended for by defendant—that it was to be plaintiff's exclusive remedy for defendant's failure to meet the quota in any year.

There was a strong dissent in *Delta Dynamics* (69 C2d at 530, 72 CR at 788), in which the majority view was characterized as a "course leading toward emasculation of the parol evidence rule." Subsequent cases applying the rule of *PG&E* and *Delta Dynamics, Inc.* indicate that the dissenter's fear that this rule will result in eventual emasculation of the parol evidence rule is groundless and premature.

(2) (*Extrinsic evidence offered to prove meaning of words used by decedent in will*) B dies, having executed a holographic will that reads, "I leave everything I own real and personal to X and Y." A, an heir at law of B, files a petition for determination of heirship, claiming that Y is a dog and that, since dogs may not take under the Probate Code, the gift to Y is void and goes to A as B's sole heir at law. X admits that Y is a dog, but introduces evidence that it was B's intention that she not die intestate and that she intended by her will that X should get the entire estate and was to use some portion to take care of her dog. The evidence introduced by X consists of B's address book, in which she stated she didn't want any heir of hers to receive anything, an undelivered quitclaim deed to X,

and B's oral statements to him that if anything happened to her, he was to take care of Y, her dog. A moves to strike X's evidence, after having made a parol-evidence-rule objection. A's motion should be granted and X's evidence stricken. (See *Estate of Russell, supra.*)

Illustration (2) deals with a will and the parol evidence rule. A will is subject to the same application of the parol evidence rule as is a contract or deed. Thus, if proffered extrinsic evidence establishes that the wording of a will is reasonably susceptible of the meaning contended for by the proponent of the evidence, the extrinsic evidence is not barred by the parol evidence rule. The admissibility rules for extrinsic evidence offered to establish the meaning of written instruments, such as contracts and deeds, set forth in the *PG&E* and *Delta Dynamics* cases, are made equally applicable to wills by *Estate of Russell, supra.* In *Russell,* from which Illustration (2) is taken, the court held that decedent's will was *not* reasonably susceptible of the construction urged by the proponent of the extrinsic evidence—that decedent intended to give proponent her entire estate so that he could use a portion to take care of her dog. The parol evidence rule makes such extrinsic evidence inadmissible as being *legally irrelevant,* because the instrument is not reasonably susceptible of the construction or meaning for which the evidence is offered.

(3) (*Extrinsic evidence offered to establish that an "Assignment-of-Rents" document was intended as an equitable mortgage*) The A Bank lends X, a homeowner, $25,000, and X executes a promissory note made payable on a date certain. He also executes in favor of the A Bank a document produced by the bank, entitled "Assignment of Rents and Agreement Not To Sell or Encumber Real Property." This document contains no words of hypothecation but, on its face, is an agreement by X not to sell his home or permit any liens to be placed on the property. X defaults on the note, and the A Bank sues X on the note and also to have the "Assignment-of-Rents" document declared an equitable mortgage of X's home and foreclosed. The bank introduces extrinsic evidence that the parties intended the document to constitute a mortgage on X's home, and that the bank had X execute this document instead of a deed of trust because the escrow had to close within a time period that did not allow for a proper title search for purposes of a trust deed. X makes a motion to strike the A Bank's evidence, after having made a parol-evidence-rule objection. X's motion should be granted and the A Bank's evidence stricken. (See *Tahoe Nat'l Bank v Phillips, supra.*)

Illustration (3) is taken from the *Tahoe Nat'l Bank* case, in which the trial judge admitted plaintiff's extrinsic evidence, held that the

parties intended the document to be an equitable mortgage, and decreed foreclosure on defendant's home. This was held to be error by the Supreme Court, which decided that the document was *not* reasonably susceptible of the meaning urged by plaintiff, after giving due consideration to the extrinsic evidence. In the *Tahoe Nat'l Bank* case the court used two principles of interpretation in determining that the instrument was not reasonably susceptible of the meaning urged by the proponent of the extrinsic evidence. One principle was that any ambiguities in the instrument must be construed against the bank because it was in the superior bargaining position and selected the instrument. The second principle was whether the construction contended for by the lender violated the borrower's reasonable expectation.

A dissent in the *Tahoe Nat'l Bank* case (4 C3d at 24, 92 CR at 714) criticized the majority for attempting to distinguish a prior case, which had held that a very similar instrument issued by a bank was capable of being construed as an equitable mortgage. This was the case of *Coast Bank v Minderhout* (1964) 61 C2d 311, 38 CR 505. There is much to be said for the dissent, as there is little to distinguish the two cases factually, and yet opposite results are reached.

Caveat: *No definitive test to guide trial judge in deciding whether a written instrument is reasonably susceptible of two interpretations. Tahoe Nat'l Bank* points up the difficulty in analyzing extrinsic evidence and the written instrument, and then deciding whether the instrument is reasonably susceptible of two meanings. The problem is difficult because there are no definitive guidelines to govern each case. The seeming inconsistency between the *Tahoe Nat'l Bank* case and the *Coast Bank* case illustrates the fuzziness and lack of precision in this area of application of the parol evidence rule.

But at least one point looms perfectly clear from *Tahoe Nat'l Bank:* that admission of extrinsic evidence on the question of the meaning of a written instrument does *not necessarily* compel a finding that the instrument is reasonably susceptible of the meaning advanced by the proponent of the evidence. This was the result in *Gribaldo, Jacobs, Jones & Associates v Agrippina Versicherunges A. G., supra,* in which was admitted extrinsic evidence of conversations between insured and insurer and letters back and forth, before and after an errors-and-omissions insurance policy was issued, to determine the question of the policy's meaning. The court held that the extrinsic evidence did not change the interpretation of the policy, which resulted from the wording of the policy itself without reference to credibility of the extrinsic evidence.

In *Estate of Cohen, supra,* a husband and wife created a trust of their community property. Upon the wife's death, the question arose whether the trust terms created a life estate in the surviving husband

or a fee interest. Relying upon *PG&E* and *Delta Dynamics,* both the trial court and the court of appeal held that extrinsic evidence of conversations between husband and wife, relative to their intent when the trust was created, indicated that the trust wording was reasonably susceptible of the two interpretations. The Supreme Court disagreed, holding that the trust instrument created a life estate in the survivor and was *not* reasonably susceptible to any other meaning. Hence, the extrinsic evidence became inadmissible, because of the parol evidence rule, which made such evidence legally irrelevant.

But in *Aetna Life Ins. Co. v Carter, supra,* a life insurance policy set forth the beneficiary by name and then added "Related to me as Administrator and Executrix of my Will." Did this entitle the beneficiary to take in a personal capacity or in her capacity as executrix only? It was held that the policy was reasonably susceptible to the two meanings, and that the extrinsic evidence to establish that the insured intended the beneficiary to take in a personal capacity was not barred by the parol evidence rule and became persuasive as to proper interpretation of the policy.

§32.4. Procedure To Be Followed When Parol-Evidence-Rule Objection Is Made to Proffered Extrinsic Evidence

RULE: When extrinsic evidence is offered to establish an oral agreement collateral or additional to a written instrument, or to prove a particular meaning of a written instrument, and a parol-evidence-rule objection is made to the admissibility of the extrinsic evidence, the court should determine its admissibility in accordance with the following procedure:

(a) Such extrinsic evidence should first be admitted

(i) either provisionally or conditionally, reserving a ruling on the objection until after the evidence has been introduced and its admissibility considered; or

(ii) subject to a motion to strike after the evidence has been introduced and its admissibility considered.

(b) The court should then consider the written instrument in light of all the circumstances shown by the extrinsic evidence, to determine whether the evidence is admissible under the Rule of §32.2 or that of §32.3, whichever is applicable.

(c) If the court determines that the extrinsic evidence is inadmissible under the test of admissibility stated in the appropriate Rule, the parol-evidence-rule objection should then be sustained if the initial ruling was to reserve ruling, or the extrinsic evidence should be stricken if the initial ruling was to admit such evidence subject to a later motion to strike.

(d) If the court determines that the extrinsic evidence is admissible under the test of admissibility stated in the appropriate Rule, the parol-evidence-rule objection should then be overruled if the initial ruling was to reserve ruling, or the motion to strike should be denied if the initial ruling was to admit such evidence subject to a later motion to strike.

AUTHORITY: *Gribaldo, Jacobs, Jones & Associates v Agrippina Versicherunges A. G.* (1970) 3 C3d 434, 91 CR 6; *PG&E v G. W. Thomas Drayage & Rigging Co.* (1968) 69 C2d 33, 69 CR 561.

COMMENT: Because the "face-of-the-document" test for determining whether a written instrument constitutes an integration, or whether the instrument is ambiguous in order to permit introduction of extrinsic evidence, is no longer acceptable law, it follows that the trial judge is unable to rule on a parol-evidence-rule objection to proffered extrinsic evidence without knowing what the evidence is. In *PG&E v G. W. Thomas Drayage & Rigging Co., supra,* the court suggests the procedure which is stated in the Rule above. The court points out that usually when an objection is made to a particular item of evidence, the trial judge is not then in a position to determine whether, in light of all the evidence offered, the particular item of evidence will turn out to be admissible or not under the stated test of admissibility. Hence, the judge should admit the proffered item of extrinsic evidence conditionally or provisionally, by either reserving a ruling on the objection or making the evidence subject to a motion to strike.

Approval of this procedure was emphasized in *Gribaldo, Jacobs, Jones & Associates v Agrippina Versicherunges A. G., supra.*

§32.5. Extrinsic Evidence To Prove that Writing Is Invalid or Unenforceable

RULE: The parol evidence rule does not make inadmissible extrinsic evidence offered to prove that a written instrument is invalid or unenforceable because

(a) the written instrument was executed

(i) as a result of mistake, which furnishes a basis for rescission or reformation;

(ii) as a result of fraud, which furnishes a basis for rescission or reformation;

(iii) without consideration being received for its obligations; or

(iv) upon a consideration or object in violation of law;

(b) there has been a subsequent failure of a promised consideration; or

(c) the written instrument was intended to be a sham instrument and not to take effect at all.

AUTHORITY: *Coast Bank v Holmes* (1971) 19 CA3d 581, 97 CR 30; Witkin, CALIFORNIA EVIDENCE, §§737-747 (2d ed 1966).

COMMENT: Evidence to prove invalidity or unenforceability of a writing. The parol evidence rule has never prevented introduction of extrinsic evidence to prove that a written instrument is invalid or unenforceable for fraud, illegality, mistake, lack of consideration, or failure of consideration. Evidence to prove any of these facts is not evidence that varies, contradicts, or adds to the terms of a written instrument. Rather, such evidence is intended to prove that the written instrument, with all of its terms, is simply not enforceable.

Illustration:

(*Extrinsic evidence to prove fraud and failure of consideration as de-*

fenses to a promissory note) B owes the A Bank and X $5000 each on past due, unsecured loans. X executes a promissory note to the bank in the amount of $5000, payable one year from date. X's note to the A Bank is accepted in payment of B's indebtedness to that bank. B executes a $10,000 note to X to cover his increased indebtedness to X, and executes in his favor a second trust deed on commercial property to secure the $10,000 note. At the time of this three-way transaction between the A Bank, B, and X, B was attempting to sell the commercial property to pay off his indebtedness to both A and X. By the time X's note to A becomes due by its terms, the first trust deed holder has foreclosed on B's property and wiped out X's second trust deed security. The A Bank sues X to recover on X's note to it. As a defense, X offers evidence that, before executing his note to the A Bank to assume B's obligation, the bank official assured him and promised that the bank would protect his second trust deed from being extinguished by foreclosure by the first trust deed holder on B's property, that this promise was made without any intention on the part of the A Bank to fulfill this promise, and that the bank and its officials made no effort to prevent foreclosure by the first trust deed holder on B's property. The A Bank makes a parol-evidence-rule objection to X's proffered evidence. The objection should be overruled. (See *Coast Bank v Holmes, supra.*)

In this illustration, X's proffered evidence is designed to prove the defenses of failure of consideration and fraud. Assurance from the A Bank that it would protect X's second trust deed security from extinguishment, through foreclosure by the first trust deed holder, constitutes the consideration for X's execution of the note to the A Bank. The evidence that bank officials made no efforts to prevent foreclosure by the first trust deed holder proves a violation of the A Bank's promise and proves a substantial failure of consideration.

Making an oral promise with no intention of performing it when made constitutes fraud. In *Coast Bank*, from which the illustration is taken, the court held that the trial judge was justified in finding fraud from the failure of the bank to perform its promise and from its dubious authority to make such a promise.

In the *Coast Bank* case, although extrinsic evidence to prove failure of consideration and fraud was not barred by the parol evidence rule, defendant also sought to prove by extrinsic evidence that the bank orally agreed not to enforce the note if the real estate was foreclosed on, and to demand payment only if the property was sold for enough to permit defendant to pay off the note from the proceeds he would receive from his debtor. Evidence to prove these latter promises was

held to be inadmissible because of the parol evidence rule. These latter promises were clearly inconsistent with the *express* terms of the promissory note.

§32.6. Extrinsic Evidence To Prove Subsequent Modification of Written Agreement

RULE: The parol evidence rule does not make inadmissible extrinsic evidence that is offered to prove that a written instrument has been subsequently modified.

AUTHORITY: *D. L. Godbey & Sons Constr. Co. v Deane* (1952) 39 C2d 429, 246 P2d 946; *Weber v Jorgensen* (1971) 16 CA3d 74, 93 CR 668.

COMMENT: Parol evidence rule no bar to proof of subsequent agreements that modify prior written instrument. The parol evidence rule precludes extrinsic evidence of *prior* or *contemporaneous* agreements that contradict, vary, or add to an integrated writing. It does not relate to *future* agreements and does not bar extrinsic evidence that proves that the parties *subsequently* modified their integrated writing.

However, CC §1698 provides that a contract in writing may be altered *only* by (1) a contract in writing, or (2) an *executed* oral agreement. Thus, extrinsic evidence of an oral contract modifying a prior written agreement must establish that the oral contract has been executed and is not still executory, in order to satisfy CC §1698. However, *D. L. Godbey & Sons Constr. Co. v Deane, supra*, established the rule that an oral modification of a written agreement is *executed* within the meaning of CC §1698 if (1) one party has fully performed, and (2) there was consideration for the oral modification agreement.

Illustration:

(*Parol agreement modifying prior written agreement for a broker's commission*) A, a broker, sues X for a commission of $15,000. A written listing agreement between A and X provides for the sale by X of ranch property at a price of $200,000, with a one-fourth downpayment of $50,000 and a commission to A of ten percent of the sales price, which is $20,000. A proposes to testify that one month later A and X orally agreed to modify the listing agreement, to the effect that a downpayment of $40,000 would suffice, and that A's commission would be $15,000 instead of ten percent of the sale price; and that A secured an able, ready, and willing buyer, who executed a

written offer to purchase under the new terms, but that X refused to accept the offer. X makes a parol-evidence-rule objection and a statute-of-frauds objection to A's proposed testimony. The objections should be overruled. (See *Weber v Jorgensen, supra.*)

In this illustration, X's parol-evidence-rule objection is not well taken, because A's proffered extrinsic evidence is offered to prove a *subsequent* oral modification of a written agreement, *not* a contemporaneous or prior oral agreement to alter its terms. X's statute-of-frauds objection is not valid, because, under CC §1698, A's evidence will establish an *executed* oral agreement of modification that is supported by consideration. The consideration is A's agreement to take $5,000 less for his commission. The oral agreement is executed because A secured a buyer for the property under the modified terms. This is full performance by him.

In *Weber, supra,* from which this illustration is taken, the court held that execution by the party suing on the oral modification complies with CC §1698. *Weber* points out, however, that the rule of one-party execution of an oral modification agreement is not applicable to contracts for the sale of goods under the Commercial Code.

§32.7. Extrinsic Evidence To Prove that a Deed, Absolute in Form, Was Intended To Transfer Security Interest Only

RULE: The parol evidence rule does not make inadmissible extrinsic evidence that is offered to prove that a grant deed, absolute in form, was intended to constitute a mortgage, or otherwise transfer a security interest only, in the property that is the subject of the deed.

AUTHORITY: *Rickless v Temple* (1970) 4 CA3d 869, 84 CR 828; *Cavanaugh v High* (1960) 182 CA2d 714, 6 CR 525.

COMMENT: Parol evidence rule no bar to proof that a grant deed, absolute in form, was intended to constitute a mortgage only. The rule of law has long been recognized that extrinsic evidence is admissible to show that a deed, absolute in form, was intended to be a mortgage. If such evidence shows that the deed was intended as security for payment of a debt or performance of any other obligation, it will be

held to transfer a security interest only. This rule of law had its origin in the fact that at one time a mortgage was a conveyance of legal title—a conditional estate subject to a right to redeem. In the case of the absolute conveyance intended as a security transaction, equitable principles are applied to prevent a forfeiture.

§32.8. Extrinsic Evidence To Prove that Party to a Written Contract Acted as Agent for Disclosed or Undisclosed Principal

RULE: The parol evidence rule does not make inadmissible extrinsic evidence that is offered to prove that a party to a written contract

(a) was acting for a known principal, whether or not such principal's name or the fact of agency is mentioned in the contract, in order to establish the liability of either the principal or the other party to the contract in favor of the other; or

(b) was acting as agent for an undisclosed principal, in order to establish the liability of either the principal or the other party to the contract in favor of the other.

AUTHORITY: *Nichols v Arthur Murray, Inc.* (1967) 248 CA2d 610, 56 CR 728; *Sumner v Flowers* (1955) 130 CA2d 672, 279 P2d 772; *Purviance v Shostak* (1949) 90 CA2d 295, 202 P2d 755.

COMMENT: Extrinsic evidence to establish liability or rights of a known principal on a written contract. It has long been the rule that if an agent signs a contract in his name and he is acting for a principal, made known to the other party, *outside* the contract, extrinsic evidence is admissible to establish the principal's liability on the contract against the other party. The parol evidence rule is not deemed a bar to such extrinsic evidence, because the evidence does not contradict the writing, but only explains it.

Extrinsic evidence to establish liability or rights of an undisclosed principal on a written contract. The rule is also well established that extrinsic evidence is admissible to prove that a party to a written contract was acting for an undisclosed principal. Such extrinsic evidence may be proffered by the undisclosed principal to establish his rights on the contract against the other party, or by the other party to the contract to establish liability of the undisclosed principal to him.

Illustration:

(*Plaintiff sues defendant as an undisclosed principal on contract plaintiff executed with another*) A sues X for damages for breach of a written contract that A made with B, who conducted a dancing school. Pursuant to the contract, A paid B substantial sums for dancing lessons, which he did not receive. B has gone out of business. A claims that B was acting as agent for X in executing the contract with A. X's defense is that B was simply a licensee franchised to teach X's dancing methods. A offers evidence to prove that X exercised complete control over B's operations and that B was in fact X's agent. X makes a parol-evidence-rule objection to A's proffered evidence. X's objection should be overruled. (See *Nichols v Arthur Murray, Inc., supra.*)

In this illustration, A seeks to hold X liable as an undisclosed principal on the contract that A made with B. The parol evidence rule does not preclude use of extrinsic evidence to prove that a defendant is liable as an undisclosed principal on a written contract that plaintiff executed with another. In *Nichols*, from which this illustration is drawn, the trial judge was upheld in admitting the extrinsic evidence and in finding that defendant was an undisclosed principal.

§32.9. Extrinsic Evidence To Contradict a Written Agreement—Offered in Action Between Party to the Agreement and Stranger

RULE: The parol evidence rule does not make inadmissible extrinsic evidence that varies or contradicts a written agreement, if such evidence is offered

(a) in an action between a party to the agreement and a nonparty who is not a successor in interest to any party to the agreement, and

(b) by either the nonparty to the agreement or the party to the agreement.

AUTHORITY: CCP §1856; *Nichols v Arthur Murray, Inc.* (1967) 248 CA2d 610, 56 CR 728.

COMMENT: Parol evidence rule applicable only between parties to a written agreement or their successors in interest. Code of Civil Procedure §1856

provides that when a written contract is involved, the parol evidence rule applies only between the parties to the contract and their successors in interest. It follows, therefore, that in an action between a party to a written agreement or a successor in interest to a party, and a nonparty, extrinsic evidence may be introduced to contradict or vary the written agreement. Such evidence may be introduced by either the nonparty to the agreement, a party to the agreement, or a party's successor in interest.

Illustration:

(*Extrinsic evidence to contradict a written agreement—offered by a stranger*) A sues X for damages for breach of a written contract that A made with B, who conducted a dancing school. Under the contract, A paid B substantial sums for dancing lessons, which he did not receive. B has gone out of business. A claims that B was acting as agent for X in executing the contract with A. X's defense is that B was simply a licensee, franchised to teach X's dancing methods under an agreement executed by B and X. X introduces the franchise agreement. A offers evidence that B and X orally agreed, in spite of their franchise agreement, that B was to act as X's agent and operate the dancing school under the direct supervision and direction of X. X makes a parol-evidence-rule objection to A's proffered evidence. X's objection should be overruled. (See *Nichols v Arthur Murray, supra.*)

In this illustration, A seeks to contradict by parol evidence the written franchise agreement executed by B and X. A's purpose is to prove that the *true* agreement between X and B created a principal-agent relationship. X's parol-evidence-rule objection is without merit, because the parol evidence rule is not applicable in litigation between a party to a written contract and a stranger to the contract. This was the holding in *Nichols,* from which this illustration is taken.

NOTES

THE PAROL EVIDENCE RULE: IS IT NECESSARY?

I

INTRODUCTION

The parol evidence rule, though simply stated,[1] has been the source of endless confusion in contract law. At least in theory it is not a rule of evidence but one of substantive law;[2] it deals not only with parol evidence but with other extrinsic evidence as well;[3] and the number of recognized exceptions to the rule raises doubts about its status as a "rule" at all.[4] In the understatement of one court, "[i]ts practical application presents many problems."[5]

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[1] The rule has been phrased in a number of ways:

(A) Common law formulation:

> When parties have deliberately put their engagements in writing, and such writing is complete on its face, and is certain and definite as to the objects of their engagement, . . . [the written contract] cannot be contradicted, altered, added to, or varied by parol or extrinsic evidence.

Bushnell v. Elkins, 34 Wyo. 495, 502, 245 P. 304, 306 (1926).

(B) Restatement formulation:

> [T]he integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto.

Restatement of Contracts § 237 (1932).

(C) Corbin's formulation:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.

3 A. Corbin, Contracts § 573 (rev. ed. 1960).

(D) Uniform Commercial Code formulation:

> Final Written Expression: Parol or Extrinsic Evidence.—Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade . . . or by course of performance . . . and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.C.C. § 2-202.

[2] Massachusetts Bonding & Ins. Co. v. Transamerican Freight Lines, Inc., 286 Mich. 179, 281 N.W. 584 (1938); 9 J. Wigmore, Evidence § 2400 (3d ed. 1940). However, the rule can be phrased as either an evidentiary or substantive rule. From the evidentiary perspective, a written document complete and clear on its face is conclusively presumed to embody the full agreement of the parties and other proof is inadmissible. According to contract principles, an integrated written contract supersedes any prior or collateral agreements.

[3] See note 2 supra; see also 4 S. Williston, Contracts § 646 (3d ed. 1961).

[4] See Zell v. American Seating Co., 138 F.2d 641, 643-44 (2d Cir. 1943), rev'd mem., 322 U.S. 709 (1944).

[5] Rinaudo v. Bloom, 209 Md. 1, 9, 120 A.2d 184, 189 (1956).

Because of the confusion and possible injustices in its application, the parol evidence rule has been the subject of nearly universal criticism.[6] As early as 1925, one commentator termed the rule a "positive menace to the due administration of justice."[7] Since that time voluminous literature has appeared in legal journals analyzing and criticizing the rule.[8] The literature has isolated two crucial defects in the rule: (1) the difficulty of applying it consistently, and (2) the unfairness and injustices caused by its rigid application.

The difficulty in applying the parol evidence rule springs from the fact that the rule is not self-executing. Taken alone, the rule merely states that where parties have reduced their final agreement to writing, the writing cannot be varied or contradicted. But the rule gives no indication of how courts are to determine whether the writing before them is "final" or "integrated," or how courts should decide whether to give the terms of the writing their normal meaning as opposed to one suggested by one of the parties. As a result, courts have had to develop various tests for applying the rule. The standards have ranged from the rigid "four corners" test[9]—holding that the court will look only within the four corners of the document to determine whether it constitutes a

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[6] See Zell v. American Seating Co., 138 F.2d 641 (2d Cir. 1943), rev'd mem., 322 U.S. 709 (1944); 3 A. Corbin, Contracts § 575 (rev. ed. 1960); 9 J. Wigmore, Evidence § 2431, at 103 (3d ed. 1940); Hale, The Parol Evidence Rule, 4 Ore. L. Rev. 91 (1925); Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036 (1968); Note, A Critique of the Parol Evidence Rule in Pennsylvania, 100 U. Pa. L. Rev. 703 (1952). But see Comment, The Parol Evidence Rule: A Conservative View, 19 U. Chi. L. Rev. 348 (1952).

[7] Hale, The Parol Evidence Rule, 4 Ore. L. Rev. 91 (1925).

[8] See note 6 supra; see also 3 A. Corbin, Contracts §§ 573-96 (rev. ed. 1960); 9 J. Wigmore, Evidence §§ 2400-78 (3d ed. 1940); 4 S. Williston, Contracts §§ 631-47 (3d ed. 1961). Other general discussions include Calamari & Perillo, A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 Ind. L.J. 333 (1967); McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L.J. 365 (1932); Murray, The Parol Evidence Rule: A Clarification, 4 Duquesne U.L. Rev. 337 (1965); Strahorn, The Unity of the Parol Evidence Rule, 14 Minn. L. Rev. 20 (1929).

There are numerous law review articles giving special treatment to the parol evidence rule in the individual states. See, e.g., Béziat, The Parol Evidence Rule in Tennessee, 15 Tenn. L. Rev. 773 (1939); Dalzell, Twenty-Five Years of Parol Evidence in North Carolina, 33 N.C.L. Rev. 420 (1955); Degnan, Parol Evidence-The Utah Version, 5 Utah L. Rev. 158 (1956); Harper, The Parol Evidence Rule in Georgia, 17 Ga. St. B.J. 49 (1954); McDonough, The Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the Uniform Commercial Code, 10 S.D.L. Rev. 60 (1965); Moreland, The Parol Evidence Rule in Virginia, 3 Wash. & Lee L. Rev. 185 (1942); Comment, Scope and Operation of the Parol Evidence Rule in Arkansas, 4 Ark. L. Rev. 168 (1950); Note, The Parol Evidence Rule: The Advent of the Uniform Commercial Code in Iowa, 52 Iowa L. Rev. 512 (1966); Comment, The Parol Evidence Rule in Missouri, 27 Mo. L. Rev. 269 (1962); Note, A Critique of the Parol Evidence Rule in Pennsylvania, 100 U. Pa. L. Rev. 703 (1952); Note, The Parol Evidence Rule in West Virginia—When Is a Writing Complete, 41 W. Va. L.Q. 273 (1935); Note, Parol Evidence in Wisconsin, 15 Wis. L. Rev. 427 (1940).

[9] See, e.g., Bushnell v. Elkins, 34 Wyo. 495, 245 P. 304 (1926); see note 16 infra.

complete expression of the parties' agreement—to tests almost as ambiguous as the parol evidence rule itself, such as those requiring the court to determine whether an alleged collateral agreement might "naturally and normally" have been made as a separate agreement.[10]

Consistent application of the parol evidence rule has been further hindered by the maze of exceptions that have developed around it.[11] Further, since parol evidence questions depend heavily upon the facts of the particular case, the value of one case as precedent for a future decision is limited. The opinions usually indicate only the test utilized by the court and the court's conclusion that the proffered evidence passed or failed it.[12] The cases thus indicate the type of evidence which has been included or excluded under varying formulations of the parol evidence rule but provide little guidance for an analytical approach to future cases. Consequently, reliable counseling or prediction of litigation on parol evidence questions is virtually impossible.[13]

A more important criticism of the parol evidence rule has been that even where consistently applied, it results in injustice.[14] In the name of protecting the parties' "agreement," the rule excludes evidence of the parties' true intentions. Under the stricter formulations of the rule, a party may be prevented from taking his case to the trier of fact whenever the written document "appears" to be complete or "appears" to be free of ambiguity. Unfairness seems inevitable where subjective questions of the parties' intentions are decided by reference to rigid objective standards. Since parties do make oral agreements outside their written contract and do use words in other than the usual sense, the

[10] See, e.g., Gianni v. R. Russel & Co., 281 Pa. 320, 126 A. 791 (1924).

[11] See 9 J. Wigmore, Evidence §§ 2470-75 (3d ed. 1940). For example, parol evidence is admissible to show that no contract was made or that the written contract executed by the parties is void because of fraud or mistake. Stock v. Meek, 35 Cal. 2d 809, 221 P.2d 15 (1950); see 3 A. Corbin, Contracts § 614 (rev. ed. 1960); Palmer, Reformation and the Parol Evidence Rule, 65 Mich. L. Rev. 833 (1967); Sweet, Promissory Fraud and the Parol Evidence Rule, 49 Calif. L. Rev. 877 (1961). If the writing contains ambiguous terms, parol evidence is admissible to resolve the ambiguity. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665 (1942); see Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161 (1965). Parol evidence is admissible to prove a collateral oral agreement if the written contract appears to be incomplete. Buckner v. A. Leon & Co., 204 Cal. 225, 267 P. 693 (1928); 3 A. Corbin, Contracts § 581 (rev. ed. 1960). Parol evidence is admissible to prove that the written contract is subject to an oral condition precedent. Lempco Prods., Inc. v. Phillips, 51 Wash. 2d 334, 317 P.2d 1060 (1957); 3 A. Corbin, Contracts § 589 (rev. ed. 1960). Parol evidence has been admitted to show that an absolute written transfer constitutes a mortgage. Campbell v. Ohio Nat'l Life Ins. Co., 161 Neb. 653, 74 N.W.2d 546 (1956); 3 A. Corbin, Contracts § 587 (rev. ed. 1960). Finally, a third party has been permitted to present parol evidence to vary or contradict the written contract. Chenevert v. Lemoine, 161 So. 2d 85 (La. Ct. App.), writ refused, 245 La. 1076, 162 So. 2d 572 (1964).

[12] See 3 A. Corbin, Contracts § 573, at 363-66 (rev. ed. 1960).

[13] On the hazards of advising clients in this area of the law, see Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036, 1044-47 (1968).

[14] 3 A. Corbin, Contracts § 575, at 381 (rev. ed. 1960).

exclusion of this evidence by the parol evidence rule may force upon the parties a contract that they never intended to make. Thus, because the parol evidence rule may exclude as much truthful testimony as it does perjurious testimony, the rule constitutes a major source of injustice in contract law.

Despite the many criticisms of the parol evidence rule, it is still in effect in some form in every jurisdiction.[15] In well over half of the states the traditional "four corners," "complete on its face," or similarly restrictive tests are followed.[16]

A number of jurisdictions have adopted rules which recognize in varying degrees that the parties' true intentions may not be those which appear on the face of an apparently complete document. Under one such test the court looks to the alleged oral agreement or alterna-

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[15] All but one state has a codified rule in the area of sale of goods. U.C.C. § 2-202 governs in every state but Louisiana. Eight states have a statutory rule outside of the sales area. These are California, Georgia, Louisiana, Missouri, Montana, Oklahoma, Oregon, and South Dakota. See Cal. Civ. Code § 1625 (West 1954) and Cal. Civ. Proc. Code § 1856 (West 1954); Ga. Code Ann. § 20-704(1) (1965) and Ga. Code Ann. § 38-501 (1954); La. Civ. Code Ann. art. 2276 (West 1952); Mo. Rev. Stat. § 441.120 (1959); Mont. Rev. Codes Ann. §§ 13-704, 13-705 (1967); Okla. Stat. tit. 15, § 137 (Supp. 1965); Ore. Rev. Stat. § 41.740 (1968); S.D. Comp. Laws § 53-8-5 (1967).

[16] See Chastain & Blass Real Estate & Ins. Co. v. Davis, 280 Ala. 489, 195 So. 2d 782 (1967); Beaudry Motor Co. v. Truax, 84 Ariz. 126, 324 P.2d 1006 (1958); Wilson v. Nugent, 174 Ark. 1115, 299 S.W. 18 (1927); Millender v. Looper, 82 Ga. App. 563, 61 S.E.2d 573 (1950); Capitol Land Co. v. Zorn, 134 Ind. App. 431, 184 N.E.2d 152 (1962); Weik v. Ace Rents, Inc., 249 Iowa 510, 87 N.W.2d 314 (1958); In re Smith's Estate, 199 Kan. 89, 427 P.2d 443 (1967); Eigelbach v. Roppel, 263 Ky. 604, 92 S.W.2d 764 (1936); Snow-White Roofs, Inc. v. Boucher, 182 So. 2d 846 (La. Ct. App. 1966); Borneman v. Milliken, 123 Me. 488, 124 A. 200 (1924); Sheldon-Seatz, Inc. v. Coles, 319 Mich. 401, 29 N.W.2d 832 (1947); Rheinberger v. First Nat'l Bank, 276 Minn. 194, 150 N.W.2d 37 (1967); Lugena v. Hanna, 420 S.W.2d 335 (Mo. 1967); Rowe v. Emerson-Brantingham Implement Co., 61 Mont. 73, 201 P. 316 (1921); Jenkins v. Watson-Wilson Transp. Sys., Inc., 183 Neb. 634, 163 N.W.2d 123 (1968); Charleston Hill Nat'l Mines, Inc. v. Clough, 79 Nev. 182, 380 P.2d 458 (1963); Allgood v. National Life Ins. Co., 61 N.D. 763, 240 N.W. 874 (1932); Marathon Ins. Co. v. Arnold, 433 P.2d 927 (Okla. 1967); Barnstable v. United States Nat'l Bank, 232 Ore. 36, 374 P.2d 336 (1962); Gladden v. Keistler, 141 S.C. 524, 140 S.E. 161 (1927); Kindley v. Williams, 76 S.D. 225, 76 N.W.2d 227 (1956); Armstreet v. Greer, 411 S.W.2d 403 (Tex. Civ. App. 1967); Pulaski Nat'l Bank v. Harrell, 203 Va. 227, 123 S.E.2d 382 (1962); Davidson v. Vaughn, 114 Vt. 243, 44 A.2d 144 (1945); Sears, Roebuck & Co. v. Nicholas, 2 Wash. 2d 128, 97 P.2d 633 (1939); Edmiston v. Wilson, 146 W. Va. 511, 120 S.E.2d 491 (1961); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961); Bushnell v. Elkins, 34 Wyo. 495, 245 P. 304 (1926).

There are a great number of other jurisdictions that recognize the "face of the document" doctrine but also have a parallel line of authority supporting another, more liberal rule. Compare Western Ill. Oil Co. v. Thompson, 26 Ill. 2d 287, 186 N.E.2d 325 (1962), with Spitz v. Brickhouse, 3 Ill. App. 2d 536, 123 N.E.2d 117 (1954).

A notable exception to the generalization in the text is the contract for the sale of goods. There the liberal U.C.C. rule of § 2-202, comment 3, generally prevails.

tive meaning and decides whether under the circumstances the agreement is one which might "naturally and normally" have been separately made, or the meaning is one which might "naturally and normally" have been intended.[17] This "reasonable man" standard, adopted by the Restatement,[18] is the most frequently accepted alternative to the "face of the document" test. A few courts have gone even further by adopting the Uniform Commercial Code formulation of the rule.[19] The official comments to Section 2-202 of the UCC provide (1) that evidence of the alleged oral agreement should be admitted unless it would "certainly" have been included in the document,[20] and (2) that evidence of alleged meaning is always admissible despite apparent unambiguity.[21] Although only a few jurisdictions now accept this formulation outside the commercial area covered by the UCC,[22] the UCC approach is expected to gain wider acceptance in the future.[23]

Nevertheless, no jurisdiction has yet considered the abolition of the rule itself as a common law relic which now creates many more problems than it resolves—an alternative worthy of examination in light of the widespread criticism that has been made both of the underlying rationale of the parol evidence rule and of its effect in actual practice. However, three recent decisions[24] by the California Supreme Court have virtually eliminated the rule in that state and indicate the desirability of a final, express abolition.

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[17] See, e.g., Rinaudo v. Bloom, 209 Md. 1, 120 A.2d 184 (1956); Gianni v. R. Russell & Co., 281 Pa. 320, 126 A. 791 (1924); Golden Gate Corp. v. Barrington College, 98 R.I. 35, 199 A.2d 586 (1964).

[18] Restatement of Contracts § 240(1)(b) (1932):

> An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and . . . is such an agreement as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.

[19] Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968); Hunt Foods & Indus., Inc. v. Doliner, 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1st Dep't 1966).

[20] U.C.C. § 2-202, comment 3.

[21] Id. comment 1(c).

[22] See note 19 supra.

[23] See Note, The Parol Evidence Rule: The Advent of the Uniform Commercial Code in Iowa, 52 Iowa L. Rev. 512, 530 (1966). It is not surprising that courts should begin to adopt the UCC version of the parol evidence rule. It has long been advocated that statutes be used as the basis for new legal rules. Courts have often relied upon a statute in an analogous area of the law to help decide cases where the statute's policy determinations would be equally valid. See Note, The Uniform Commercial Code as a Premise for Judicial Reasoning, 65 Colum. L. Rev. 880 (1965).

[24] Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968); Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); Masterson v. Sine, 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

II

THE CALIFORNIA DECISIONS

Questions of parol evidence arise in two ways: (a) when the evidence is offered to prove a collateral agreement in addition to or different from the writing before the court, and (b) when it is offered to give a different meaning to apparently unambiguous terms in the writing. Prior to 1968, California courts followed the "face of the document" test to determine whether a writing was an integrated document and hence not subject to variation by parol evidence.[25] Furthermore, in interpreting a contract, the "plain meaning" rule prevented the admission of parol evidence to interpret a writing which had a clear meaning on its face; the contract would be enforced according to the "plain meaning" of its terms.[26]

A. Masterson, Pacific Gas, *and* Delta Dynamics

In *Masterson v. Sine*[27] the California Supreme Court made its first major incursion on the parol evidence rule. Dallas Masterson conveyed his ranch to his sister and her husband by a grant deed, reserving an option to repurchase the property at a later date. When Masterson was adjudged bankrupt, his trustee in bankruptcy sought to enforce the option for the benefit of the creditors, since options are freely transferable unless expressly limited.[28] At trial, Masterson's sister and her husband attempted to present evidence showing that they and Masterson had agreed orally that the ranch was always to be kept in the family, and that the option was therefore personal to Dallas Masterson and not assignable to his trustee in bankruptcy. The trial court, invoking the parol evidence rule, excluded evidence of the oral agreement and found for the plaintiff.

In a 5-2 decision, the California Supreme Court reversed and held that evidence of collateral oral agreements on the assignability of the option should have been admitted at trial.[29] Rejecting the "face of the document" test, the court utilized the Restatement[30] and UCC[31] standards for determining admissibility. Both tests, the court noted, were fulfilled. Since the deed was silent as to assignability, since deeds

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[25] Harrison v. McCormick, 89 Cal. 327, 26 P. 830 (1891) (where written contract mentioned the quality of coal to be sold, parol evidence inadmissible to show there was a sale by sample).

[26] Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 P. 1017 (1929); County of San Joaquin v. Galletti, 252 Cal. App. 2d 840, 61 Cal. Rptr. 62 (Dist. Ct. App. 1967).

[27] 68 Cal. 2d 222, 436 P.2d 561, 65 Cal. Rptr. 545 (1968).

[28] Mott v. Cline, 200 Cal. 434, 253 P. 718 (1927); Altman v. Blewett, 93 Cal. App. 516, 269 P. 751 (Dist. Ct. App. 1928).

[29] Masterson v. Sine, 68 Cal. 2d 222, 231, 436 P.2d 561, 567, 65 Cal. Rptr. 545, 551 (1968).

[30] Restatement of Contracts § 240(1)(b) (1932); see note 18 supra.

[31] U.C.C. § 2-202, comment 3; see note 20 supra.

do not lend themselves to the inclusion of collateral agreements, and since the parties lacked legal experience and were engaged in a family transaction, the limitation on the exercise of the option was judged to be one which " 'might naturally be made as a separate agreement.' "[32] A fortiori, the case was not one in which the parties would "certainly" have included the collateral agreement in the deed. Hence, proof of the oral agreement was held admissible.

Four months later the California Supreme Court further liberalized the parol evidence rule in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*[33] Plaintiff utility company contracted the defendant to make repairs on its steam turbine. The contract provided unambiguously that defendant would perform the work "at [its] own risk and expense" and indemnify against "all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract."[34] During the course of the work the turbine was damaged and plaintiff sought to recover the cost of repairs on the basis of the indemnity clause. Defendant attempted to introduce evidence to show that the clause was meant to cover injury to the property of third parties only and not to that of the plaintiff. The trial court found that the "plain language" of the contract supported the contention that all property was included within the meaning of the clause and held defendant's evidence inadmissible.

The supreme court again reversed in a 6-1 decision, and adopted a much broader rule of admissibility: "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible."[35] The court reasoned that to look only at the words in the document to discover the intended meaning of the parties "presupposes a degree of verbal precision and stability our language has not attained."[36] Therefore the trier of fact should consider all credible evidence to prove the intent of the parties and refuse to admit only that evidence which would support a meaning to which the language of the instrument was not "reasonably susceptible."

Applying the rule to the facts of the case, the court observed that there was ample parol evidence showing that the parties intended to indemnify only third party claims, and noted that even the trial judge had observed that the contract used "the classic language for a third party indemnity provision."[37] Despite its seeming unambiguity, the

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[32] 68 Cal. 2d at 228-29, 436 P.2d at 565, 65 Cal. Rptr. at 549.
[33] 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968).
[34] Id. at 36, 442 P.2d at 643, 69 Cal. Rptr. at 563.
[35] Id. at 37, 442 P.2d at 644, 69 Cal. Rptr. at 564.
[36] Id.
[37] Id. at 36, 442 P.2d at 643, 69 Cal. Rptr. at 563.

court felt the clause was reasonably susceptible to the meaning alleged by the defendant, and held that parol evidence to that effect had been erroneously excluded.

The final relaxation of the parol evidence rule came in a closely divided decision in *Delta Dynamics, Inc. v. Arioto*.[38] In that case plaintiff company engaged the defendant to be the exclusive distributor of the safety locks which it manufactured. The contract called for a certain number of locks to be sold each year and provided that if the distributor failed to sell the required number, the agreement would be subject to termination upon notice by the plaintiff.[39] The contract also provided for reasonable attorneys' fees for the party who prevailed in any action for breach of the contract. Defendant ordered less than half the locks required by the contract and plaintiff brought suit for damages. The trial court refused to admit extrinsic evidence, based primarily upon pre-contract discussions, that termination of the contract was intended as the exclusive remedy for failure to meet the quota, and it awarded damages to the plaintiff.

Utilizing the "reasonably susceptible" test of *Pacific Gas*, the California Supreme Court reversed.[40] The court found that the contract could reasonably be interpreted to mean that termination was the only remedy for failure to meet the quota and that the clause dealing with damages and enforcement applied only to other breaches. The court thus held that extrinsic evidence on that point should have been admitted, despite the fact that the evidence consisted of discussions preceding the writing of the contract.

B. The Effect of the Decisions

In terms of the tests they enunciate, the California decisions represent only conventional liberalizations of the parol evidence rule. The *Masterson* opinion expressly adopts the Restatement[41] and UCC[42] approaches to the rule, neither of which are recent formulations.[43] *Pacific Gas* and *Delta Dynamics* both essentially follow the UCC approach to the question of interpretation by use of parol evidence. The requirement of ambiguity is dropped as a condition of admissibility, and the cases recognize, as does the UCC, that the surrounding circumstances or the "commercial context" must be considered in each case to discover what the parties intended in the written document. In general, all three cases follow the UCC provision that extrinsic evidence is admissible to explain or supplement the writing, the only limitation being that the evidence may not directly contradict it.[44]

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[38] 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968).

[39] Id. at 527, 446 P.2d at 786, 72 Cal. Rptr. at 786.

[40] Id. at 530, 446 P.2d at 788, 72 Cal. Rptr. at 788.

[41] See note 18 supra.

[42] See note 20 supra.

[43] The Restatement of Contracts was promulgated in 1932. The UCC was first promulgated in 1952 and adopted in California in 1963, effective January 1, 1965.

[44] U.C.C. § 2-202 states that the writing "may not be contradicted by evidence

However, if the cases are analyzed on their facts, rather than in terms of the legal formulas in which the decisions were couched, it becomes clear that little if anything remains of the parol evidence rule in California. Despite the ostensible use of "tests" to determine admissibility and the proscription of evidence which "directly contradicts" a document, the nature of the evidence held admissible in the three cases indicates that virtually any evidence, if believed by the court, will be held admissible in the future.

Both *Masterson* and *Pacific Gas* cast doubt upon the "directly contradicts" standard as a limitation upon the admissibility of parol evidence. In both cases, evidence was admitted which clearly contradicted either the meaning or the legal effect of an unambiguous document. The deed involved in *Masterson* granted an unrestricted option to one of the parties, and a long line of authority had established that, unless expressly restricted, such an option is freely transferable.[45] Since both the language of the deed and its legal effect were clear, it is difficult to see how the evidence held admissible by the court did not directly contradict the document before it. Similarly, in *Pacific Gas* evidence was held admissible to interpret "all loss . . . arising out of or in any way connected with the performance of this contract" as not referring to the loss caused to the plaintiff. While the parol evidence in *Pacific Gas* seems clearly to have indicated the parties' intention to indemnify only third parties,[46] the evidence admitted nevertheless ran directly against the language of the document.

Nor do the standards adopted by the court to test the admissibility of parol evidence—"reasonably susceptible" and "naturally made as a separate agreement"—lend themselves to consistent application. Rather, such standards seem no more than legal language expressing the court's conclusion that it believed the parol evidence before it. For example, although in *Masterson v. Sine* the court's opinion did not indicate the nature of the parol evidence offered by the defendants to prove nonassignability of the option, it seems doubtful that there was any express oral agreement. It is more likely that the parties shared a desire that the ranch always remain in the family and did not envision the circumstances under which Dallas Masterson's option might be used for the benefit of other persons. Had they considered that eventuality and had they felt strongly about retaining control of the ranch, it seems more than likely that they would have placed an express restriction on the option in the deed to insure that result. A strict inquiry into whether such an important restriction would "naturally" have been made separately might have led the court to hold the evidence inadmissible. A similar conclusion might have been reached in *Pacific Gas* had the court strictly applied the "reasonably susceptible" test. It is not self-evident

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of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented."

[45] See note 28 supra.

[46] See text accompanying notes 35-37 supra.

that the phrase "all loss" is reasonably susceptible to a meaning that would exclude the loss incurred by the plaintiff. That conclusion seems to spring not from an application of the court's test but from an examination of the credibility of the extrinsic evidence offered by the party.[47] Thus, the unifying principle behind the cases seems not to have been any consistent application of a "reasonably susceptible" or "directly contradictory" test, but rather the court's belief in each case that the true intentions of the parties were indicated by the parol evidence submitted.

The *Delta Dynamics* decision, moreover, appears to indicate that there are no limitations on admissibility based upon the nature of the parol evidence. While the case involved a more ambiguous fact pattern and thus rendered parol evidence more appropriate, *Delta Dynamics* is perhaps the most significant of the three decisions, since it admitted evidence of the kind usually excluded even under liberal formulations of the parol evidence rule, such as conversations, discussions, and negotiations prior to making the contract.

The nature of the evidence admitted in the three decisions, and the manner in which the "tests" and restrictions upon admissibility were applied, leave unclear what real restrictions, if any, remain on the admissibility of parol evidence in California. Despite the conventional tests used in the decisions and the retention of the "directly contradicts" limitation, it appears that any credible parol evidence will be held admissible in California. The language of the three decisions supports that conclusion. In *Masterson*, the court stated: "Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence."[48] *Pacific Gas* applied the credibility standard to the

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[47] A case decided after *Masterson* and *Pacific Gas*, but before *Delta Dynamics*, indicates how the court may use the "reasonably susceptible" standard less as a test than as a means of expressing its conclusion that the evidence should not be placed before the trier of fact. In In re Estate of Russell, 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968), the testatrix left a will reading: "I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell." Since Roxy Russell was a dog and hence ineligible to inherit property, the testatrix's niece argued that the part of the estate ostensibly left to the dog should pass to her instead, under the laws of intestate succession. Chester Quinn attempted to present parol evidence designed to show that the testatrix had intended to pass her entire estate to him and that he was merely to care for the dog with the proceeds of the estate. The lower court admitted the evidence, but the supreme court reversed, holding that the will was not "reasonably susceptible" to the meaning suggested by Quinn. Id. at 214-15, 444 P.2d at 362-63, 70 Cal. Rptr. at 570-71. It does not appear, however, that Quinn's reading of the will was an unreasonable one, and indeed there was abundant parol evidence to show that the testatrix intended the niece to receive nothing. The court's decision seems to be based less on an application of its test than on an unstated conclusion that the niece should benefit under the will. While cases involving wills present different problems than those involving contracts, *In re Russell* illustrates the extent to which a court may use even a liberally formulated parol evidence rule to control the outcome of a case.

[48] 68 Cal. 2d at 227, 436 P.2d at 564, 65 Cal. Rptr. at 548.

question of interpretation, noting that "rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties."[49] And in *Delta Dynamics* the court stated: "To determine whether offered evidence is relevant to prove [an alleged] meaning the court must consider all credible evidence . . . ."[50]

Thus, the three decisions indicate that California courts will determine admissibility by making a determination of the credibility of the evidence. If the evidence is "credible," it may be placed before the trier of fact. By looking first to the credibility of the parol evidence, the judge passes over any determination that the document itself is "reasonably susceptible" of the meaning alleged by the evidence or that the alleged collateral agreement was one that would "naturally" be made separately.

Although not fully acknowledged by the California Supreme Court, these cases represent a dramatic departure from traditional parol evidence theory. If the credibility of the parol evidence is decisive, and not the written document itself, it can no longer be said that the parol evidence rule is a rule of substantive law; such a formulation accepts a subjective rather than objective theory of contracts. The rule thus persists as a rule of evidence under which parol evidence is not deemed inadmissible because it is irrelevant but because it is unreliable.[51] And if courts are expected to examine reliability on a case by case basis, it is not even a general rule of evidence.

III

An Analysis of the Justifications for the Parol Evidence Rule

Historically,[52] the parol evidence rule was based on two premises: (1) that the written document is more reliable and accurate than human memory to establish the terms of an agreement, and (2) that to allow extrinsic evidence to vary these terms would open the door to perjury.[53] The rule is thought to have two important effects: first, to encourage parties to embody their complete agreement in a written contract and thereby to foster reliance upon it;[54] second, to prevent

[49] 69 Cal. 2d at 39-40, 442 P.2d at 645, 69 Cal. Rptr. at 565.

[50] 69 Cal. 2d at 528, 446 P.2d at 787, 72 Cal. Rptr. at 787.

[51] Cf. 9 J. Wigmore, Evidence § 2400, at 3-4 (3d ed. 1940).

[52] For the historical development of the parol evidence rule, see 2 J. Bentham, Rationale of Judicial Evidence 454-513 (1827); 9 J. Wigmore, Evidence § 2426 (3d ed. 1940).

[53] Dreyfus, The Effect of Masterson v. Sine on California's Parol Evidence Rule, 43 L.A. Bar Bull. 411 (1968); see 9 J. Wigmore, Evidence § 2426, at 85-89 (3d ed. 1940).

[54] "Without [the parol evidence] rule there would be no assurance of the enforceability of a written contract. If such assurance were removed today from our law, general disaster would result, because of the consequent destruction of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts." Cargill Comm'n Co. v. Swartwood, 159 Minn. 1, 7, 198 N.W. 536, 538 (1924). See

juries from being misled by false testimony.[55]

It seems clear today, however, that the rule fails to perform either of these functions effectively, and it often frustrates the true intention of the parties. The number of different tests for applying the rule, the number of exceptions to its application, and the uncertainty surrounding parol evidence rule litigation all tend to decrease, rather than increase, the certainty of the written document.[56] Because it is impossible to forecast whether or not the facts of a given transaction will come within one of the exceptions or various tests of the rule, the assumption that the rule is indispensable to business stability is specious.[57]

Nor does the rule add stability by encouraging people to commit their complete contract to writing. Despite the long existence of the parol evidence rule, contracts which are partially written and partially oral are not uncommon.[58] The fact that many business transactions must be carried out quickly and over long distances by telephone often precludes a complete reduction of contractual terms to writing.[59] Furthermore, informal business transactions between friends or long-time business associates are likely to involve "understandings" between the parties that are not reduced to writing.[60] The extent to which businessmen place their agreements in writing because of the parol evidence rule is thus questionable.[61] The average layman, moreover, is probably

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also S.W. Bridges & Co. v. Candland, 88 Utah 373, 380, 54 P.2d 842, 845 (1936); C. McCormick, Evidence § 210, at 428 (1954).

[55] Moffitt v. Maness, 102 N.C. 457, 9 S.E. 399 (1889); C. McCormick, Evidence § 210, at 428 (1954).

[56] See text accompanying notes 6-13 supra.

[57] E. Fisch, New York Evidence § 64, at 42 (1959).

[58] Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036 (1968). For example, in a survey of architects in northern California, it was found that in 45% of their written contracts, the projected cost figure was agreed upon orally. Id. at 1047 & n.57.

[59] See C. McCormick, Evidence § 216, at 441 (1954).

[60] Note, A Critique of the Parol Evidence Rule in Pennsylvania, 100 U. Pa. L. Rev. 703, 719 (1952). It is unlikely that parties in this situation would insist on reducing these to writing because it would seem to imply a distrust of the other party.

[61] McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L.J. 365, 366, 384 (1932).

There seems to be only one area in which the "business reliance on the writing" argument has any validity. This is in the relation between principal and agent. Principals often require their agents to use form contracts containing integration or merger clauses. In this way the principal is protected from the unauthorized acts of his agent because if the agent makes an oral agreement, the parol evidence rule prevents its admission for the purpose of adding to the written contract. But should an innocent third party be unable to enforce all the terms of his agreement in order that a principal may shield himself from the acts of his agents? Since a principal benefits from the acts of his agents, it should be his responsibility to control them. Therefore the rule frustrates public policy by denying an innocent party his reasonable expectations and by discouraging a principal from maintaining internal control over his agents.

For a more complete discussion of the principal-agent problem, see Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule,

unaware of the rule's existence.[62]

The primary justification for the parol evidence rule has always been the fear that the fact-finding process might be compromised by the unrestricted admission of evidence. Concern has been expressed that abolition of the rule might encourage perjury. It is clear, however, that the fear of perjury has been overemphasized.[63] An identical fear served to prolong the life of a similarly archaic common law rule. At one time parties in interest were not competent to testify in their own case. That rule has been abandoned with no apparent harm to the judicial process.[64] If the jury is capable of weighing the evidence in cases where parties testify in their own behalf, it should be entrusted to discern the facts in parol evidence cases despite the possibility of perjury. Another fear is that an unsophisticated jury would not be able to differentiate between evidence of a valid parol agreement and a party's recollection of parleying or mere wishful thinking.[65] Coupled with the fear of unsophisticated juries is the alleged danger of juries being swayed by sympathy. Since the party alleging the parol agreement will suffer heavily in many cases if the parol agreement is not recognized, it is felt that the jury will not be able to deliver an objective verdict.[66]

These fears seem to be founded upon the belief that mere amateurs are incapable of deciding factual controversies bearing on legal relationships.[67] Although often repeated, this belief has little empirical support. In fact, research[68] on this problem has shown that the jury both understands the case and is disciplined by the evidence.[69] A comparison of jury verdicts and hypothetical verdicts by the judge in the same

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53 Cornell L. Rev. 1036, 1050, 1057-58 (1968).

[62] Note, A Critique of the Parol Evidence Rule in Pennsylvania, 100 U. Pa. L. Rev. 703, 719 (1952).

[63] See Sunderland, Scope and Method of Discovery Before Trial, 42 Yale L.J. 863, 867 (1933): "Perjury is one of the great bugaboos of the law. Every change in procedure by which the disclosure of the truth has been made easier has raised the spectre of perjury to frighten the profession."

[64] Parties to civil actions were made competent to testify by Lord Brougham's Act, 14 & 15 Vict., ch. 99, § 2 (1851).

[65] C. McCormick, Evidence § 210, at 428 (1954).

[66] Id.

[67] Dean Griswold states: "But jury trial, at best, is the apotheosis of the amateur. Why should anyone think that twelve persons brought in from the street, selected, in various ways, for their lack of general ability, should have any special capacity for deciding controversies between persons?" 1962-1963 Harvard Law School Dean's Report 5-6.

[68] See H. Kalven & H. Zeisel, The American Jury (1966), in which the findings of the Chicago Jury Project—an empirical study of all phases of the jury in both civil and criminal cases—are presented. The civil trial part of the study was based on data collected from 4000 jury trials throughout the United States. Id. at v-viii, 63 & n.11.

[69] Id. at 149-62. This book deals primarily with criminal jury trials and only mentions civil trial data by comparison. Kalven, however, sees no reason why criminal trial data in the area of jury ability would not apply equally well to civil cases. See Kalven, The Dignity of the Civil Jury, 50 Va. L. Rev. 1055, 1066 n.23 (1964).

cases showed 78 per cent agreement.[70] In those cases where the judge disagreed with the jury's finding, he rarely attributed his disagreement to an inability of the jury to deal with the evidence objectively.[71] The empirical data further discredits the fear that juries are swayed by sympathy. It has been shown that when judge and jury disagreed on the verdict in personal injury cases, the judge favored the plaintiff almost as often as did the jury.[72] Since jury sympathy in parol evidence cases would seem to parallel that in personal injury cases, it is impossible to say that the jury would be less objective in its verdict than the judge.

Finally, since the jury has the duty of deciding the credibility of evidence in other difficult cases, there is no compelling reason to make an exception in cases involving parol evidence. The same issues of credibility arise in other areas of the law where the jury is faced with evidence from witnesses who may have a claim on its sympathy or evidence which seems inherently suspect. Nevertheless, the jury is considered capable in those situations of making a finding of fact based upon a hearing of all relevant evidence. Furthermore, the same technical questions of contractual relationship arise when the alleged prior agreement and the subsequent agreement are both oral. However, in such a case the jury is permitted to decide whether the entire agreement of the parties was embodied in the subsequent contract. A jury should be just as capable of reaching a fair decision when the prior agreement is oral and the subsequent contract is written. Since the question of whether a parol understanding was part of the parties' total agreement is wholly one of fact,[73] there seems no reason to remove that question from the jury's consideration in the absence of proof that the jury is incapable of dealing with it.[74] As shown above,[75] no such proof of jury incompetence exists.

IV

Abolition of the Parol Evidence Rule and the Integrity of the Fact-Finding Process

Since it has become obvious that the reasons for the strict parol evidence rule are no longer valid, a number of tests have been suggested

[70] H. Kalven & H. Zeisel, The American Jury 63 (1966). The Jury Project's figures are comparable to the findings of a number of judges who made individual studies from their own experience on the bench. One judge agreed with the jury in 85% of the civil cases (the highest) while another in only 72% of the cases (the lowest). Id. at 521-23.

[71] Id. at 168.

[72] Of the 22% of the cases in which the judge and jury disagreed on the verdict, 12% of the time it was the jury that was more favorable to the plaintiff, while in 10% of the cases it was the judge who was more sympathetic to the plaintiff. Id. at 64.

[73] "Most, if not all, of the issues that are raised in the application of this rule, are issues of fact." 3 A. Corbin, Contracts § 595, at 570 (rev. ed. 1960).

[74] In Tennessee, integration of an agreement is treated as a question of fact for the jury. Hines v. Willcox, 96 Tenn. 148, 159, 33 S.W. 914, 916 (1896); Béziat, The Parol Evidence Rule in Tennessee, 15 Tenn. L. Rev. 773, 779 (1939).

[75] See text accompanying notes 63-72 supra.

to liberalize it. In addition to the "reasonable man" test of the Restatement and the UCC test discussed above,[76] many commentators have advocated a third test: that an unambiguous written document be *presumed* to contain all the terms of the agreement.[77] Under such a test, the judge, after hearing all the extrinsic evidence, would determine whether the presumption had been overcome by clear and convincing proof to the contrary; and only if the presumption had been overcome would the evidence be submitted to the jury.

These suggested rules are improvements over the "complete on its face" doctrine, but they still make it possible to frustrate the true intent of the parties. Even the last test can keep the true intent of the parties from the trier of fact if the judge is not convinced that the presumption against admissibility is overcome.[78] As Corbin observed, everyone (not excluding judges) makes judgments about language according to his own education and experience.[79] Therefore judgment as to admissibility of evidence could vary depending on the judge ruling on the case.[80] Thus, in varying degrees, the suggested tests have the same flaws that they were designed to overcome—frustration of the parties' true intentions and unpredictability of litigation.

Since the parol evidence rule is no longer applied as a substantive rule of contract law, there is no theoretical reason, and certainly no practical reason, for its continuance. Issues of fact such as the credibility of parol evidence or the degree of integration of the writing should properly be placed before the trier of fact.[81] Abolition of the rule would eliminate the double hurdle of convincing the judge as well

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[76] See text accompanying notes 15-23 supra.

[77] Hale, The Parol Evidence Rule, 4 Ore. L. Rev. 91, 122 (1925); Murray, The Parol Evidence Rule: A Clarification, 4 Duquesne U.L. Rev. 337, 341 (1966); Note, A Critique of the Parol Evidence Rule in Pennsylvania, 100 U. Pa. L. Rev. 703, 721 (1952).

[78] In some contract situations truth can be stranger than fiction. See, e.g., Raffles v. Wichelhaus, 159 Eng Rep. 375 (Ex. 1864). Just because the parties allege they did something "unnatural" or "incredible" should not preclude them from taking their case to the trier of fact. Of course, if the story is so preposterous that reasonable men can not differ, the judge may direct the verdict as in any other case.

[79] Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161, 187 (1965).

[80] Not only do backgrounds vary from judge to judge but also attitudes toward the law. Judge Frank in a parol evidence rule case remarked: "Candor compels the admission that, were we enthusiastic devotees of that rule, we might so construe the record as to bring this case within the rule's scope . . . ." Zell v. American Seating Co., 138 F.2d 641, 644 (2d Cir. 1943), rev'd mem., 322 U.S. 709 (1944).

It might also be said that judgment could vary depending on the jury sitting on the case. This is much less likely since in the usual civil case there is a twelve man jury and, taken as a whole, it is likely to represent the objective community judgment. Also, since verdicts do not have to be unanimous, one person's unique background will be overridden by the "community judgment" and will not distort the verdict.

[81] See note 70 supra.

as the jury of the credibility of the evidence. The danger of incorrect verdicts because of the absence of the parol evidence rule would be no greater than the danger of incorrect verdicts with the rule. If the rule occasionally prevents parties from winning through perjury, it also allows parties to prevail through the concealment of their actual agreement.

Complete abolition of the rule would not leave written documents completely vulnerable to perjurious testimony and overly sympathetic juries. Cross-examination is always available to examine the credibility of testimony relating to parol agreements. More importantly, the abolition of the rule would not detract from the judge's supervisory power over the jury. If the facts were so clear that reasonable men could not differ, the judge could direct a verdict on certain issues or enter judgment notwithstanding the verdict.[82] If the judge felt the evidence was insubstantial, he could comment on it, instruct the jury as to the burden of proof, or, in appropriate cases, utilize special verdicts.

If a party to a written contract wanted assurance that the document could not be varied, added to, or contradicted by prior oral agreements, he could, by adding a merger clause, gain protection similar to that provided by the parol evidence rule. Without the parol evidence rule, of course, the merger clause would not be conclusive,[83] and the jury would still hear the extrinsic evidence. However, if the merger clause were in plain language and placed in an obvious position on the document in large type, it would operate with the same effect as the strict parol evidence rule. Such a clause would undoubtedly be conclusive in the eyes of the jury in the absence of the most convincing evidence to the contrary. If not, it would certainly give the court an opportunity to exercise some of its procedural controls over the jury.[84]

V

Conclusion

The parol evidence rule was founded on the common law's fear of juries and its concomitant belief in the sanctity of documents. Neither of these tenets supports the rule today, and virtually every major commentator has recommended its liberalization.[85] It is an established principle in the law that where the reason for a rule fails, so too should the

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[82] But see McCormick, The Parol Evidence Rule as a Procedural Device for Control of the Jury, 41 Yale L.J. 365, 378-79 (1932). McCormick feels that when it is one party's word against the other on whether the written contract was complete and final, a judge—especially a timid one—would be reluctant to declare that reasonable men could not differ on the issue. Thus, this may not be too potent a control on the jury. However, abolition of the parol evidence rule will probably encourage greater use by the courts of its powers in these situations.

[83] In the case of adhesion contracts this is desirable protection for parties without great bargaining power.

[84] See text accompanying note 82 supra.

[85] See note 6 supra.

rule.[86] Since the underlying rationale of the parol evidence rule has long been suspect, and since retention of the rule has caused both confusion and injustice, abolition of the rule is perhaps overdue. In view of the availability of alternative means to enable parties to protect documents from attack by extrinsic evidence, abolition of the parol evidence rule would not sacrifice the legitimate ends the rule may previously have served.

The three landmark decisions by the California Supreme Court in 1968 indicate that, in California, if the court believes the evidence presented, it will be admitted. Although this represents a significant liberalization of the rule, it still retains for the court a function which properly belongs to the jury—that of determining the credibility of the evidence. Since in California the parol evidence rule is codified by statute,[87] no further court-initiated reform is possible. In other jurisdictions, however, courts will be freer to consider whether the rule restricting the jury's access to relevant evidence should be retained at all.[88]

Finally, the parol evidence rule has been so weakened in California that the results of litigation in that state should cast light on the wisdom of ultimate abolition. If faith in written documents continues, commercial relationships remain stable, and no miscarriages of justice occur from perjured evidence in contract cases, this success should stand as the most persuasive argument for the rule's complete abolition.

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[86] See Davies v. Powell, Willes Rep. 46, 51 (C.P. 1738).

[87] Cal. Civ. Code § 1625 (West 1954); Cal. Civ. Proc. Code § 1856 (West 1955).

[88] In the absence of additional legislative action, contracts for the sale of goods will be subject to the parol evidence rule in U.C.C. § 2-202, except in Louisiana. See note 15 supra.