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THE PAROL EVIDENCE RULE IN VIRGINIA

W. H. MORELAND*

It is here intended first to present a pattern of the Parol Evidence Rule in what is believed to be its generally accepted form and then to attempt to fit Virginia cases into that pattern. The work of our great American scholars, Wigmore1 and Williston,2 will be accepted as the true exponent of that pattern.

That view of the subject will be accepted which assigns to the Parol Evidence Rule only a portion of the large problem of how to give legal effect to written documents;3 and that portion is the identification of the legal act as distinguished from the interpretation of the legal act after its identity has been fixed upon. Therefore, the discussion will not include rules for interpreting legal documents. Before the time comes for interpretation there must be a legal act to be interpreted. It is equally true, however, that the two processes do not necessarily take place successively; to a great extent they rather supplement and accompany one another. We cannot determine how far we may add to a legal act at least partially integrated,4 unless we can at the same time interpret the writing so far as we have it. This has led some writers to say that there is only one rule.5 We prefer the view that there are two distinct processes—one the identification of the legal act in its entirety, and the other the legal interpretation of that legal act. It is with the first process that we shall be concerned.

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1The reference is to Wigmore on Evidence (3d ed. 1940). Hereafter it will be referred to simply as Wigmore.
2The reference is to Williston on Contracts (rev. ed. 1936). Hereafter it will be referred to simply as Williston. Reference to "Greenleaf" will be to 1 Greenleaf on Evidence (16th ed., Wigmore).
4The integration of the act consists in embodying it in a single memorial as a writing. Williston § 632.
5Williston § 632; Strahorn, The Unity of the Parol Evidence Rule (1929) 14 Minn. L. Rev. 20, 35.
SCOPE AND APPLICATION OF THE PAROL EVIDENCE RULE

The best known definition of the Parol Evidence Rule is that of Greenleaf: "Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." A concise statement of the rule, not so well known is: "A written contract is what the written instrument says it is; nothing more, nothing less, and nothing different." An early Virginia case gives us the following: It is a "general rule equally applicable to courts of Law and Equity that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement."

1. The rule is not a rule of evidence at all, but a rule of substantive law. Following Thayer's great exposition of the subject, this principle is now generally accepted.

This brings up an interesting question. If evidence, improper under the Parol Evidence Rule, is admitted without objection, should the jury be permitted to consider it, or should the court trying the case without a jury consider it, or should the case be handled as one in which improper evidence having probative value is admitted without objection?

Clearly, if evidence which is excluded by a rule of exclusion, such as the hearsay rule, has been admitted without objection it will be considered. This does not fit in with the theory that the Parol Evidence Rule is a rule of substantive law, and that such objectionable evidence does not establish a term of the contract because under the law it is not a part of the contract. The courts are divided, some holding that being admitted without objection it should be treated as part of the evidence in the case, with other courts following the logical view that as a matter of substantive law, though the term is proved, it cannot be treated as a part of the contract; and therefore, it should not be taken into consideration. However, a qualification is added in the interest of dealing fairly with the trial court: objec-

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*Greenleaf 405.
*Salmond and Winfield, Law of Contracts (1927) 104.
*Williston § 631; Wigmore § 2400; Restatement of Contracts (1932) § 233. Comment.
*Thayer, Preliminary Treatise on Evidence (1898) c. 10, p. 390; American Crystal Sugar Co. v. Nicholas, 124 F. (2d) 477, 479 (C. C. A. 10th, 1941).
*Stevens v. Mirakian, 177 Va. 123, 12 S. E. (2d) 780 (1941); Note (1936) 104 A. L. R. 1130.
tion to consideration of the intruder must be made in the lower court and cannot be made for the first time in the appellate court. The case cannot be tried on one theory in lower court and on another theory in appellate court. This would be something like permitting a trial court to proceed without taking judicial notice and then urging an appellate court to take judicial notice.

2. That which appears to be a jural act may not be enforceable as such:

(a) Because the party in a unilateral act or the parties in a bilateral act did not intend that jural relations should be created.

(b) Because the act was not intended by the parties to be final, though it was the act they had agreed on. Its ultimate taking effect depended upon the happening of an extrinsic event.

(c) Because, while a jural act may have been created, it was not the jural act given expression in the writing.

(d) Because, though the parties intended this jural act, it is not enforceable as such because of defenses which may be made to it in law or in equity.

The cases under (a) are few when the act is unilateral. But one of the best cases was decided in Virginia in 1921, when on the offer of a will for probate, the opponents of the probate were permitted to offer evidence to prove that while the document was executed with all proper legal formalities, the signer did not intend that the writing should be his will. This may be considered as arising under the statute with reference to wills, but the principle is the same. But where the act is bilateral different principles apply, and a number of Virginia cases illustrate the point. The case which frequently arises is this: A bank is in financial distress. To swell its assets a director deposits his note for which he receives no consideration; later when sued on the note, he attempts to set up that defense. This is a dangerous procedure for, on one reason or another, he is forced to pay,

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25Wigmore § 2406.
26Williston § 634; Wigmore §§ 2408, 2409, 2410.
27Wigmore §§ 2413-2417.
28Williston § 634; Wigmore §§ 2423, 2439.
the courts differing widely in the reasons they give for holding him responsible.20

In the cases which have arisen in Virginia on this point, the instrument given was usually a bond, in which case the problem of consideration does not arise; but cases are not wanting in which defenses were offered to liability. In a very recent case the defense attempted was that defendant was induced to execute the bond by the cashier's assurance that the bank was solvent. The court repelled this attempt with the striking and surprising statement that as defendant could not show a parol promise which would modify his engagement to pay, then he cannot show this misrepresentation or fraud which would have the result of relieving him from his obligation to pay.21 This is rather difficult to understand, particularly in view of the universal rule that fraud may be set up despite the Parol Evidence Rule, and in view of the court's recent holding that innocent misrepresentation will support an action for damages.22 In another case directors, when sued on their bond to protect the bank, attempted to prove that their liability was to cease when a particular debt of $35,000 should be repaid to the bank. This, of course, was a very clear attempt to qualify their absolute promise in the writing, and the defense was very properly excluded.23 In the last reported case decided by the court, a director, sued on his note, attempted without success to prove a parol agreement that the note was to be paid by having credited on it collections on certain notes and securities held by the bank.24 Clearly, this would have altered the absolute promise to pay. All in all, the person who comes to the aid of a failing bank experiences difficulty in avoiding liability on his undertaking. But, digressing still further, it may be pointed out that by rearranging some of the terms of the entire arrangement between the bank and the director, the desired result might have been attained. If there had been an agreement either in writing or orally entered


22Union Trust Corp. v. Fugate, 172 Va. 82, 200 S. E. 684 (1939); Note (1939) Wash. and Lee L. Rev. 98.


into as part of the transaction which gave rise to the note that certain of the bank's accounts should be set aside and the collections thereon credited to the director, the credits arising from such collections could have been availed of as a set-off against the note.\(^\text{25}\)

Another case presented a very unusual situation. P conveyed land to D who executed notes therefor in the amount of \$8,750\ and conveyed the property in trust to secure them. Later the property was sold under the deed of trust. After crediting the amount produced by the sale on the notes more than \$6,000\ was left due, and P sued D at law to recover this amount. The defense was that the entire transaction was a sham. But unfortunately for D, he had told third persons that he had bought the property and had said that the notes were good. The court held that the defense could not be made.\(^\text{26}\)

If this simply amounts to holding that his defense was false, of course there is nothing unusual about the court's holding that the defense could not succeed. But it does not follow that because he might be estopped as to persons who had relied on his statements and had dealt with the notes as valid, he could not show the real nature of the transaction as between himself and his grantor. All that the court had to say about violating the Parol Evidence Rule and proof of conditional delivery of the notes seems beside the point.

Under (b) we have the familiar case in which by understanding of the parties, not expressed in the writing, the taking effect of the jural act, complete on its face, is to wait some extrinsic event. The leading case is probably \textit{Pym v. Campbell}.\(^\text{27}\) "By the present principle, the act is not an act until the final moment appointed, and that moment may by the the parties be made to depend upon some future event, which thus becomes a condition precedent to the jural existence of the act."\(^\text{28}\)

"In the United States, the doctrine is not only completely accepted, but has even been applied to sealed instruments other than deeds of land in jurisdictions still bound by precedent to the older rule for deeds."\(^\text{29}\)

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\(^{25}\)\textit{Rector v. Hancock}, 127 Va. 101, 102 S. E. 663 (1920); Wigmore \S 2444.  
\(^{27}\)6 E. & B. 370 (1856); briefly stated, Wigmore \S 2410, n. 2.  
\(^{28}\)Wigmore \S 2410, p. 35; \textit{Williston} \S 634.  
\(^{29}\)Wigmore \S 2410, p. 30; \textit{Williston} \S 634.
Several distinctions must be made:

(1) The so-called condition may be actually written in the contract, when, of course, the problem is one of construction or interpretation.\(^3\)

(2) It is possible to consider the proof of such a term or condition as an exception to the Parol Evidence Rule. There is excellent authority for this view.\(^3\) But under the view first spoken of, the matter is entirely outside of the Parol Evidence Rule, and this is the view generally taken.

(3) Distinction must be made between the present problem and that presented when the term or provision in question is to accompany and affect the performance of the contract or bring it to a conclusion. Either presents a true problem under the Parol Evidence Rule, for if evidence to prove the provision is admitted it really amounts to supplementing and varying the contract.\(^3\)

This state is firmly committed to the view that to prove such a condition does not violate the Parol Evidence Rule.\(^3\) A note may be delivered on such a condition which can be proved to show that the instrument never went into effect.\(^4\) And the same rule prevails as to an endorsement.\(^5\) Of course, the intervention of a holder in due course changes the picture.\(^6\) An insurance policy may be delivered subject to such a condition.\(^7\) The outstanding case is *Whitaker v. Lane*, decided in 1920.\(^3\) Here the court restated the principle and in addition ap-

\(^3\) Willison § 634.
\(^2\) Ballantine, Delivery in Escrow and the Parol Evidence Rule (1920) 29 Yale L. Jour. 826; Corbin, Delivery of Written Contracts (1927) 30 Yale L. Jour. 443, 455; Salmond and Winfield, Law of Contracts (1927) 118.
\(^5\) Rhodes v. Walton, 163 Va. 960, 175 S. E. 865 (1934). The Court also said, if the bond was not delivered on condition, to prove the subject matter of the alleged condition would violate the Parol Evidence Rule, while if the bond was delivered on condition, the condition had transpired and the bond was effective according to its terms.
\(^6\) Catt v. Olivier, 98 Va. 580, 36 S. E. 980 (1900).
\(^10\) 128 Va. 317, 104 S. E. 252, 11 A. L. R. 1157 (1920); and the principle applies though the instrument is a deed conveying land and has been recorded, Burnett v. Rhudy, 137 Va. 67, 119 S. E. 97 (1923). Meadows v. McClaugherty, 167 Va. 41, 157 S. E. 475 (1936).
plied it to a situation to which the cases from the earliest times have said it had no application—stated otherwise, a sealed instrument complete on its face could not be delivered to the obligee on condition; the condition could not be shown. The case, which is probably the most definite instance of judicial legislation in our law, has been very frequently cited and strictly adhered to, though there have been numerous occasions when attempts have been made to extend its application to cases to which it had no application: to a case in which the condition was written in the contract when only a question of interpretation was presented; to a case in which it was attempted to prove that the instrument could be discharged by payment of a smaller amount. When an action was brought on a note given for an automobile, the defendant was not permitted to show that the note was not to be paid unless the buyer sold the automobile for a price equal to the amount of the note. The court said that this was condition subsequent. Our court has carefully preserved the distinction between varying the contract and setting up a condition which prevents the contract from taking effect. And it is well that this is true, for otherwise there would be scant protection from the "uncertain testimony of slippery memory."

Under (c), we have the familiar case of error in expression which calls for equitable relief by way of reformation. This is not generally looked upon as part of the Parol Evidence Rule at all. It is certainly true that normal equitable relief is never obstructed by the rule. It is not necessary to cite Virginia cases on reformation of contract. It must be remembered, however, that there must be some basis for equitable relief. When parties deliberately leave a provision out of their contract, there is no such basis and there is no relief. While beyond the scope of this discussion, the application of the Statute of Frauds may present interesting and difficult questions. For example, defendant may offer to prove that the memorandum does not state the actual agreement. May he do this and thus render the contract unenforceable? May

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*Hopkins v. Le Cato, 142 Va. 769, 128 S. E. 55 (1925), with two judges dissenting.
*Broughton v. Coffer, 59 Va. (18 Gratt.) 184 (1868); Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239 (1889); Charles v. McClanahan, 130 Va. 682, 108 S. E. 858 (1921).
plaintiff in such a case have the memorandum reformed to express the true agreement?46

Under (d), some of the defenses, infancy, illegality, fraud, forgery, duress and insanity, are purely legal and have no connection with the Parol Evidence Rule, though of course they may furnish a basis for equitable relief.46 Others, so-called equitable, open up the whole field of mistake and its effect on the written act—a very difficult and important subject, but here again the Parol Evidence Rule plays no part in handling such problems, and it is not necessary or proper to go into the Virginia case law.47 The Parol Evidence Rule applies in equity as well as in law, and one who sues for specific performance of a contract is bound by the rule if he attempts to add to or vary the terms to the contract which he wishes enforced.48 The rule does not prevent proof of the well recognized defenses to specific performance such as misrepresentation, unfairness, hardship and other circumstances outside of the writing which make it inequitable to grant specific performance.49 Probably no better case can be found than a Virginia case decided in 1825,50 when in an action to enforce specific performance of a written contract to sell a town lot the defense was made that while the vendee had orally agreed that he would not set up a tavern on the lot, he had refused to sign a contract which contained that restriction. In an excellent opinion, Carr, J., made it clear that while to incorporate the term in the contract would violate the Parol Evidence Rule, to prove it to defeat specific performance was permissible. The learned judge did not fall into the mistake (as many modern judges do) of treating such defenses as exceptions to the rule.

On the other extreme is a New York case in which rescission of a deed was granted because the conveyance had been secured under the false oral promise that the lot was not to be used for business
purposes. Here no doubt the Parol Evidence Rule would have prevented an action for damages for breach of contract or covenant, but the inadmissible oral promise furnished the basis for affirmative equitable relief.

We are at last brought face to face with the Parol Evidence Rule, and the question is: Does the writing constitute integration of a legal or jural act; and if integration, is it partial or complete? If there has been no integration, there is no place for application of the rule; if integration is partial or complete, the rule must be considered.

It is clear that not every exchange of writings between parties amounts to integration; receipts, bills of lading, memoranda of various sorts, entries in a party's books, may refer to jural relations but may not have been intended by the parties to be memorials of their undertakings. They may be mere evidence. Thus, in a Virginia case when an attorney signed a receipt for bonds that were placed in his hands for collection, it might be proved that the bonds should be held by him as collateral security for certain claims in the attorney's hands. But merely to call a document a receipt does not necessarily bring about this result. It may actually be a contract.

The questions as a lawyer would put them are these: Does the Parol Evidence Rule apply to this writing; and if it does, is this additional material excluded, or may I add it to the writing, or may I contradict something in the writing?

This is the problem to which our discussion will be principally directed: assuming that we have an integrated jural act, say a contract, is the integration partial, in which case further terms may be added, or is it complete, in which case the Parol Evidence Rule applies to the full extent, excluding everything outside of the writing?

This question begging statement is not at all helpful. How may we determine whether integration is partial or complete? We must consider the cases. Before taking up the Virginia cases we may state two of the outside cases. Let us consider first, Thompson v. Libby, one of the leading cases in which the opinion was delivered by one of the best of American judges. This was an action to recover the

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52 Wigmore § 2432.
54 Wigmore § 2432.
55 Thompson v. Libby, 34 Minn. 374, 26 N. W. 1 (1885).
purchase price of logs delivered pursuant to a written contract which was in the following terms:

\begin{quote}
"Hastings, Minnesota
June 1, 1883

I have this day sold to R. C. Libby, of Hastings, Minn., all my logs marked H. C. A., cut in the winters of 1882 and 1883 for ten dollars a thousand feet, boom scale at Minneapolis, Minnesota. Payment cash as fast as scale bills are produced.

J. H. THOMPSON
By D. S. MOOERS
R. C. LIBBY"
\end{quote}

The defense pleaded was oral warranty of the quality of the logs alleged to have been made at the time of the sale, and a breach of that warranty. The question was, would the proof of the oral warranty violate the Parol Evidence Rule? Going into some detail, the problem was handled as follows: The court quoted Greenleaf’s rule,56 and pointed out that the rule presupposes that the parties intended to have the terms of their complete agreement embraced in the writing. But in what manner shall it be determined whether the parties intended to express the whole of their agreement in writing? It is sometimes loosely said that where the whole contract be not reduced to writing, evidence may be admitted to prove the part omitted. But the court quickly pointed out that to permit a party to lay the foundation by oral testimony that only part of the agreement was reduced to writing and then prove the part omitted, would be to work in a circle and permit the very evil that the rule was designed to prevent. The only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. This agreement purports to be a full expression of the whole agreement. It follows necessarily that the alleged oral warranty could not be proved.

But with the passing of the years the learned judge had occasion to elaborate and modify his views on this subject, and in a later case57 the subject is treated as follows: there are two extreme views, some cases holding that the incompleteness of the written contract may be shown by going outside of the writing and showing an omitted term; but this leaves very little of the rule remaining. Other cases go to the opposite extreme by holding that the incompleteness of the writing must

56Greenleaf 405.
appear from the face of the document from mere inspection. But, con-
cluded this distinguished judge, the true rule is that the only criterion
of the completeness of the written contract as a full expression of the
agreement of the parties is the writing itself; and, in determining
whether it is thus complete, it is to be construed according to its sub-
ject matter and the circumstances under which, and the purposes for
which, it was executed.

It is suggested that this view is unquestionably sound and is fol-
lowed by practically all courts today, though many continue to assert
that the incompleteness of the contract must appear from an inspection
of the writing itself. Fortunately, this latter rule is not actually applied
in deciding the cases. Mr. Wigmore says of looking exclusively at
the writing, "Such a proposition, however, is untenable, both on prin-
ciple and in practice. In practice, it is not enforced by its theoretical
advocates."

It must be apparent, however, that the result of Judge Mitchell's
efforts, while clearly designating the data which may be taken into
consideration in determining whether or not the parties intended all
of their agreement to be expressed in the writing, gives us no rule by
which we can evaluate the data and reach the critical conclusion—
what was the parties' intention? For this we must look elsewhere.

In another case the plaintiff sued on a written contract which pro-
vided that plaintiff should cut and deliver certain poplar logs to de-
fendant. The contract was much more elaborate than that in Thomp-
son v. Libby, just considered, but failed to contain any agreement as
to how and by whom the logs were to be measured. Could evidence
be received to prove an oral agreement which the parties had entered
into on that subject but which had not been included in the written
contract? The court permitted it to be proved, saying that the writings
were only informal memoranda exchanged relating to time, place, and
price and making certain the things usually most in debate and most
desirable to have made certain. The logs would require to be scaled; it
was natural to provide for a scaler, and the omission to name him in
the contract does not indicate that the parties agreed to do without a
scaler. The alleged oral agreement does not add to, subtract from, or
in any way vary the duties of either party. Therefore, the oral stipula-
tion could be proved.

Wigmore § 2431, p. 109.
Several remarks may be ventured principally to emphasize the questions involved and the court’s method of solving them. The contract while somewhat informal was really rather complete, dealing with all terms which might normally be expected to be found in such an agreement—except that no method of scaling or measuring the logs was provided for. The court noted that the logs would require to be scaled in order that the amount due for plaintiff’s service could be estimated, and therefore it would be natural to provide for a scaler. The court thus went entirely beyond the contract in its inquiry, but it certainly was mistaken when it said that to prove the oral term would not vary the contract. If that were not the effect of the oral term, why should either party wish to prove it? In fact, the court failed to demonstrate any principle by which a court, estimating the data before it, decides whether the parties intended the writing to be the sole memorial of the terms of their agreement, though it adopts a perfectly sound course in taking into consideration the matters which parties situated as these were would have to consider or might consider. As it was necessary that there be some understanding on the subject of measuring, the contract to that extent at least was only partial integration of their agreement. The importance of the case lies in the fact that the court looked beyond the contract itself and took into consideration the circumstance that parties situated as these were would naturally and normally have to take into consideration.

It is apparent that our great need is for a rule by which to determine whether the integration is partial or complete; and this is not changed by the fact that some of the cases are so plain that the result stands out, clear and unquestionable. Referring again to the excellent opinion in Thompson v. Libby, as supplemented in a later opinion by the same eminent judge, some courts say that the incompleteness of the contract must appear from an inspection of the writing. This does not explain the cases; and no matter how often such a rule may be repeated by the courts, it is not applied in the cases, for if it were, no parol evidence could ever be offered when the contract on inspection appears to be complete. The statement is frequently found even in actions brought on negotiable paper. Another statement which goes to the opposite extreme is to the effect that if the contract is silent on the subject of the proposed term, the contract may be supplemented. It is at once apparent that this abrogates the Parol Evidence Rule entirely when an attempt is made to add to a contract on a subject on which it is silent. This is clear because we certainly would not add a term on which there had been no agreement, but if the jury found that there
was such an agreement the term would be added. This, of course, obviates all need for a rule, for no term would be added on which there had been no agreement.\footnote{Williston § 698; Eighmie v. Taylor, 98 N. Y. 288, 294 (1885).} Fortunately, the courts for the most part pay only lip service to such a rule. Actually, the silence of the contract on a particular subject is merely of evidential value in determining whether the parties intended the writing to be the sole memorial of their undertakings.

Another statement frequently found in cases is that a collateral term may be added. But clearly this does not give us a rule of decision, for the term entirely lacks content. Whether one thing is collateral to another is largely a matter of degree or viewpoint, for as Williston says: “where an agreement contains several promises on each side, it is ordinarily easy to put any of them in the form of a collateral agreement.”\footnote{Williston §§ 638, 639, 640; Wigmore § 2430.}

Frequently the statement is found that the true consideration may be shown. This, however, is mere borrowing from the law with respect to deeds, where the consideration unless executory may be shown. But consider the usual executory contract—promise for promise, each promise being consideration for the other. Certainly whether the contract can be varied cannot depend on the position of the parties in the action. The plaintiff’s undertakings constitute consideration, while the defendant’s undertakings are promises. Plaintiff’s side of the controversy may be varied, but defendant’s may not. Of course there is no such rule, and no such result would be countenanced. But remarkable as it may seem, the statement is frequently made that consideration can be varied. The results reached in the cases are usually sound and are easily explained on other grounds.

“In general, then, it may be said that a recital of consideration received is, like other admissions, disputable so far as concerns the thing actually received; but that, so far as the terms of the contractual act are involved, the writing must control, whether it uses the term ‘consideration,’ or not, and therefore the terms are not disputable.”\footnote{Wigmore § 2433; Wood v. Southern Brick Corp., 173 Va. 364, 4 S. E. (2d) 360 (1939); Burke v. Sweeley, 177 Va. 47, 12 S. E. (2d) 763 (1941).}

But our quest is for a rule to guide us in determining whether the writing may be varied or added to. Without such a rule one wanders through the maze of decided cases and, aside from the cases in which there was a plain attempt to contradict what was already written, he
must get the feeling that the decision in each was made on an intuition or hunch and that what is stated as the rule governing the decision is no more than an attempted rationalization which, not infrequently, expresses what is actually belied in the decision the court is in the act of making. Of course, this is not to say the wrong decision was reached.

It is generally agreed that the question, is the writing complete or partial integration, depends on the intention of the parties.\(^63\) It is evident that whether the parties intended complete integration cannot be determined by direct proof as to this intent, for if this were opened up to direct proof there would be nothing left of the Parol Evidence Rule. One party would offer evidence, including his own testimony, as to what this intent was and the other party would do likewise. "Slippery memory" would do its fell work—and this is what the rule is devised to prevent. Consequently, it is now generally accepted that the proof of intent must be by indirection.\(^64\)

Of course, this intent may be specifically expressed in the writing; but unless the parties do this, "the very fact that the parties made a contemporaneous oral agreement will of itself prove that they did not intend the writing to be a complete memorial. The only question open would be whether such a contemporaneous oral agreement was in fact made.... Certainly the law does not permit this."\(^65\)

Then how can this all-controlling intent be arrived at? Two processes are necessary: It is now generally agreed that the contract must be read in the light of the purpose the parties were intending to effect by their negotiations—were they negotiating a loan of money, the sale of an automobile, of an apartment house, or of a manufacturing plant? If the subject of negotiation was a loan of money, we should be apt to assume that the note given was the sole memorial of their engagements; if they were selling an automobile, a promissory note would certainly not be considered the sole memorial.

But the court, by putting itself in the position occupied by the negotiating parties, does not thereby decide the question of whether the offered evidence is admissible? Our search is for a rule which will enable us to use the data which has been assembled.

After citing a multitude of cases, Wigmore takes this gloomy view of the situation:

\(^{63}\) Wigmore § 2430, p. 98; Williston § 633.

\(^{64}\) "This intent, of course, must be judged by an external standard," Wigmore, § 2430, n. 1.

\(^{65}\) Williston § 633.
"Even in the foregoing classes of transactions, it is rare that the circumstances of a particular case cannot justify a special result contrary to the ordinary one. Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed,—the general principle."

And he concludes with the suggestion that in almost all instances the application of the rule should be left to the judge's determination. Another authority speaks of the general run of opinions as "a rehash of contradictory cliches, worn smooth with unthinking repetition since they were first culled from the pages of Greenleaf."

But dark as the picture is, it is believed that in recent years there has been at least a very considerable approach to a rule which will reconcile most of the cases.

Turning first to Wigmore, his suggestion is:

"the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation."

This principle, he says, is used by most careful judges. The judge decides whether or not evidence to prove the questioned term may be admitted. If it is admitted, the jury decides whether the parties agreed on the omitted term.

With all proper deference the suggestion is offered that the above is of only limited assistance. If a written contract for the sale of chattels contains no warranty at all, may an oral warranty be included; or if the contract contains two warranties, may another be added? Williston's approach is this:

"the test of admissibility is much affected by the inherent probability of parties who contract under the circumstances in question, simultaneously making both the agreement in writing which is before the court, and also the alleged parol agreement.

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68Wigmore § 2442; see also Greenleaf § 305ff.
70Wigmore § 2430, pp. 98, 99; compare Williston § 699, p. 1837.
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. If that is true, the parol agreement is so far collateral and separate from the writing as to make it admissible.6

This view, the writer submits, has been taken up by the courts and has found expression in an increasing number of states as the true governing rule by which to determine the parties' intention. The first case to apply this rule definitely and clearly was decided in Pennsylvania in 1924. A store in an office building was rented to be used only for the sale of "fruit, candy, soda-water," and the sale of tobacco in any form was prohibited. Tenant sued to recover damages for breach of alleged oral contemporaneous agreement that he should have the exclusive right to sell soft drinks in the building. The question was, could this oral term of the lease agreement be proved? The court decided against the tenant since it would have been the natural thing to have included the promise of exclusive rights.7

There was no opportunity for equitable relief by reformation for there was no contention that the term had been omitted from the lease by mistake.

A most interesting case was decided in New York in 1928.71 Here there was an elaborate written contract for the purchase of a farm—buyer to pay purchase price in manner described, also to pay her proportion on mortgages, insurance premiums and water meter charges, to make a survey of the premises if desired; seller to sell the farm and the personal property on the farm, which he represents he owns, to credit amounts paid on contract as part of purchase price, to assume risk of loss until deed is delivered, and to pay broker's commission; cost of examining title to be a lien on the property. Later the property was conveyed to the purchaser who now sues the seller for the specific performance of an alleged oral contemporary undertaking to remove an ice house which the seller owned on property across the road and which the purchaser had objected to. Could this oral stipulation be proved? The court divided five to two, the ma-

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6Williston § 638. See also Restatement of Contracts (1932) § 239 (B).


majority holding that the claimed oral term could not be proved. The prevailing opinion by Andrews, J., and the dissenting opinion by Lehman, J., are excellent. Both profess to agree completely on the test to apply and differ only in the application of the test. The oral term to be admitted must be one that parties would not ordinarily be expected to embody in the writing. The prevailing opinion found that, "were such an agreement made it would seem most natural that the inquirer would find it in the contract." But the dissenting opinion found that the contract, though it was complete on its face in regard to the subject of the conveyance, did not show that it was intended to embody negotiations or agreements, if any, in regard to a matter so loosely bound to the conveyance as the removal of an ice house from land not conveyed. This would seem to be an exceedingly close case, and it would not be difficult to agree with either position taken.

Judge Lehman makes this statement which it would be well to remember: the fact that the parol agreement is established is not a factor which may be considered in determining the competency or legal effect of the evidence. No question was raised as to the effect of the deed on the contract.

In a later case the New York court, applying the same principle, refused to allow a party to a contract for the sale of real property to prove an oral undertaking to make repairs and improvements. The decision here was unanimous.\textsuperscript{72} Connecticut\textsuperscript{73} and Maryland\textsuperscript{74} seem to have adopted the same rule, which it is believed comes closer to providing a genuine rule of decision based on an understandable principle than does any other that has been suggested.\textsuperscript{75}

To restate, the procedure is this. Having in mind the subject of the parties' negotiations and having a writing before us, we ask ourselves this question: Would parties situated as these were and doing what these parties were doing, reaching what is at least partial integration, have naturally and normally included this unexpressed but asserted term if it had actually been agreed upon, or might they have left it to parol proof as a part of the whole contract? If normal parties

\textsuperscript{72}Ball v. Grady, 267 N. Y. 470, 196 N. E. 402 (1935).
\textsuperscript{73}Cohn v. Dunn, 111 Conn. 342, 149 Atl. 851, 70 A. L. R. 740 (1930).
\textsuperscript{74}Markoff v. Kreiner, 23 A. (2d) 19 (Md. 1941).
\textsuperscript{75}See full note, Parol Evidence Rule: tests for determining whether entire agreement is embodied in the writing (1931) 70 A. L. R. 752; 20 Am. Jur., Evidence § 1138.
would have included it and these parties did not, then it is not a part of their agreement and the court should refuse to permit it to be proved. If normal parties might have left it as the subject of separate statement, then the court should admit it.

It must constantly be borne in mind that what we want is the intention of the parties and yet we cannot prove it by direct evidence. It must be inferred from other data.

Other important principles to be borne in mind are: 1. Partial integration, so far as it has gone, can no more be varied than can complete integration. 2. A written contract may be expressed in more than one writing. 3. Several contracts, some in writing and some oral, may be entered into at the same time. 4. The Parol Evidence Rule applies when the parol term is offered in an action brought on the written contract, either as a supplement to the contract, or as a defense to plaintiff's action, and applies as well when an effort is made to bring an action on the parol term. 5. Terms which are read into a contract by the law can no more be varied than can the terms written by the parties. And the following may be of assistance: The attempt may be made to introduce evidence, 1. To contradict directly. 2. To contradict inferentially or indirectly. 3. To add to the writing.

When the evidence is offered for the first purpose the court is not apt to look very closely for a general rule, and the same is true but to a less degree when the intruder contradicts only indirectly. But in the third type of case we need an underlying rule, and it is submitted that the rule stated is the true one, in fact the only possible rule which can give us a real general principle to which we can at least attempt to refer our problem for solution. It will be referred to herein as the modern rule.

It cannot be pretended that this will give a certain and sure solution of all problems. No matter what rule we pretend to follow, not all courts would arrive at the same conclusion. To quote what Judge Cardozo said in another connection: "What is needed, in fact, what is demanded, is a common sense accommodation of judgment to kaleidoscopic situations."

**Virginia Cases**

Proceeding to a consideration of Virginia decisions and setting aside for the time being cases which involve negotiable instruments, cases which involve the application of the rule that a deed may be

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*Williston § 631, p. 1814.*
shown to be a mortgage, cases which involve usages, and the rules which govern when a third person, not a party to the writing becomes involved in litigation on it, we consider first Brent v. Richards,27 decided in 1846. Plaintiff had sold a slave to defendant, and had given a bill of sale which warranted the slave sound and a slave for life. Later plaintiff sued defendant for breach of an oral undertaking to permit plaintiff to repurchase the slave. The court admitted the evidence, holding that the oral term "was neither inconsistent with, nor contradictory of the bill of the sale. At most it is but additional." This has always been considered a very doubtful case. One might amuse himself by applying to its solution the many rules of thumb which have been enunciated by the courts. A decision either way might very well be reached. But applying the modern rule, would parties situated as these were, contracting for the sale and purchase of the slave and providing in a writing for the transfer of title with two warranties, have naturally and normally included the provision for re-purchase had that been really agreed on? It would seem that they would, in which case the parol term should have been excluded. The problem would obviously have been different had the bill of sale served merely to transfer title. But it did much more than that; it contained two contractual obligations, and it would seem to have been natural in that case to include all of the terms of the entire transaction. In Towner v. Lucas,28 decided in 1857, we have one of our best known cases. Obligor, when sued on a bond which he executed with others, endeavored to show that obligee gave him oral assurance that he would never be called on to pay the bond, and also promised orally to give him security against liability. The evidence of course was excluded. It was clearly a case in which the evidence would directly contradict a term in the contract. The case is remembered principally for the unusually fine opinion of Allen, J., which discusses the whole subject very fully. The same fact situation has been presented in many cases, some of which have been referred to already; others will be noted later.

When a deed conveys exactly what the parties intended it to convey, the grantee cannot show that he paid for more land which grantor orally agreed to convey to him later. All previous negotiations were merged into the deed. This case clearly establishes the principle that though it be shown that the term was deliberately left out of the writ-


28 54 Va. (13 Gratt.) 705 (1857).
ing, still the term cannot be established by parol evidence. There are numerous cases involving deeds, and contracts to sell real property which may have been followed by conveyance. When a land owner contracts with a railroad company to sell a right of way across his land and provides in the contract for a certain right of way across the track but the deed pursuant to the contract fails to mention such reservation, parol proof of this term will not be admitted. The deed merges the contract and as the omission was purposely made, there can be no reformation. Aside from any technical merger or estoppel, this conclusion can easily be explained by the modern rule. Parties would naturally put such a reservation in their deed. If they do not, then it is assumed there was no such agreement. In a well known case plaintiff, who had conveyed land to a railroad company, sued the company on an oral undertaking to construct and maintain a pass under its track for use of plaintiff. In a very good opinion the court refused to permit proof of this alleged undertaking. The real question would seem to be, would this undertaking have naturally and normally appeared in the deed if it had been a part of the real undertakings of the parties? While the court reiterated several of the now discredited tests for determining when integration is complete and parol evidence should be excluded, the conclusion is sound, for to prove his claim plaintiff would have to detract from the interest conveyed. Certainly we should expect to find such interests provided for in the deed. It is for the same reason that a tenant under a written lease cannot prove a parol agreement that he should have the right to remove buildings he might erect on leased premises. And where there was a contract for sale of land which provided for reservation of possession by the grantor until a future date, but the deed when executed contained no reference to this reservation, the grantee was entitled to immediate possession. The court said that such a provision not contained in the deed conflicted with the plain legal intent of the deed. Such a detracion from the legal interest conveyed would naturally have been included in the deed.

But it is not always true that where there is a written contract and a subsequent deed the latter merges the contract and abrogates it en-

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80 Shenandoah Valley R. Co. v. Dunlop, 86 Va. 346, 10 S. E. 239 (1889).
82 Tait v. Central Lunatic Asylum, 84 Va. 271, 4 S. E. 697 (1888).
tirely. Whether or not it does so is governed by very clear principles. A deed of conveyance has its particular function, to convey the property and to set out the covenants. When there has been a prior written contract, it will in all probability contain many provisions which, being temporary in character, one would not expect to find in the subsequent deed. In such a case the contract as to those terms survives the deed and its terms may be enforced. But if the parties so desire they may include these subordinate and incidental provisions in their deed; if they do this they expose themselves to the danger of having the Parol Evidence Rule exclude all such which were not inserted in the deed. Here the parties evidently intended the deed to be the final expression of their entire engagements. Persons who inserted some of these subordinate provisions would be likely to insert all. It will be recalled that in the leading New York case, *Mitchill v. Lath*, already discussed, the deed had been delivered, and the question in issue was whether a term could be added to the written contract. There is a written contract, later a deed, and then it is attempted to give effect to an oral undertaking found neither in the contract nor in the deed. The procedure is interesting. The deed is first examined; if it contains no provisions except those which one would naturally expect to find in a deed as a permanent muniment of title and if the oral term in question has reference to something else, the deed does not invalidate the term and we proceed to examine the contract to determine if the oral term can be added to it. Here one may struggle with the many rules which the courts have applied in determining whether the parties intended the writing to be complete or only partial integration of their agreement. Applying what has been here called the modern rule, we ask ourselves these questions, what is the nature of transaction the parties were engaged in? What is the writing they agreed on? Would parties situated as they were and doing what they were doing, have included the questioned term in the writing if it had been agreed on? If the answer is yes, the evidence is excluded; if no, it is admitted.

A Virginia case decided in 1935, presented the following interesting situation: Property was conveyed to plaintiff by a deed in the usual form containing the usual covenants and no more. The deed

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84 Williston § 645.
85 Note 71, supra.
was made pursuant to a previous written contract for the sale of the house which contained the usual terms, a description of the property, the time of possession, the time and amounts of payments, and provided for a fence to be built around the rear of the house. Later the purchaser sued the seller to recover damages for failure to correct certain defects in the building and to furnish a policy of title insurance which the seller by oral agreement had undertaken to do but which term the parties had intentionally left out of the contract.

Applying the simple principles just stated, it would seem perfectly clear that these oral undertakings could not be proved. The deed should not exclude them for evidently the parties did not intend the deed to do more than convey the property; but in the contract it would seem too clear for argument that they intended to include all of the terms of their entire agreement. This was simply an attempt to add to a written contract. The court, however, decided that the oral undertakings could be proved, giving as reasons that the parol terms were collateral, that consideration can be varied, and that there were two contracts, one oral and one in writing. The first two grounds for varying writing have already been commented on. It is enough to say of the third that this leaves nothing of the Parol Evidence Rule, for the same could be said of any other case in which the offered term did not contradict something already found in the contract. The case is in direct conflict with the two New York cases already discussed.87 The court seems to fall into the grave error of considering this as an attempt to vary a deed,88 when it was really an attempt to vary a contract; and it is distressing to find the statement that the true consideration agreed upon may always be shown.89 Evidence is not admissible to prove that bonds secured by a deed of trust are payable only out of proceeds of mortgaged property.90 When in a lease of summer resort property for a period of five years the lessee convenanted to make certain repairs and improvements but no provisions were made as to when these repairs were to be completed, evidence to prove that it was agreed that the repairs were to be made before a certain date was excluded. The court said the law gave the tenant until the expiration of the lease to fulfill his contract for repairs, and therefore

87Notes 71, 72, supra.
proof of another and different period than the expiration of the lease would contradict the writing. This familiar principle finds frequent application in cases dealing with negotiable paper.

In a later case, by written contract defendant agreed to sell to plaintiff 400 barrels of potatoes, delivery beginning July 1st and extending to July 20th, plaintiff to deposit in bank $1.00 per barrel to guarantee acceptance of potatoes by plaintiff. When the purchaser sued for non-delivery, the seller offered to prove that by oral agreement, the deposit was to be made as soon as the contract became effective, and as the deposit was not made the seller was not bound to make the delivery. The deposit was in fact made on June 28th. The court very properly said it was essential in the first place to determine exactly what the contract was as it was expressed in the writing; in other words, the first problem is that of the proper legal construction of the written terms. The court then proceeded to hold that what the parties intended was that the deposit should be made before the delivery of the potatoes was to start and this the contract fixed as July 1. The offered parol term would contradict this written provision and therefore could not be proved. The court very effectively disposed of the claim that this was merely an attempt to show a condition precedent to the taking effect of the contract by pointing out the distinction between a term of the contract and a condition precedent to any binding obligation upon either of the parties—a distinction which the dissenting opinion missed entirely. No case could better illustrate the fact that the process of construction or interpretation on the one hand and the operation of the Parol Evidence Rule on the other are often complementary to one another. When the construction of the terms used is fixed upon, the application of the Parol Evidence Rule may be very plain. In Woodrum v. Bonsack Machine Company, decided in 1891, a bill in equity was filed to enjoin Woodrum from violating a contract not to compete with the company. He had entered into such a contract in 1888, but in 1889 he and the company entered into another written agreement whereby the latter, in consideration of $20,000, agreed that all "matters and things embraced by said contract of July 10, 1888 were fully adjusted and settled and the con-

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[Nota Bene: The text concludes with a list of notes and references.]
tract itself was ended and settled." But in the face of this language the company contended that it should be permitted to show that Woodrum's agreement not to compete was not discharged. The court dismissed the bill. This was really a problem of construction. If the language used is given its clear meaning, the parol understanding would be clearly in conflict with it. Whether a full examination of all the circumstances might not have warranted the court in giving another construction to the language used is not our present problem.

In *Scott v. N. & W. Railway Company*, 95 decided in 1893, Scott contracted in writing with the company to furnish 170,000 cross-ties to be placed on the line of the road where they were wanted, but later he offered to prove a parol term that 20,000 of the ties were to be hauled by the company to the place where they were wanted. No clearer case of contradicting the plain terms of the writing can be imagined, and of course the evidence was excluded; but the court's reasoning is interesting. It said, if there had been any such agreement why was it not inserted in this formally prepared and elaborately written contract. This seems to be getting us into a modern atmosphere. It would have been the natural thing to insert this term if it had been agreed upon. All we need is to shift our attention from these two parties to normal parties situated as they were, and we have our modern rule.

In *Slaughter v. Smith*, 96 decided in 1899, we have one of our best cases. This was a suit in equity to enforce an alleged parol term of a contract otherwise in writing. The transaction was the sale of a drug store and business. The writing, which was signed by the buyer only, was in the opinion of the court "a clear and complete memorial." It set out the purchase price, strict terms for its payment from the proceeds of the business, the purchase of additional stock; it provided that the buyer was to receive a clear bill of sale when the purchase price of $3500 was paid, the business to remain that of the purchaser until this amount was paid. The parol undertaking on which the suit was brought was the seller's promise to remove from the city and discontinue the drug business in the neighborhood. It might be interesting to pause here and review the cliches which the court might have utilized. The undertaking is collateral; it can be proved because consideration can always be varied; the writing is silent on

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the subject, therefore the undertaking may be proved. (The court said of the latter: "On that assumption the rule which excludes parol evidence as a means of adding to the written contract would be entirely abrogated.") Or it might have said that this was a separate agreement. The court said none of these things except to discredit them as rules of decision, but unfortunately it did say that the only evidence of the completeness of a written contract as a full expression of the terms of the agreement is the contract itself. Thus, it paid lip service to a rule which no court follows. The opinion on the whole is one of our best, the conclusion that the parol term could not be proved is undoubtedly sound, but it is to be feared that this sound conclusion was reached first and most of what the court had to say was in justification of the conclusion and failed to include the rule which was applied to reach the conclusion. Applying the modern rule: would parties negotiating as these parties were, naturally and normally have included this term in their contract if it had actually been agreed upon? The answer seems clear, that they would have done so; then the parol term cannot be proved. This seems so perfectly clear that it is surprising to find Williston apparently approving the admission of such evidence.\textsuperscript{97}

\textit{Farmers Manufacturing Co. v. Woodworth}, decided in 1909,\textsuperscript{98} was an action brought on an oral warranty when there was a written contract. To prove this warranty would not contradict anything in the writing but it would add to it, and very definitely vary it. The contract which was signed by both parties provided for the manufacture of an amusement device, called a "revolving parachute," intended to be erected on the grounds of the The Jamestown Exposition. Defendant contracted to build the steel structure with sixty feet of screw as per plans submitted, for $5,000; plaintiff was to transport all materials from defendant's plant to place where the device was to be erected; the structure was to be ready for delivery by September 15; brake and air cushion were to be sufficient for purpose intended; metal was to be used; and black iron work was to be covered with two coats of paint. Unfortunately, the structure when erected appeared unsafe and the Exposition officials prohibited its operation. Plaintiff brought

\textsuperscript{97}Williston § 642, p. 1844, n. 4, citing many cases.
action to recover damages for breach of an oral warranty that the device would be safe and suitable for its intended use.

The court disposed of the case rather summarily. It said that the letter which composed the body of the alleged written agreement was of the most general character and bore internal evidence of the fact that to be intelligible it must be read in the light of outside matters in the minds of the parties. The court found the term "steel structure" a term of general significance which conveys no definite idea of what was intended, and no material aid was gathered from the inspection of the plans referred to. They were mere tracings of the proposed device. The court thought there were necessarily other provisions of the contract which did not appear in the writing and thus permitted the proof of the oral warranty.

The suggestion is ventured that the court confused interpretation of what was written, with adding to the writing. The reference to "steel structure" and to "plan submitted" no more made the contract incomplete than does the reference in a deed to a map or plat, or the reference in a building contract to outside plans and specifications make such documents incomplete. Each is merely a reference to an outside source for the purpose of interpreting what is written, and the fact that interpretation fails does not afford a ground for adding terms to the contract.

In a later case in which a contract called for the delivery "of coal of such quality as is required, as of this date, by the Soldiers' Home at Johnson City, Tennessee," Judge Chichester in an unusually good opinion said, "parol evidence was competent to identify these specifications, but for no other purpose." It would seem very clear that the fact that it is necessary to go outside of the writing to interpret terms found in it is no justification whatever for allowing proof of an oral term in no way connected with the identification of the terms which need interpretation. The fact that terms need identification or interpretation does not show that the parties intended the writing to be only partial integration. It is clear that the modern rule would have excluded proof of the warranty.

In litigation over an elaborate separation agreement, the husband was not allowed to prove the wife's oral undertaking not to engage in certain improper behavior. This needs no comment. Epes, J., said

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it is not permissible to insert into a contract a condition or provision for the termination thereof which is not included in the contract.\footnote{Gloth v. Gloth, 154 Va. 511, 153 S. E. 879 (1930).}

A contract of employment which the court construed as providing for employment at will could not be varied by proving an oral agreement for thirty days notice of termination of employment.\footnote{Title Ins. Co. v. Howell, 158 Va. 713, 164 S. E. 387 (1932).} The cases follow the well-established rule that one cannot be permitted to avoid liability by proving that he was merely an agent.\footnote{Fentress v. Steele & Sons, 110 Va. 578, 66 S. E. 870 (1910).}

_Harvey v. R. F. & P. Railway Company_, decided in 1934,\footnote{Harvey v. R. F. & P. Ry. Co., 162 Va. 49, 173 S. E. 351 (1934).} is one of our strongest cases. Plaintiff was injured in the course of his employment by the railway company. In a document in the familiar form used in such instances, in consideration of $500 he released his employer of all liability. Later he sued his employer for breach of an alleged oral term of his agreement by which he asserted that as part of the consideration for the release the company had agreed to pay hospital bills and give him employment for life. The release was executed only by the plaintiff. Gregory, J., in a very careful opinion held that the oral term could not be proved. It would have been very easy to dispose of the case by applying the modern rule that parties situated as these were would almost certainly have included in the writing all of the compensation that plaintiff was to receive in exchange for his release of the company of liability. While the court did not do this, it dealt very effectively with several of the reasons usually given for permitting oral terms to be added, any one of which would have permitted proof of the plaintiff's claim; but in particular it dealt most effectively with the contention that the true consideration can always be shown. It is regrettable that only one year later the court returned to that heresy.\footnote{Sale v. Figg, 164 Va. 402, 180 S. E. 173 (1935).} However, four years later,\footnote{Wood v. Southern Shale Brick Corp., 173 Va. 364, 4 S. E. (2d) 360 (1939). See comprehensive note (1936) 100 A. L. R. 1, 17.} the court again adopted the true view on that subject, in an opinion which put the matter at rest, for the present at least. The court adhered to this position in a case decided in 1941.\footnote{Burke v. Sweeley, 177 Va. 47, 12 S. E. (2d) 763 (1941). Compare Bruce v. Slemp, 82 Va. 352 (1886); Summers v. Darne, 72 Va. (31 Gratt.) 791 (1879).}

Our court has never succumbed to the temptation, which has overcome the judgment of other courts, to hold that the failure to
perform an unexpressed term is fraud and that as fraud works an
exception in the Parol Evidence Rule the unexpressed term may be
proved and full effect given to its breach. This reasoning is strik-
ingly circular and in addition it assumes that fraud is an exception
to the rule. It is certainly not. The fraudulent inducement may cause
the contract to be made, but it is never a part of the contract. The
ways along which a ship is launched are not part of the ship.

It is hardly necessary to cite cases to the point that the rule does
not prevent proof of fraud. Since our court has recently taken the
position that an innocent misrepresentation will support an action
for damages, it follows that if fraud can be extended to cover a
promise of future performance, the rule that a parol warranty can-
not be added to a written contract stands in danger of considerable
modification; or, at least, its effectiveness will be greatly modified.

Parties may enter into two or more contracts at the same time, and
they may enter into only one contract which may be found in
more than one document, or it may be part oral and part in writ-
ing. It may be difficult to ascertain what the parties were really in-
tending to do. When the two contracts have to do with different sub-
ject matters, the case may be clear. On the other hand, it is difficult
to distinguish a contract which exists in two parts, both in writing,
or one oral, from a writing which is a complete integration of what
the parties intended but which one of the parties is attempting to
alter or add to, in violation of the Parol Evidence Rule.

The intention of the parties expressed in the writing that it is
the sole memorial of their agreement should control, but not even

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109 Union Trust Corp. v. Fugate, 172 Va. 82, 200 S. E. 624 (1939); Note (1939) 1 Wash. & Lee L. Rev. 98.
110 Wigmore § 2434; Williston § 643.
that was effective in one Virginia case.\(^{113}\) In another case a deed and a writing were found to be parts of the same contract.\(^{114}\) In another a contract for the sale of real estate and an oral agreement to do certain work to complete the dwelling thereon and to install a furnace in it were held parts of one contract.\(^{115}\) In an interesting case a note given for the purchase price of corporate stock and a letter executed at the same time in which it was provided that the note might be paid from dividends on the stock\(^ {116}\) were held to be parts of one transaction. An interesting problem in construction arose when it became a reality that there would be no more dividends. A clear case is that in which an application containing terms on which a loan was applied for and the note given for the loan were both parts of the entire agreement.\(^ {117}\) A note for $790, payable on demand, was attached to a writing which showed that the transaction was the sale of lots of land for $1190, $400 of which was paid in cash and the $790 evidenced by the attached note was to be paid to the seller out of proceeds of the lots as they were sold. Clearly these documents were part of one entire transaction and both could be proved.\(^ {118}\) Note that the terms of the agreement then became conflicting. This, however, presented a question for interpretation only. But in a case already referred to there was a deed conveying the premises, a contract of sale which contained what might ordinarily be expected to be included in such a writing, and an oral undertaking to make alterations in windows and to furnish a title insurance policy, and the court permitted the oral terms to be proved as part of the complete transaction between the parties.\(^ {119}\)

We can say with respect to this troublesome question that some problems are readily solved. The two transactions were clearly separate and distinct; each must be considered on its own merits. But the parties may plainly stipulate in one writing that this is their entire agreement; this should suffice to exclude everything else. Or writings may be physically attached or they may clearly refer to one another. But there are other cases which it is impossible to bring within any rule of decision. We feel that they can be no more than unreasoned judicial hunches, and what is said about the writings or the writing and

\(^{113}\)Note 112, supra.
\(^{114}\)Note 112, supra.
\(^{116}\)Long v. Mayo, 156 Va. 185, 157 S. E. 767 (1931).
\(^{117}\)Richmond Postal Union v. Booker, 170 Va. 129, 195 S. E. 663 (1938).
\(^{118}\)Nottingham v. Ackiss, 107 Va. 63, 57 S. E. 592 (1907).
the oral term being parts of one contract is only a make-weight for a decision already determined upon.

**Cases Involving Negotiable Instruments**

There are several topics which warrant separate treatment. The first is the application of the Parol Evidence Rule to negotiable instruments or to transactions which include such instruments. Here Wigmore and Williston have given us some of their best work. The cases may involve varying or modifying the relations of the parties as they appear on the instrument; or they may involve varying or modifying the terms of the document or the undertakings therein; or they may have to do with supplementing the document by showing additional terms of the entire jural act of which the negotiable instrument may be only a part. Further, an act may be in two or more writings and the note may be only one of them. If all writings are part of one entire act, then all can be proved and if this produces inconsistencies, as it may, the problem is one of interpretation. A Virginia case of that type has just been referred to.

Referring again to the modern rule already suggested, when such a problem is presented we ask ourselves these questions: 1. What was the subject of negotiation between these parties? 2. What is the writing they have produced? 3. Would normal parties, situated as these were, if they had agreed on other terms of their act, have normally and naturally included them in their writing—in this case a negotiable instrument—or might they have left them to independent expression? These parties desired to use a negotiable instrument. They knew that the content of such an instrument must be closely limited or it may lose its character as a negotiable instrument. Therefore, it is very easy to conclude that parties situated as these were would very naturally have left the terms in question out of the negotiable instrument. Then the court would permit evidence of the questioned term, and it would be for the jury to say whether the term was actually agreed upon. But we must also bear in mind that so far as they have reduced their act to writing, the Parol Evidence Rule protects it, and, in addition, the terms of what they have written must be interpreted.

The subject is too large to be fully considered here in detail. After referring to the classical expositions of Wigmore and Williston, we can do no more than consider some of the Virginia causes.

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1. Wigmore §§2443, 2444, 2445; Williston § 644.
2. Note 118, supra.
It is important to remember that the application of the rule may be gravely modified or controlled by the principles of law controlling in the field in question—in this instance in the field of the law of negotiable instruments. Thus, one who signs a negotiable instrument without any indication of a representative capacity is held individually, and there is a statutory rule as to one who indicates more or less clearly that he signs in such a capacity. Joint makers may show that as between themselves the relation is that of principal and surety. It is familiar law that despite his plain promise to the payee, the maker can show that he signed for accommodation only. Further examination into this phase of the subject would carry us too far into negotiable instruments law.

Many cases already discussed on the principle that a condition precedent to the taking effect of the contract may be shown, involved negotiable instruments.

The cases in which a party attempted to contradict or modify his undertaking are many. They fully bear out Williston's terse statement: "A parol agreement that an instrument need not be paid, or need not be paid in a certain contingency, or may be paid wholly or partly in merchandise or services, or shall not be sued on when due, or shall be renewed, is also in violation of the parol evidence rule."
One of the leading cases is *Woodward, Baldwin & Co. v. Foster*, decided in 1868.\(^{130}\) Defendant who had indorsed a bill of exchange offered to prove a parol agreement between himself and plaintiff-indorsee that defendant was to retain in his hands the amount paid him for the bill until it was ascertained if the bill was accepted and paid; if it was not accepted and paid, the bill was to be returned to him and he would refund plaintiff that amount. This evidence was rejected. Joynes, J., said in his excellent opinion: "Though the writing consists only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement than if the whole contract had been fully written out in words." While it would be preferable to preserve the distinction between evidence which contradicts directly or inferentially the terms of the instrument and evidence to prove all of the terms which the parties intended to include in their complete memorial, the distinction cannot be made in every case. It is easy to say that the parties did not intend to include a term which contradicts the undertakings in the negotiable instrument; the case is not so clear when there is no contradiction, but only addition. In fact, unless the case is one in which we might expect to find all of the terms of the agreement in the negotiable instrument (and these instances are few), the field of supplementation is very broad, and the evidence if excluded suffers that fate because it violates our subordinate rule that the Parol Evidence Rule protects partial integration as far as it has gone. The maker of a note cannot defeat liability by proving that he was to remain on the land conveyed by deed of trust to secure the note and work for the creditor for a certain period after which the note was to be considered paid. Here no doubt the oral agreement to work for the creditor for pay could have been proved, but the evidence that the work was to be accepted as payment contradicted the promise in the note.\(^{181}\)

When a note was given for cattle purchased, an oral undertaking to repurchase the cattle and thus discharge the note could not avail against a holder in due course, and the court intimated that it could not have been proved between the original parties.\(^{132}\) But no doubt

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\(^{131}\) *Rector v. Hancock*, 127 Va. 101, 102 S. E. 663 (1920). Judge Kelly's opinion is excellent.

the promise to repurchase could have been proved to establish a cause of action for breach of that promise. One would never expect to find all of the terms of this entire undertaking in a negotiable note. It is for this reason that consideration can be gone into fully. We should not expect to find this in a note. By contrast consider the case in which there was an elaborate contract reserving title to an automobile and providing for cash and deferred payment evidenced by notes, and the buyer offered an oral understanding that the price of the automobile would be reduced if there was a drop in the market price of the car. It was not necessary to consider varying the undertakings in the notes; this was a plain attempt to prove an oral term when the contract must be assumed to include the entire agreement. And, as already noted, when the note and writing are physically attached to one another or when the note and writing refer one to another, there is no problem of the Parol Evidence Rule presented, but only a question of construction. There is obviously a radical distinction between a case in which there is a contract put in writing by the parties which contains inconsistencies and contradictions and a case in which it is attempted to introduce parol or even written evidence which would create such contradictions or inconsistencies. The first presents only a problem of interpretation, though the parties may have expressed themselves in such terms as may defy interpretation. The latter presents a problem under the Parol Evidence Rule.

**Cases Involving Deeds Given as Mortgages**

A deed absolute on its face may be shown to be a mortgage. Probably there is no more familiar axiom in our law. How can this be reconciled with any general rule? Here again Wigmore and Williston, giving us the full benefit of their scholarship, have proposed several courses of reasoning which might account for the rule. All are interesting. But in the writer's opinion it is safe to say only two things: 1. The chancellor has never permitted the Parol Evidence

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135Nottingham v. Ackiss, 107 Va. 68, 57 S. E. 592 (1907).
137Wigmore §§ 2437, 2438.
138Williston § 685; Restatement of Contracts (1932) § 240 (1) (B). See also Smedley and Blunk, Oral Understandings at Variance with Written Deeds (1939) 34 Ill. L. Rev. 189.
Rule to stand in the way of proper equitable relief. 2. No more firm principle of equity can be found than that the chancellor will go behind any front to ferret out the fact that the transaction, no matter how it may be expressed, is really a security for debt and will accommodate his relief accordingly. We proceed to examine the Virginia cases, for here the principle has been given fullest application. The principle applies to transfers of all sorts. An absolute assignment may be shown to be a mere security for debt, and a deed may be shown to be on trust to pay grantor's debts. It seems that though there is a contract in writing for purchase of land, setting out in detail how the purchase price is to be paid, an oral undertaking to assume a deed of trust on the premises may be proved. Naturally, when the contract provides for assumption of a deed of trust, but the deed when executed does not mention it, the term in the contract will be given effect. It is well settled in Virginia that a parol express trust may be proved. This was decided in 1915, after very full consideration and has been steadily adhered to since that time. Cases involving attempts to clog the equity of redemption, as well as the great group of cases involving constructive trusts, are no doubt governed by similar principles. It seems not unlikely that ultimately it may be found necessary to prune this luxurious growth and bring the entire subject under statutory regulation.

**Cases Involving Usages**

In the whole subject no more interesting topic is found than that of usages. By usage is meant habitual or customary practice. It is distinguished from custom which is "such a usage as has by long and uniform practice become the law of the matter to which it relates." Usage may present (1) simply a technique for defining a term found in the contract; (2) it may afford the medium for interpreting

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188Didier v. Patterson, 93 Va. 534, 25 S. E. 661 (1896).
190Goode v. Bryant, 118 Va. 314, 87 S. E. 588 (1915).
192Young v. Holland, 117 Va. 433, 84 S. E. 637 (1915).
an undertaking found in the contract; (3) it may serve to add a term to the contract. Thus, in its first two meanings, only a problem of interpretation is presented, but the third presents a real problem in the Parol Evidence Rule when it aids in fixing upon the identity of the terms of the jural act.

To illustrate, when a contract provides for "Winter Wheat Bran," and the purchaser refuses the product tendered because it is not all bran, as it contains an adulterant, a usage may enable the court to identify the term used with a commercial product which contains a certain amount of adulterant.\textsuperscript{147} When a mason claims pay for work done under a contract which provides pay for cubic feet "measured in the wall," a usage may cause this term to mean that the corners shall be counted twice.\textsuperscript{148} When, after performing his contract to excavate a cellar, the contractor insists that the earth removed belongs to him, a usage may enable him to make good his claim. All three applications of usages are demonstrated in these three simple illustrations. But in addition, we should note the rule of thumb that a usage will not be applied if it is unreasonable. This means probably only that the usage may not be applied if it contradicts a term found in the writing to such a decided extent that it cannot reasonably be inferred that the parties intended that such usage should be a part of their contract. A leading English case makes the unanswerable point that if it did not vary the contract there would be no reason for bringing it into the case.\textsuperscript{149}

We are not primarily concerned with usage which presents only a problem in interpretation.\textsuperscript{150} Usage presents one of the problems of the Parol Evidence Rule when by its operation it adds to a contract; and the underlying principle seems to be the same as our modern rule, applicable over the whole subject. The assumption is that "the parties have not set down on paper the whole of their contract in all of its terms, but only those which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex,\textsuperscript{151}

\textsuperscript{147}Walker v. Gateway Milling Co., 121 Va. 217, 92 S. E. 826 (1917).
\textsuperscript{149}Brown v. Byrne, 3 El. & Bl. 709 (1854).
\textsuperscript{150}An Oregon court made the following significant observation: "Thus one is justified in saying that the language of the dictionaries is not the only language spoken in America." Hurst v. Lake & Co., 141 Ore. 306, 16 P. (2d) 627 (1932).
and according to which they must in reason be understood to contract, unless they expressly exclude them."151

The refusal of the courts to recognize usages which are unreasonable or which conflict with terms actually found in the contract or which would countenance a practice which is contrary to the standards of fidelity required by the law in the particular relationship are very readily referred to for support to this principle.

After referring to the work of Wigmore and Williston152 for general discussions of this most interesting subject, we may proceed to note some of the many Virginia cases. While it cannot be pretended that the courts have followed the division already suggested, it would probably tend to clearness if they did. And there are cases to be noted later in which it is critically important to make the distinction between interpreting and supplementing. The effect of usages in defining terms is illustrated by the case already cited concerning "Winter Wheat Bran." And in a contract to "excavate" for a foundation, the word can be interpreted to mean removing earth only and not stone.153 The letters F. O. B. in a sale contract are interpreted to mean "free on board." This is so generally recognized that most courts will take judicial notice of it,154 but this interpretation generally gives rise to a further problem of interpretation or construction, and here there may be found a usage which will aid in interpreting not a mere term but an undertaking. For example, "F. O. B. sight draft against documents" means free on board, and such delivery is condition precedent to right to demand payment. It does not concern the question of when title passes.155 While the language "F. O. B. Suffolk" in a transaction when property is in Suffolk and buyer in Norfolk means that Suffolk is the place of delivery, title passes there, and an oral undertaking to make delivery in Norfolk will be excluded. The case presents problems of interpretation as well as of the Parol Evidence Rule.156

An example of cases which have to do with interpreting an under-

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152Wigmore §§ 2440, 2464; Williston c. 23 §§ 648-662; and see excellent Note (1922) 22 Col. L. Rev. 741; Restatement of Contracts (1932) § 245 and following.
154Notes (1921) 11 A. L. R. 653; (1936) 100 A. L. R. 1470.
taking is found in a case involving a contract for brick work, to be
paid for at a certain price per thousand; such a term will be inter-
preted pursuant to a usage to ascertain the number of bricks laid by
allowing twenty-two bricks per cubic foot, rather than by counting
the bricks actually laid.\textsuperscript{167}

When lumber of a certain grade was purchased to be shipped and
was refused at delivery point because of a usage that such grade of
lumber should not have been put in transit until it was "shipping
dry," it is not entirely clear whether this was a part of the description
of that grade or whether the usage added a term to the contract as to
when such goods should be shipped.\textsuperscript{168} But we clearly have cases of
the third type when to an agency contract to sell land, usage adds an
undertaking to pay commissions after a certain rate.\textsuperscript{169} The same
must be said of adding to or limiting an agent's powers by usage.\textsuperscript{160}

Numerous cases apply the rule that a usage will not be admitted
when its effect would be to contradict what is written. When a seller
of cattle which were to be delivered on October 15 attempted to prove
in excuse of his failure to deliver, a usage that cattle were to be de-
livered between daylight and nine o'clock in the morning, and that
they were so tendered but the buyer was not on hand to receive them,
the court said that he could not give that proof, for such usage would
alter a term in the contract. The purchaser had all day in which to take
delivery.\textsuperscript{161} This seems entirely too strict. When a contract by which
an agent is employed to sell land fails to provide for compensation,
the law would undoubtedly supply the term that reasonable compen-
sation was to be paid, but usage was permitted to be proved that a
fixed compensation was to be paid.\textsuperscript{162}

Probably the best known case is \textit{North Shore Improvement Com-
pany} \textit{v. N. Y. P. \& N. Ry.}, decided in 1921.\textsuperscript{163} A bill of lading pro-
vided that car load freight should be delivered at Colley Avenue sid-
ing, Norfolk, Va. The carrier held the car at Port Norfolk which is

\textsuperscript{167}Richlands \textit{v. Hiltebeitel}, 92 Va. 91, 22 S. E. 806 (1895). To same effect, Rich-
\textsuperscript{169}Hansbrough \textit{v. Neal}, 94 Va. 722, 27 S. E. 593 (1897). The fact that the
contract in this case was oral seems to make no difference in principle.
\textsuperscript{161}Sutherland \& Co. \textit{v. Gibson}, 117 Va. 840, 86 S. E. 108 (1915). See also Straus
\textit{v. Fahed}, 117 Va. 833, 85 S. E. 969 (1915); Scott \textit{v. Chesterman}, 117 Va. 584, 85
S. E. 502 (1915). See comment on this case, Williston, \S 652, p. 1882, n. 4.
\textsuperscript{162}See note 159, supra.
several miles from Norfolk and across the river, notifying the consignee of its arrival and offering to place the car on the indicated siding when the freight should be paid. The consignee refused to comply. The question was whether the carrier could prove a usage that this should be considered proper handling of the freight. In a careful opinion by Burks, J., the court said this could not be done for such a usage would override an express provision of the bill of lading in conflict therewith. The court laid down its familiar rule that if the contract deals with the subject of the usage and conflicts therewith, the contract prevails. The case seems clear. But would not the conclusion have been different if the bill of lading had given the destination simply as Norfolk, Virginia? A usage cannot be proved which contradicts the general principle of law that acceptance of part of a shipment is acceptance of all. No doubt the court would be very reluctant to permit proof of a usage which would result in hardship or questionable practices—e.g., a usage which would permit an agent to give less than entire fidelity in his dealings with his principal.

No attempt has been made to discuss questions which must be solved by application of principles of conflict of laws or the question of what is necessary to make a party to a contract chargeable with a usage.

While in the greater number of cases there may be no point in distinguishing proof of usage to interpret and proof of usage to add terms to a writing, there are many cases in which the distinction is of critical importance. The collapse of the sugar market some twenty years ago brought many such cases before the courts. Refiners' contracts or memoranda of sales are couched in terms which are not intelligible to the uninitiated. When buyers refuse to accept delivery the contract is found to be unintelligible. If its meaning may be made clear by interpretation, usage in the business may be availed of to assist in the process. But if it is necessary to add terms, then the case is hopeless in those states which have re-enacted the seventeenth section of the Statute of Frauds. There are many such cases. But for the Statute of Frauds, when the incompleteness of the contract is once made to appear, the Parol Evidence Rule no doubt would permit

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184Syer & Co. v. Lester, 116 Va. 541, 82 S. E. 122 (1914); Williston §§ 651, 655.
185Williston §§ 653, 659.
186Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397 (1896); Williston § 659.
188Williston § 661; Restatement of Contracts (1932) §§ 247, 248; Note (1922).
oral terms to be added; but not so when integration is required by law.\textsuperscript{169}

**Cases Involving Third Persons**

Another rule of thumb to which the courts pay lip service, at least, is that the Parol Evidence Rule applies only in suits between the parties; but as a rule of decision this is definitely untrustworthy and is not followed uniformly, nor could it be. Wigmore says the "statement suffices in most instances to reach correct results, but it is not sound on principle," and he makes the further discouraging statement that "the precedents are often arbitrary and confused and cannot be reconciled by any general distinctions."\textsuperscript{170} One who examines the cases will readily agree. Williston in his careful discussion of the subject says, "But where the issue in dispute even between third parties, is what are the obligations of A and B to one another, and those obligations are stated in a written contract, the parol evidence rule is applicable," and "There can be no doubt that if a third person claims in the right of a party to a written contract, he is subject to the parol evidence rule." But he also finds cases which are hard to reconcile with any principle.\textsuperscript{171}

Very little can be said with assurance except that the rule of thumb is undependable; that the subject is in a state of great judicial confusion; and that it is unsafe to venture a prediction of the result in any except the plainest cases, fortified by local precedent.

Virginia cases are not distinctive in any way. From a very briefly reported case it may be gathered that a Lumber Company had rights in timber land which would yield to a subsequent purchase for value and without notice. The Company, suing to enjoin infringement of its rights by defendant who claimed under a subsequent contract, was permitted to prove by oral testimony that the writing was not what it purported to be, but was a mere license which had been revoked.

\textsuperscript{169}Franklin Sugar Refining Co. v. William D. Mullen Co., 12 (2d) 885 (C. C. A. 3d, 1926). The court said: "We are not writing into the contract something that is not in it, but we are finding the meaning of the terms used." Franklin Sugar Refining Co. v. Lipowicz, 247 N. Y. 465, 160 N. E. 916 (1928). The buyer in this case took a loss of 17.30 cents per pound. Franklin Sugar Refining Co. v. Howell, 274 Pa. 190, 118 Atl. 109 (1922). Here the court refused to permit a written price list not referred to in the memorandum to be made a part thereof. Exhaustrive note, Trade Custom or Usage to explain or supply essential terms in a writing required by Statute of Frauds (1924) 29 A. L. R. 1218.

\textsuperscript{170}Wigmore § 2446; also 1 Greenleaf on Evidence (16th ed.) §§ 279, 305 h.

\textsuperscript{171}Williston § 547. See also Strahorn, The Unity of the Parol Evidence Rule (1929) 14 Minn. L. Rev. 20, 41.
Of course, this could not have been shown between defendant and his contracting party.\footnote{Bruce v. John L. Roper Lumber Co., 87 Va. 381, 13 S. E. 153 (1891).} This conclusion seems orthodox.

In a prosecution for selling without license, when the defense was that the transaction was entirely interstate, it was very properly held that the prosecution could go behind the written agreement between defendant and his customer and show that the transaction was really intrastate.\footnote{Roselle v. Com., 110 Va. 235, 65 S. E. 526 (1909).} No other conclusion would have been possible. Surely conspirators who put what they pretend to be their plan in writing so that it appeared entirely innocent could not invoke the rule to prevent the government from showing what the real plan was. It is not necessary to refer to the rule in such a case. In a leading case the assignee of a tenant was not permitted to vary the terms of the lease between his assignor and his landlord.\footnote{Calhoun & Cowen v. Wilson, 68 Va. (27 Gratt.) 639 (1876).}

This discussion is closed with the statement of a principle from which there seems to be no dissent: A "subsequent agreement altering, waiving, discharging, or otherwise novating a prior transaction is not excluded by reason of the prior transaction having been reduced to writing."\footnote{Wigmore § 2441.} Virginia cases are fully in accord.\footnote{J. P. Houck Tanning Co. v. Clinedinst, 118 Va. 131, 86 S. E. 851 (1915); Warren v. Goodrich, 133 Va. 366, 112 S. E. 687 (1922).}