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Comments and Casenotes

The Parol Evidence Rule — A New Exception

*Rinaudo v. Bloom*¹

Plaintiffs entered into a written contract with defendants for the purchase and sale of a motel. The pertinent parts of the contract provided that the purchase price was \$85,000 and that \$10,000 had been paid prior to the signing, that all deposit money was to be held by the sellers' real estate agent until settlement, and that upon failure of purchasers to secure a beer license, the buyers had a right to cancel and recover "all deposit monies". The contract concluded with an integration clause.

Plaintiffs failed to obtain the license and exercised their right to cancel. This suit was brought to recover the deposit money, the plaintiffs alleging that they had contracted to purchase the motel for \$100,000, that \$25,000 had been paid as a down payment of which \$10,000 was paid by check and \$15,000 in cash, that an agreement of sale was subsequently executed, and that for reasons unknown to the plaintiffs, the defendants gave credit to the plaintiffs for the cash payment by setting out the purchase price as \$85,000. Trial was by jury, and the plaintiffs were permitted over objection to introduce oral testimony of the payment of the \$15,000 in cash immediately prior to the signing of the contract. The verdict was for the plaintiffs and defendants appealed, the principal question being whether the admission of this testimony constituted reversible error as a violation of the parol evidence rule. The Court of Appeals decided that it did not, resting its decision on a statement in the case of *Dinsmore v. Maag-Wahmann Co.*,² and held that the rule was not violated since the writing was integration only of the terms remaining executory at the time of the signing and delivery of the written contract. The decision is important as a summary of law surrounding the rule and as an indorsement of Professor McCormick's method of applying it in jury cases, but it is open to criticism on two grounds: first, it creates another "exception" to the rule and, second, it does so on no authority other than the *Dinsmore* case, which, it is submitted, is not necessarily on point.

¹ 120 A. 2d 184 (Md. 1956).

² 122 Md. 177, 89 A. 399 (1914).

The parol evidence rule was explained by the Court of Appeals in 1823 as follows:

"By the rule of the common law, independent of the statute of frauds and perjuries, parol proof is inadmissible to contradict, add to, or vary the terms of a written agreement. This principle is founded in the wisest policy, it guards the chastity of written contracts against all interpolations, by considering the agreement as furnishing the best evidence of the intention of the parties. It therefore shuts out all inquiry into parol proof which can give a different sense to the instrument."³

Thus the rule is, as the courts have frequently pointed out, a rule of substantive law, not a rule of evidence,⁴ since its application is independent of the credibility of the evidence offered. By definition, such a rule can apply only where a writing *exists* which *expresses* the intent of the parties. Under these two elements of existence and expression can be grouped most of the so-called exceptions to the rule. The majority, if not all, of these exceptions may just as properly be thought of as criteria for determining whether there is such a writing as the rule was fashioned to protect,⁵ *i.e.*, for determining whether the parol evidence rule applies in this situation in the first instance.

First then, the rule is applicable only where there is a valid contractual writing,⁶ and therefore where the existence of the contractual act itself is controverted, extrinsic evidence is admissible to prove the non-existence; for example, the statement in many cases that the rule applies except where the contract is impeached for fraud, duress, or mistake,⁷ the presence of which prevent the necessary

³ Wesley v. Thomas, 6 H. & J. 24, 27 (Md., 1823).

⁴ *Supra*, n. 1, 188. "In other words: *Where a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*" 9 WIGMORE, EVIDENCE (3rd ed., 1940) 76.

⁵ Strahorn, *The Unity of the Parol Evidence Rule*, 14 Minn. L. Rev. 20 (1929).

⁶ It is obvious that not all writings, but only those of a contractual nature fall within the proscription of the rule. That non-contractual writings are open to parol evidence, see Barger v. Collins, 7 H. & J. 213 (Md., 1826), involving an account stated, and Courtney v. Knabe & Co. Mfg. Co., 97 Md. 499, 55 A. 614 (1903), dealing with letters.

⁷ This statement appears as *dictum* in several leading cases, notably Kiser v. Eberly, 200 Md. 242, 88 A. 2d 570 (1952), and Markoff v. Kreiner, 180 Md. 150, 23 A. 2d 19 (1941). Smith v. Bounds Package Corp., 206 Md. 74, 110 A. 2d 71 (1954), held parol evidence admissible to show mutual mistake, and Standard Motor Co. v. Peltzer, 147 Md. 509, 128 A. 451 (1925), permitted the showing of fraud. See also Councill v. Sun Ins. Office, 146 Md. 137, 126 A. 229 (1924). *Cf.* Rinaudo v. Bloom, *supra*, n. 1, 189.

meeting of the minds of the contracting parties.⁸ Where the written act is not contractual in nature, but by way of recital of a fact only, as a receipt,⁹ or the recital of consideration in a deed,¹⁰ it is open to interpretation by extrinsic evidence. An independent agreement, separate from a given writing may be proved, since as to that agreement there is no written contract. Where the agreement is collateral to the writing, *i.e.*, shares a common consideration with the writing or is made in consideration of its execution, the question must be answered: can the parties reasonably be presumed to have intended the agreement sought to be proved to be integrated in the writing.¹¹ The rule proceeds upon the presumption that all matters pertaining to the transaction are integrated in the writing.¹² This presumption that the writing was intended as the final and full statement of the agreement is strengthened by an integration clause¹³ and usually made conclusive by mention of the matter in the written contract.¹⁴ Before the court can present to the jury the question of whether particular litigants intended integration the court must decide in the abstract if the agreement is such as the parties would not reasonably be expected to embody in the main

⁸ In *Furness-Withy & Co. v. Fahey*, 127 Md. 333, 96 A. 619 (1915), involving the issue of whether a certain writing was the agreement of the parties, the court held that parol evidence is admissible to show that there was never a real meeting of the minds. *Lutz v. Porter*, 206 Md. 595, 112 A. 2d 480 (1955), held such evidence admissible to show that a contract held by a lawyer pending execution of a bond was not to become effective until such execution.

⁹ *Hirons v. Hubbell*, 149 Md. 593, 132 A. 645 (1926), held that an unsealed receipt may be shown to be false. *Nealon v. Travers*, 160 Md. 324, 153 A. 44 (1931), held that a check, indorsed and cashed, is *prima facie* evidence of payment, but is, like an unsealed receipt, always open to explanation. *Cf. Rinaudo v. Bloom*, *supra*, n. 1, 189.

¹⁰ *Carr v. Hobbs*, 11 Md. 285 (1857).

¹¹ *Markoff v. Kreiner*, *supra*, n. 7, 155:

"All prior and contemporaneous negotiations are merged in the written instrument, which is treated as the exclusive medium for ascertaining the extent of their obligations."

¹² *Kikas v. Baltimore County*, 200 Md. 360, 89 A. 2d 625 (1952), held that an agreement to permit salvage of refuse by lessee of the premises used as a dump was such that it could not be collateral but would be merged in a lease of the premises.

¹³ *Rinaudo v. Bloom*, 120 A. 2d 184, 189 (Md., 1956).

¹⁴ *Markoff v. Kreiner*, *supra*, n. 7, 155, discussed more fully within, quoted Chief Justice Fuller's explanation of collateral agreements given in *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S. 510 (1891), the third element of which is that the agreement be such as the parties could not reasonably be expected to embody in the contract. If the parties actually mention the matter in the writing, this test cannot be met. *Winslow v. Atz*, 168 Md. 230, 249, 177 A. 272 (1935), cited 4 WIGMORE, EVIDENCE (1st ed., 1904) Sec. 2430 [now 3rd ed., 1940, Vol. IX, Sec. 2430], for the statement that if the matter is, "mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transactions on that element; . . ."

contract and would naturally make *dehors* the written instrument. If the answer is affirmative, proof of such agreement does not impinge upon the written contract and the rule does not apply.

Once the existence of the contractual act is established, the problem arises of determining to what extent it expresses the intent of the parties. Of course, if the meaning of the writing is apparent upon its face, the rule may properly apply; but if the meaning is not readily ascertainable or if there are latent ambiguities, extrinsic evidence is necessarily admissible to aid in ascertaining the meaning, though not to contradict or vary whatever part of the meaning is clearly ascertainable.¹⁵

Application of the rule presents a practical problem since it must be applied by the court to exclude certain evidence from the fact finder, and to determine its application, the court must first hear the evidence of the nature of the agreement sought to be proved. Since in jury cases this may present the paradox of allowing the evidence to get to the jury in the course of the determination, McCormick has suggested that the court first hear the testimony out of the presence of the jury for the preliminary determination of whether the agreement is such that it does not fall within the prohibition of the rule,¹⁶ a procedure which the Court of Appeals in the *Rinaudo* case indorsed,¹⁷ but which the trial court had not adopted.

In reciting the applications of the rule set out above, the court was on firm ground with scores of cases as precedents. But the final decision in the *Rinaudo* case rested on none of the above. The payment of \$15,000 prior to execution of the contract in addition to the \$10,000 recited therein was not a "collateral agreement" within the *Markoff v. Kreiner* test,¹⁸ it was not independent, separate, and distinct from the written instrument but dealt with a matter specifically mentioned in the writing; it was inconsistent with and contradicted the statement of the consideration which the

¹⁵ *Globe Home Impvt. Co. v. McCarty*, 204 Md. 513, 105 A. 2d 216 (1954), held a "floor finishing" contract sufficiently ambiguous to permit testimony of the surrounding circumstances. Parol evidence has been held admissible to explain the meaning of the following words in the following cases: *Levi v. Schwartz*, 201 Md. 575, 95 A. 2d 322 (1953), "coincide" in a deed; *Applestein v. Royal Realty Corp.*, 181 Md. 171, 28 A. 2d 830 (1942), "amortize" in a contract to purchase real estate; *Keyser v. Weintraub*, 157 Md. 437, 146 A. 275 (1929), "loss" in a guaranty contract. *Insley v. Myers*, 192 Md. 292, 64 A. 2d 126 (1949), held parol evidence inadmissible to construe a plain, unambiguous lease.

¹⁶ *McCORMICK, EVIDENCE* (1954), Sec. 216, pp. 439, 441.

¹⁷ *Rinaudo v. Bloom*, *supra*, n. 13, 190.

¹⁸ 180 Md. 150, 23 A. 2d 19 (1941).

court in the *Rinaudo* case at page 191, regarded as an "important contractual term and not as a mere recital", and it was an agreement to a matter such as the parties would reasonably be expected to and did embody in the main contract.

The court stated these two grounds for holding the parol evidence admissible: first, "A somewhat narrow reason", that the provision for return of "all deposit monies" was capable of a broader interpretation than the \$10,000 specifically called for in the instrument; and second, that this case was controlled by *Dinsmore v. Maag-Wahmann Co.*¹⁹ In the *Dinsmore* case, the vendor had sold an oven under a conditional contract of sale which stated the purchase price to be \$275.90 payable monthly. A creditor of the vendee sold the oven under attachment proceedings, and the proceeds were paid into court. In the resulting suit between the vendor and the creditor for these proceeds, the conditional contract of sale was put in evidence. The vendor was allowed to testify over objection that the original sale price was \$450.90 and that this amount was decreased by an allowance for an old oven accepted in trade at \$125.00 and a down payment of \$50.00 to the amount named in the contract. The creditor appealed, alleging, *inter alia*, a violation of the parol evidence rule. As the vendor pointed out in his brief, and as the court in the *Rinaudo* case noted, it was immaterial whether the unpaid balance is computed from \$450.90 less trade-in and all payments or from \$275.90 less subsequent payments; the result would be the same. The Court in the *Dinsmore* case, however, without precedent or explanation gratuitously stated that such an admission is "... entirely proper and in no sense violates the general rule . . ." ²⁰ In this statement, the court in the *Rinaudo* case found an exception to the general rule so strongly stated that, "Unless the *Dinsmore* case is to be overruled, the exception which it recognized appears to be controlling in this case; and we are not prepared to overrule it."²¹

¹⁹ 122 Md. 177, 89 A. 399 (1914).

²⁰ *Ibid.*, 181.

²¹ *Supra*, n. 13, 193. For precedents to the contrary, note the following language in *Rafferty v. Butler*, 133 Md. 430, 432, 102 A. 530 (1919): "In 17 *Cyc.* 610, it is said and supported by authority, that 'the statement in a contract of sale as to the price *paid or to be paid* by the purchaser is an essential part of the contract and hence it cannot be varied or contradicted by parol.'" (Emphasis added.) Note also the language in *Trotter v. Lewis*, 185 Md. 528, 533, 45 A. 2d 329 (1946); "We specifically hold that a written contract of sale is conclusive as to the time, mode and terms of payment, and such provisions cannot be varied or contradicted by parol." Prior to the *Rinaudo* case, the *Dinsmore* decision had been cited four times on questions of sales law and once, in *Sommers v. Dukes*, 208 Md. 386, 394,

Besides being a questionable use of precedent and besides whatever unsettling effect this exception, whether new or merely newly discovered, may have on the parol evidence rule, it indicates a willingness on the part of the court to administer *ad hoc* justice in a field of commercial relations, an area where certainty in the law is perhaps more important than justice in a particular case. In applying the *Dinsmore dictum* to the *Rinaudo* case, the court in effect held that an executed portion of a contract is not considered integrated in a subsequent writing and may be proved by parol evidence, thus creating another real or apparent exception to the rule.²² This raises the question of whether a rule so riddled with exceptions is worth the legal gymnastics of keeping it alive without being bound by it in a given case.

Writers have tended to regard the rule and its exceptions, real or apparent, as a hopeless morass.²³ Only one, the late Professor Strahorn, saw any underlying unity.²⁴ McCormick suggests that the rule may have originated as an attempt on the part of judges to control juries who might give undue weight to oral testimony and not enough to the written word, and that its continued existence is felt to be necessary to the stability of the business community.²⁵ Corbin has come out frankly against it.²⁶ In 1944 in the

118 A. 2d 660 (1955), on a question of parol evidence, as supporting the statement that ". . . if any doubt arises from the language of a contract as to the intention of the parties, extraneous evidence may be admitted to aid the court in comprehending its meaning." Such a citation indicates that the court did not regard *Dinsmore* as a new exception. *Of.*, n. 15, *supra*.

²² Assuming that the money was paid, there is still some doubt as to the necessity of this exception to recover it. The plaintiffs could probably have recovered on the common counts, subject, of course, to the rules of illegality. The court pointed out at page 193 that the reason for not stating the full consideration may have been concealment from some third party. The court also discussed this method of recovery at page 193.

²³ Wigmore opens his introduction to the parol evidence rule with a quotation from Professor Thayer: "Few things . . . are darker than this or fuller of subtle difficulties." Wigmore goes on to observe that due to the subtlety and elusiveness of certain distinctions and improper terminology the rule is attended with a confusion and obscurity which make it the most discouraging subject in the whole field of evidence. 9 WIGMORE, EVIDENCE (3rd ed., 1940) 3.

²⁴ Strahorn, *The Unity of the Parol Evidence Rule*, 14 Minn. L. Rev. 20, 46 (1929). Even he recognized one exception "which permits the proof of extrinsic facts to show that the parties to a transaction hold to each other a different relation from the one resulting from the form of the written transaction". *E.g.* A deed absolute on its face may be shown to be a mortgage or deed of trust and a joint or principal maker to be a surety. Wigmore states that: "There is no one and undivided Parol Evidence Rule." 9 WIGMORE, EVIDENCE (3rd ed., 1940) 4.

²⁵ McCormick, EVIDENCE (1954), Sec. 210. If this is the reason, such stability is not promoted by the creation of new exceptions.

²⁶ Corbin, *The Parol Evidence Rule*, 53 Yale L. J. 603 (1944).

Yale Law Journal he declared that it would have been better if no such rule had ever been stated as preventing the introduction of testimony but that the inquiry should be whether the parties by the writing made a substituted contract discharging and annulling previous agreements, and that on this question no relevant testimony should be excluded.

“This is what the wiser courts, seeking justice in each separate case, have in truth been doing. Operating at times through exceptions and limitations, while not denying the majesty of the supposed rule, they have not precluded the parties from ‘showing forth the transaction in all its length and breadth.’”²⁷

This may be what the Court of Appeals was doing in the *Rinaudo* case. If so, and granting that substantial justice may have been done, the question remains whether it would not be better to strike the rule altogether than to continue to honor it more in the breach than in the observance. As Corbin points out, if the parties mutually assent to a writing as the complete and accurate expression of the terms of their agreement, the proof of any antecedent understanding is immaterial: the written contract prevails because it is the later in time, with or without any parol evidence rule.²⁸ Certainly any rule which functions to obscure the true factual situation in favor of an artificial conclusion of law may be looked askance; but if the rule is basically invalid or if the conditions which gave rise to it have substantially changed, the simpler course tending to less confusion is to say so and discharge it *in toto* rather than whittle it away by exceptions.

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²⁷ *Ibid.*, 632, quoting from *Saltzman v. Barson*, 239 N. Y. 332, 146 N. E. 618, 619 (1925).

²⁸ *Ibid.*, 633. For a later statement of Corbin's ideas see 3 CORBIN, CONTRACTS (1951 ed.), Sec. 573.