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Parol Evidence, Misrepresentation and Collateral Contracts

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Introduction

A and B are conducting negotiations with a view to entering into contractual relations. In the course of their negotiations, A makes a promise to B, on the faith of which B enters into a written contract. The contract contains a term which is inconsistent with the oral promise made to B. Does the parol evidence rule preclude B from leading evidence of the promise?

As authority stands at present the question is a difficult one to answer. On the one hand there exists a line of cases which have held that evidence of a separate collateral contract is inadmissible if the oral contract is inconsistent with the later written contract.¹ On the other hand, over the past thirty years or so, there has developed a line of cases which stands for exactly the converse of the above proposition.² These cases state that if the contest is between an oral assurance given at or before the time for contracting and a term in a later standard-form written contract, it is the oral assurance that

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¹ *Lysnar v. National Bank of New Zealand Ltd* [1935] N.Z.L.R. 129 (P.C.); *Carter v. Salmon* (1880) 43 L.T. 490 (C.A.); *Henderson v. Arthur* [1907] 1 K.B. 10 (C.A.); *Horncastle v. The Equitable Life Assurance Soc. of the U.S.A.* (1906) 22 T.L.R. 735 (C.A.); *Hoyt's Pty Ltd v. Spencer* (1919) 27 C.L.R. 133 (H.C. Aust.); *Maybury v. Atlantic Union Oil Co.* (1953) 89 C.L.R. 507 (H.C. Aust.); *Hawrish v. Bank of Montreal* [1969] S.C.R. 515; *Donovan v. Northlea Farms Ltd* [1976] 1 N.Z.L.R. 180 (N.Z.S.C.); *Bradshaw v. Fitzgerald* [1919] G.L.R. 78 (N.Z.S.C.); *Hammond v. C.I.R.* [1956] N.Z.L.R. 690 (N.Z.S.C.); *Steine v. Mathieu* [1923] 3 W.W.R. 493 (Sask. C.A.); *Canadian Fur Auction Sales Co. v. Neely* [1954] 2 D.L.R. 154 (Man. C.A.); *Kaplan v. Andrews* [1955] 4 D.L.R. 553 (Ont. C.A.).

² *Couchman v. Hill* [1947] K.B. 554 (C.A.); *Harling v. Eddy* [1951] 2 K.B. 739 (C.A.); *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch. 129; *Mendelsohn v. Normand Ltd* [1970] 1 Q.B. 177 (C.A.); *J. Evans & Son (Portsmouth) Ltd v. Andrea Merzario Ltd* [1976] 1 W.L.R. 1078 (C.A.); *Brikom Investments Ltd v. Carr* [1979] Q.B. 467 (C.A.); *Canadian Acceptance Corp. v. Mid-Town Motors Ltd* (1970) 72 W.W.R. 365 (Sask. D. Ct.); *Findlay v. Couldwell* (1976) 69 D.L.R. (3d) 320 (B.C.S.C.); *Lister (Ronald Elwyn) Ltd v. Dunlop Canada Ltd* (1978) 85 D.L.R. (3d) 321 (Ont. H.C.); *Roberts v. Montex Development Corp.* (1979) 100 D.L.R. (3d) 660 (B.C.S.C.).

prevails and not the later inconsistent term. The reason advanced for this conclusion is said to be that it is illusory to say, "We promise to do a thing, but we are not liable if we do not do it."³ Although these latter cases do not square easily with the former, they at least ensure that promisors do not snap their fingers with impunity at the undertakings that they have given.

In recent times this problem has come to the attention of appellate courts in two Commonwealth countries, where opposing conclusions have been reached. In *Bauer v. Bank of Montreal*,⁴ the Supreme Court of Canada has held that evidence of a promise given prior to the time of entering into the written contract is inadmissible if inconsistent with the later writing. By contrast, in *Fletcher Bernard-Smith Ltd v. Shell, B.P. & Todd Oil Services Ltd*,⁵ the New Zealand Court of Appeal has indicated that it considers such a rule to be excessively rigid and that it does not think that a claim based on an inconsistent collateral contract is bound to fail.

Closely related to, but conceptually distinct from these cases, is yet a third line of cases holding that a party who misrepresents (albeit innocently) the contents or effect of a clause inserted in a written contract cannot rely on the clause in the face of this misrepresentation.⁶ Although these cases are generally thought to have been rightly decided, it has never been made clear how they fit in with the parol evidence rule or quite what their conceptual basis is.⁷ The representations are generally thought to be too vague to found an estoppel⁸ and the cases are sometimes explained as laying down a principle of interpretation.⁹ Now in *Bauer v. Bank of Montreal* the Supreme Court of Canada has held that the parol evidence rule operates to keep out evidence of such misrepresentations if they are inconsistent with the terms of the written contract. Clearly, if this decision is correct, many of the decisions

³ *Mendelsohn v. Normand Ltd*, *ibid.*, 184 *per* Lord Denning M.R. citing *Firestone Tyre and Rubber Co. v. Vokins & Co.* [1951] 1 Lloyd's Rep. 32, 39 (K.B.D.) *per* Devlin J.

⁴ [1980] 2 S.C.R. 102, *aff'g* (1978) 19 O.R. (2d) 425 (C.A.), *rev'g* (1977) 15 O.R. (2d) 746 (H.C.).

⁵ (1979) 5 N.Z. Recent Law (N.S.) 161 (unreported, C.A. 9/78).

⁶ *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805 (C.A.); *Jacques v. Lloyd D. George & Partners Ltd* [1968] 1 W.L.R. 625 (C.A.); *Mendelsohn v. Normand Ltd*, *supra*, note 2; *Royal Bank of Canada v. Hale* (1961) 30 D.L.R. (2d) 138 (B.C.S.C.); *Bank of British Columbia v. Wren Developments Ltd* (1973) 38 D.L.R. (3d) 759 (B.C.S.C.); *Brideau v. Gravel* (1959) 5 D.L.R. (3d) 89 (N.B.S.C., App. Div.); *Free Ukrainian Society (Toronto) Credit Union Ltd v. Hnatkiw* [1964] 2 O.R. 170 (C.A.); *Ballard v. Gaskill* [1955] 2 D.L.R. 219 (B.C.C.A.). For further cases see S. Waddams, *The Law of Contracts* (1977), 205, fn. 64.

⁷ See *Note* (1952) 11 Cambridge L.J. 288; Spencer, *Signature, Consent, and the Rule in L'Estrange v. Graucob* [1973] Cambridge L.J. 104, 117-9, in particular at fn. 82.

⁸ *Curtis v. Chemical Cleaning and Dyeing Co.*, *supra*, note 6, 809 *per* Denning L.J.

⁹ See *Note* (1951) 67 L.Q.R. 152; *Neuchatel Asphalt Co. v. Barnett* [1957] 1 W.L.R. 356, 360 (C.A.) *per* Denning L.J.; *Royal Bank of Canada v. Hale*, *supra*, note 6, 150-1 *per* Munroe J.

in the misrepresentation line of cases may have been wrongly decided.¹⁰ In these circumstances it seems worthwhile to see how these matters stand in principle. Part I of this article will consider the position on inconsistent collateral contracts. Part II will be devoted to discussing whether, and if so why, oral evidence is admissible to prove that one contracting party innocently misrepresented the contents of a writing which the other party subsequently signed.

I. Inconsistent Collateral Contracts

As classically formulated, the parol evidence rule states that "if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written statement was made, or during the time that it was in a stage of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract."¹¹ The rule dates back to at least Lord Coke's time¹² and was originally conceived as being founded on the superiority of written evidence.¹³ Towards the middle of the last century, however, another justification began to be advanced. It was said that to admit parol evidence when the parties had decided to reduce their agreement into writing and to have their rights and obligations determined by the writing was to act contrary to their declared intention.¹⁴ As a result, at the present day, the parol evidence rule does not apply to every contract of which there is written evidence but only applies "where the parties to an agreement reduce it to writing, and agree or intend that that writing shall be their agreement."¹⁵ The difficulty, of course, lies in ascertaining when contracting parties can be said to have intended their writing to constitute their agreement.

The traditionally accepted way of ascertaining the intention of the parties is to say that their intention must be gathered from the four corners

¹⁰ On the assumption that the contracts in question involved contracts in writing.

¹¹ *Goss v. Lord Nugent* (1833) 5 B. & Ad. 58, 64-5, 110 E.R. 713, 716 (K.B.) *per* Denman C.J.; and see the formulation in *Bank of Australasia v. Palmer* [1897] A.C. 540, 545 (P.C.) *per* Lord Morris.

¹² *The Countess of Rutland's Case* (1604) 5 Co. Rep. 25b, 26a-b, 77 E.R. 89, 90 (K.B.) *per* Popham C.J.: "Also it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory."

¹³ Salmond, *The Superiority of Written Evidence* (1890) 6 L.Q.R. 75, 81. And see *Guardhouse v. Blackburn* (1866) L.R. 1 P. & D. 109, 117 (P.D.A.) *per* Wilde J.: "The general rule ... is based on the proposition that written testimony is of a higher grade— more certain, more reliable— than parol, and that resort should be had to the highest evidence of which a subject is capable to the exclusion of the inferior class."

¹⁴ See *Inglis v. Buttery & Co.* (1878) 3 App. Cas. 552, 577 (H.L.) *per* Lord Blackburn; *Wake v. Harrop* (1862) 30 L.J. Exch. 273, 277 *per* Bramwell B.

¹⁵ *Harris v. Rickett* (1859) H. & N. 1, 7, 157 E.R. 734, 737 (Ex.) *per* Pollock C.B.

of the written instrument itself. If, on its face, the written document appears to contain the whole contract, parol evidence is excluded to add to, subtract from or vary the writing.¹⁶ The argument seems to be that since the parties could have left their rights and liabilities to be determined by oral testimony, their decision to reduce their agreement into writing necessarily demonstrates an intention to regard that writing as providing the best evidence of their agreement.¹⁷ Put in a slightly different way, as their reason for executing a written instrument can only be to ensure that their rights and obligations are to be determined by the writing, their agreement is to be found in that writing. So the only question is whether or not, looking at the matter objectively, the parties can be said to have reduced their agreement into writing. And to determine that question, one looks at the writing itself against the background of the surrounding circumstances.

*Hutton v. Watling*¹⁸ and *Beckett v. Nurse*¹⁹ are perhaps the best modern illustrations of this approach to the parol evidence rule. In *Hutton v. Watling*, the defendants sold a dairy business to the plaintiffs. The agreement contained a series of unnumbered paragraphs including the following provision: "In the event of the purchaser wishing at any future time to purchase property in which the business is situated, she has the option of purchase at a price not exceeding £450." The purchaser subsequently sought to exercise the option, and on the vendor's refusal to implement it, brought proceedings for specific performance. The vendors sought to adduce oral evidence to show that although the document was intended as a memorandum of an agreement to sell the goodwill of the business together with the stock and fixtures to be ascertained at a valuation, some of its provisions (including the clause relied on by the plaintiffs) had been inserted without having been intended to be contractually binding. The Court of Appeal affirmed Jenkins J.'s decision to refuse to admit the oral evidence to contradict the apparent agreement signed by the defendant. The kernel of the Court's reasoning is to be found in Lord Greene M.R.'s opinion:

The first thing we have to do ... is to construe that document. The true construction of a document means no more than that the court puts upon it the true meaning, being the meaning which the other party, to whom the document was handed or who is relying upon it, would put upon it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances. This document, on the face of it, was intended to be handed to the purchaser, and it is produced by the purchaser. Indeed, the whole tenor of the document indicates that it is to be the purchaser's document. What then would the purchaser when she received the document have

¹⁶ *L.G. Thorne & Co. v. Thomas Borthwick & Sons (Australasia) Ltd* (1956) 56 S.R. (N.S.W.) 81 (S.C., *in banco*).

¹⁷ See Comment, *The Parol Evidence Rule: A Conservative View* (1952) 19 U. Chi. L. Rev. 348, 352-3 where this point is most forcefully made.

¹⁸ [1948] Ch. 398 (C.A.).

¹⁹ [1948] 1 K.B. 535 (C.A.).

thought it meant as an ordinary reasonable person, intelligently understanding the English language and construing it in the light of the relevant circumstances? She could only have understood that the vendors were deliberately and solemnly recording the terms of an agreement into which they were prepared to enter, or indeed, into which they had entered

In my opinion, when once the document is construed and understood it is only susceptible of one interpretation. This is that it was intended by the signatories to be ... a true record of the contract When once that is ascertained it appears to me that the idea of letting in parol evidence to prove an antecedent oral agreement different in its terms fails.²⁰

By contrast, in *Beckett v. Nurse*²¹ the plaintiff as administratrix of her husband claimed specific performance of an agreement to sell him a plot of land. The document on which she relied stated, "Received from Mr E. Beckett of Thorpe Cottages, Thorpe Audlin, the sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for fifty pounds." Across a twopenny stamp was the signature "T. Nurse". Lower down on the document there was a small sketch plan showing the position of the inn and the field. The defendant vendor sought to show that various other terms not contained in the note or memorandum had been agreed to and that the agreement was unenforceable as a result of the *Statute of Frauds*.²² At first instance, the trial judge refused to hear such evidence holding that the document was an agreement in writing and that evidence to contradict or vary it was not admissible. The Court of Appeal upheld an appeal against the trial judge's decree of specific performance, holding that on its face the wording of the document did not show that it was intended to contain all the terms of the contract. Amongst the factors that the Court of Appeal took into account in reaching this conclusion were that the document was signed by one party only and purported to be no more than a receipt. Accordingly, oral evidence of other terms was admissible and the case had to go back to the County Court judge to decide what agreement the parties had in fact made.

The reason usually advanced for approaching the question of ascertaining the parties' intentions in this way is that it promotes certainty and predictability in commercial transactions. As one American judge has put it, "[i]f we may go outside of the instrument to prove that there was a stipulation not contained in it, and so that only part of the contract was put in writing, and then, because of that fact, enforce the oral stipulation, there will be little of value left in the rule itself."²³ Nevertheless, the

²⁰ *Supra*, note 18, 403 *per* Lord Greene M.R.

²¹ *Supra*, note 19.

²² *The Statute of Frauds* requires all essential terms to be evidenced in writing: see *Hawkins v. Price* [1947] Ch. 645.

²³ *Eighmie v. Taylor* 98 N.Y. 288, 294 (C.A. 1885) *per* Finch J., cited in S. Williston, *Contracts*, 3d ed. (1957), vol. 4, §633.

inevitable concomitant of stating the rule in this way is that it is seen to be subject to many exceptions, not all of which are easy to reconcile with the basic rule. The recent working paper of the English Law Reform Commission lists eight,²⁴ and as one distinguished commentator has observed these exceptions go far to undermine the basic objectives of stating the parol evidence rule in the manner set out above.²⁵

Partly as a result of difficulties such as these and partly as a result of a growing recognition of the very different bargaining process that occurs when parties enter into contracts on standard-form agreements, some theorists have been prompted to reassess the traditional way in which the law ascertains the intention of the parties for the purposes of determining whether the parol evidence rule applies.²⁶ Of the studies of the rule that have been undertaken recently, much the most comprehensive is that of Mr McLauchlan in his book *The Parol Evidence Rule*.²⁷ Building upon the foundations laid down by the earlier work of Professor Corbin²⁸ and of Professor Wedderburn,²⁹ Mr McLauchlan shows that although the rule has often been stated and applied in wide exclusionary terms, evidence has in fact been admitted in a whole host of cases to add to, vary and sometimes even to contradict the terms of the writing. The significant thing about these cases is that in the vast majority of them it is not made clear whether the evidence is admitted by way of exception to the rule or because, when properly understood, the rule does not extend to them. Mr McLauchlan points out that as there has been no modern leading case which has attempted to collect all the authorities and definitively restate the rule, the true scope and nature

²⁴ Great Britain: Law Commission, *Law of Contracts: The Parol Evidence Rule* (1976), [Working Paper No. 70] paras 10 *et seq.*: vitiating factors; conditions precedent; rectification, specific performance and rescission; damages for misrepresentation: non-exclusiveness of writing; collateral contract, custom and implied terms.

²⁵ G. Treitel, *The Law of Contract*, 5th ed. (1979), 143.

²⁶ See, in particular, D. McLauchlan, *The Parol Evidence Rule* (1976), 67-79; McLauchlan, *The Inconsistent Collateral Contract* (1976) 3 Dalhousie L.J. 136; Wedderburn, *Collateral Contracts* [1959] Cambridge L.J. 58. The American literature is voluminous and valuable discussions can be found in the following: Corbin, *The Parol Evidence Rule* (1944) 53 Yale L.J. 603; Calamari & Perillo, *A Plea for a Uniform Parol Evidence Rule and Principles of Contract Interpretation* (1967) 42 Ind. L.J. 333; Sweet, *Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule* (1968) 53 Cornell L. Rev. 1036; Hale, *The Parol Evidence Rule* (1925) 4 Ore. L. Rev. 91; McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury* (1932) 41 Yale L.J. 365; Murray, *The Parol Evidence Rule: A Clarification* (1965) 4 Duquesne U.L. Rev. 337; Strahorn, *The Unity of the Parol Evidence Rule* (1929) 14 Minn. L. Rev. 20; Comment, *The Parol Evidence Rule: A Conservative View*, *supra*, note 17; Note, *The Parol Evidence Rule: Is It Necessary?* (1969) 44 N.Y.U. L. Rev. 972; J. Wigmore, *Evidence*, 3d ed. (1940), vol 9, §§2400-78.

²⁷ *Ibid.*

²⁸ Corbin, *supra*, note 26.

²⁹ Wedderburn, *supra*, note 26.

of the parol evidence rule is a question that still remains to be settled and one that is open to be considered on principle.

Mr McLauchlan proceeds to show that when considered as a question of principle, it is evident that the question whether the parties intended a written document to contain all the terms of the agreement cannot be determined solely by construing the written document. Contracting parties are not, as a general rule, required to reduce their agreements into writing, unless the contract is of a class governed by the *Statute of Frauds* or similar statute, and there is, therefore, nothing in principle to prevent their concluding a contract which is partly oral and partly in writing. *Ex hypothesi*, then, a document may not have been intended to constitute the final record of the parties' agreement. Mr McLauchlan argues that the view that a writing can somehow be intrinsically self-determinative of the parties' intent is an impossible one not only because this is to apply the parol evidence rule in the course of determining whether it does apply but also because, as Corbin has pointed out, before the parol evidence rule can apply, considerable oral testimony must be given by the contracting parties to prove the genuineness of the writings:

The difficulty is that the court's assumption or decision as to the completeness and accuracy of the integration may be quite erroneous. The writing cannot prove its own completeness and accuracy. Even though it contains an express statement to that effect, the assent of the parties thereto must still be proved. Proof of its completeness and accuracy, discharging all antecedent agreements, must be made in large part by the oral testimony of parties and other witnesses.³⁰

Mr McLauchlan's conclusion is therefore that the question whether the parties intended a written document to contain all the terms of their agreement is a question of fact for the trial judge to decide rather than a question of construction. The parol evidence rule should be viewed as raising a presumption that a document which looks like the whole contract does in fact contain the whole contract, but the trial judge must hear all relevant testimony to determine whether or not as a matter of fact it was the intention of the parties that the instrument contain all the terms of the agreement. The key is thus to distinguish between hearing the oral evidence, and giving it effect. In determining whether or not to give effect to the evidence, the court must take into account such factors as the form of the writing (is it formal and detailed or a mere memorandum), the manner in which the agreement was prepared (is it one party's standard form or not), the nature and effect of the oral testimony, and whether or not the writing contains a merger clause.³¹

³⁰ Corbin, *supra*, note 26, 630.

³¹ As Professor Williams observed in his work on the *Statute of Frauds*, the extent to which the courts may rely upon extrinsic circumstances in drawing an inference as to the intention of the parties does not seem to be very definitely laid down in the authorities: J. Williams, *The Statute of Frauds, Section 4* (1932), 155, fn. 1. It seems to be fairly inferable

This new perspective on the nature and scope of the parol evidence rule is of considerable importance in determining the true boundaries of the collateral contract exception to the parol evidence rule, and the extent to which a contracting party is permitted to adduce evidence to prove an oral undertaking inconsistent with the terms of a subsequent writing. The use of a collateral contract as a way of circumventing the parol evidence rule is well known and is premised on the idea that whereas oral evidence is inadmissible for the purpose of adding to, subtracting from or varying the written document, it is admissible to prove a separate prior agreement the consideration for which is the entry of the subsequent written contract. However, since the consideration for the prior oral contract is the entry of the later written contract, some judges have considered it "logically impossible to assume the existence of a valid preliminary or collateral contract containing terms not consistent with the settled provisions of the subsequent main contract".³² This reasoning can be traced back to *Hoyt's Pty Ltd v. Spencer*,³³ a decision of the High Court of Australia, in which the plaintiff had subleased certain premises from the defendant on the understanding that the defendant would not exercise a contractual right to give notice to terminate the lease. In breach of the agreement the defendant exercised his contractual rights and gave notice to terminate. It was held that even assuming the prior oral agreement had been made, evidence of it was inadmissible on the ground of its inconsistency with the subsequent writing.

As we have seen, however, a number of more recent cases suggest that the collateral contract exception is much broader than has generally been recognized. In these cases³⁴ the oral promise is given effect to notwithstanding its inconsistency with the later written contract. *Canadian Acceptance Corp. v. Mid-Town Motors*³⁵ provides a useful illustration of the lengths to which some trial judges are prepared to go in applying this line of authority. In that case the plaintiff agreed to hire out a mobile brake shop

from Lord Watson's observations in *Mercantile Bank of Sydney v. Taylor* [1893] A.C. 317, 321 (P.C.) that the Judicial Committee was prepared to look outside the writing to determine whether the parties intended it to be a complete statement of their contract. To this can be added an important opinion of Blackburn J.'s in giving advice to their Lordships in *Peek v. North Staffordshire Ry. Co.* (1862) H.L.C. 472, 516-8, 11 E.R. 1109, 1126-7 which approaches the application of the parol evidence rule in this way. See also *Allen v. Pink* (1838) 4 M. & W. 140, 144, 150 E.R. 1376, 1378 (Ex.) where Abinger C.B. held the parol evidence rule to be inapplicable in the absence of evidence of any agreement by the plaintiffs that the whole contract should be reduced into writing by the defendant. For contrary authorities see *supra*, notes 16-20.

³² See, e.g., *Donovan v. Northlea Farms Ltd*, *supra*, note 1, 184 *per* Mahon J.; *Hoyt's Pty Ltd v. Spencer*, *supra*, note 1, 147 *per* Isaacs J.

³³ *Supra*, note 1. And see *Carter v. Salmon*, *supra*, note 1; *Henderson v. Arthur*, *supra*, note 1; *Horncastle v. The Equitable Life Assurance Soc. of the U.S.A.*, *supra*, note 1.

³⁴ *Supra*, note 2.

³⁵ *Ibid.*, discussed in Goodale & Goodie, *Comment* (1970) 35 Sask. L. Rev. 192.

for a period of five years at a certain monthly rental. During the negotiations leading up to the conclusion of the contract the plaintiff through its agent had orally promised the defendant that it would supply an advertising and promotional programme to go into effect on the installation of the machine. The written agreement entered into, however, contained no such provision and included a clause purporting to negative all oral agreements. The plaintiff failed to honour its promise and as a result the machine was hardly used. In an action by the plaintiff to recover the monthly rentals owed, the trial judge admitted the oral evidence and dismissed the plaintiff's claim. It can be seen that the result in this case was that the written contract was discharged for breach of the oral promise—a dramatic example of Professor Burrows' observation that the effect of this line of cases is to work a complete reversal of the parol evidence rule placing the emphasis exactly the other way.³⁶ Is this line of authority an aberration?

It is at this point that one's view as to the true conceptual basis of the parol evidence rule becomes critical. If one subscribes to the traditional approach, one must regard this line of cases as anomalous. The reason is that the parties, having once determined to put their agreement into writing, must be taken to have intended that their rights and obligations be contained in the writing. To allow in evidence of any oral promise, let alone one that contradicts the writing, is therefore to go against this intention. It is also highly illogical, since the consideration for the alleged oral contract is the entry of a written contract one of whose terms is inconsistent with the alleged oral contract.

If, on the other hand, one accepts that the parol evidence rule can be formulated in the way that Mr McLauchlan and other theorists suggest, these cases can be supported. The starting point is to point out that there is no *a priori* reason why the validity of the oral undertaking should be conditioned on its consistency with the subsequent written contract. The reasoning to the contrary contained in such cases as *Hoyt's Pty Ltd v. Spencer*³⁷ is premised on the view that the parties must always intend that the subsequent written contract be the dominant one. While this may have been a true reflection of the intention of the parties in the *Hoyt's* case itself, it is manifestly unreal to believe that this will be the case every time parties enter into written standard-form agreements on the faith of a prior oral undertaking. Indeed, the intention of the parties in such cases is likely to be exactly the other way around, as the modern cases reflect. In these cases, the likely intention of the contracting parties is that the prior oral undertaking should govern the subsequent writing. Once this is accepted, there is no conceptual difficulty in supporting these cases. One way of doing so is to

³⁶ Note [1969] N.Z.L.J. 556.

³⁷ *Supra*, note 1.

adopt a two contract analysis. In such cases one will view the consideration for entering into the written contract as the assumption of all the obligations contained in the written contract except those which are inconsistent with the oral contract. Another way of justifying this line of cases is to say that it was the intention of the parties to enter into one composite agreement, partly oral and partly in writing.³⁸ This approach is useful because not all of the cases can be justified using the collateral contract reasoning. Thus the "partly oral, partly written" approach would explain the results in those cases which have held that one contracting party is discharged from an obligation contained in a written agreement because of a plaintiff's breach of a prior oral promise.³⁹

From the foregoing discussion it is apparent that cases which have held that an oral promise is admissible even though inconsistent with a later writing cannot be dismissed out of hand as necessarily wrong or as logically untenable. Whether this line of cases can be said to be rightly decided, however, must ultimately depend on the view of the parol evidence rule to which one subscribes.

In principle, the view propounded by Mr McLauchlan and other modern authors as to the scope of the rule appears to be the preferable one. It should not be forgotten that despite the inroads that have been made on the autonomy of the contracting parties,⁴⁰ the prime objective of a court in a contract dispute remains to ascertain what the parties' agreement was, and within the bounds of public policy, to give effect to that agreement. Wherever possible, rules of evidence ought to facilitate and not hinder that objective. A parol evidence rule which is seen in terms of a presumption that the writing is intended to constitute the parties' agreement does have the necessary flexibility to separate those cases where the writing is intended to constitute the agreement from those where it is not. That cannot be said of the orthodox approach, as *Hutton v. Watling*⁴¹ all too aptly demonstrates. For these reasons it is respectfully submitted that the view of the New Zealand Court of Appeal that oral evidence to prove the existence of a collateral contract inconsistent with a later written contract is not necessarily inadmissible, is to be preferred to the view of the Supreme Court of Canada

³⁸ *J. Evans & Son (Portsmouth) Ltd v. Andrea Merzario Ltd*, *supra*, note 2, 1083 per Roskill L.J.

³⁹ See, e.g., *Canadian Acceptance Corp. v. Mid-Town Motors*, *supra*, note 2.

⁴⁰ *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] 2 W.L.R. 45, 60 (H.L.) per Lord Wilberforce: "I think that the movement of the law of contract is away from a rigid theory of autonomy towards the discovery — or I do not hesitate to say imposition — by the courts of just solutions, which can be ascribed to reasonable men in the position of the parties."

⁴¹ *Supra*, note 18.

recently expressed in *Bauer v. Bank of Montreal*⁴² that such evidence is invariably inadmissible.

II. Parol Evidence and Misrepresentation

Is oral evidence admissible to prove that one contracting party innocently (in the sense of non-fraudulently) misrepresented the contents of a writing which the other party subsequently signed? In *Bauer v. Bank of Montreal* the Supreme Court of Canada has held that such evidence is not admissible.⁴³

In *Bauer*, the respondent bank brought its action against the appellant on a guarantee. The appellant had given the guarantee in connection with an extension by the bank of a line of credit to a company of which the appellant was the controlling shareholder. As part of the transaction, that company assigned its book debts to the respondent bank. At the time of entering into the contract of guarantee the bank told the appellant that upon his paying the amount secured under the guarantee, the book debts would be reassigned to him. The written contract of guarantee was in the bank's standard form and contained a clause providing that the bank "may abstain ... from perfecting securities of the customer." The bank negligently registered the assignment in the wrong county, so that when the company went into bankruptcy the assigned accounts became available to the general creditors and were of little value in recouping the defendant's loss under the guarantee. In an action by the bank on the guarantee, the trial judge dismissed the bank's claim on the basis that under the general law of guarantee and suretyship, the bank was obliged to safeguard the security given to it and to reassign it to the appellant on his honouring the guarantee.⁴⁴ The Ontario Court of Appeal reversed the decision because the terms of the guarantee permitted the bank to abstain from perfecting its security.⁴⁵ On appeal to the Supreme Court of Canada the appellant argued that the guarantee ought to be set aside as its execution had been procured by the bank's misrepresentation as to its nature and effect. The Supreme Court rejected this argument. It held that as a result of the parol evidence rule there was no admissible evidence of the misrepresentation. So far as material the opinion reads as follows:

The third argument involves the assertion that the execution of the guarantee was procured by misrepresentation of its full nature and effect by the bank The misrepresentation alleged is that the bank manager told the guarantor that upon his paying the amount secured under the guarantee, the book debts would be reassigned to

⁴² *Supra*, note 4.

⁴³ See also *Hawrish v. Bank of Montreal*, *supra*, note 1, and Waddams, *Comment* (1969) 47 Can. Bar Rev. 505 for a similar decision.

⁴⁴ *Bank of Montreal v. Bauer* (1977) 15 O.R. (2d) 746 (H.C.).

⁴⁵ *Bank of Montreal v. Bauer* (1978) 19 O.R. (2d) 425 (C.A.).

him. This representation was false for the reason that it contradicted the bank's own document. It was contended that the guarantee would not have been executed in its absence. Various authorities were cited for the proposition that a contract induced by misrepresentation or by an oral representation, inconsistent with the form of the written contract, would not stand and could not bind the party to whom the representation had been made No quarrel can be made with the general proposition advanced on this point by the appellant. To succeed, however, this argument must rest upon a finding of some misrepresentation by the bank, innocent or not, or on some oral representation inconsistent with the written document which caused a misimpression in the guarantor's mind For reasons which will appear later in that part of this judgment dealing with the collateral contract argument, I am of the view that there is no evidence which would support any such finding against the bank The only evidence I can find in the record ... is a statement by the bank manager that the bank would have reassigned the accounts on payment by the guarantor as normal practice, and the assertion by the guarantor that he had been told by the bank manager that if he made good on his guarantee the accounts would be reassigned to him There was then some evidence for the finding of the trial Judge and its sufficiency is not for this Court to judge. However, it seems clear to me that this evidence would go towards imposing a limit on the bank's rights with respect to the security given by the debtor. This would clearly contradict the terms of the guarantee which, as has been pointed out, gave the bank the right to abstain from registration and perfection of security. On this basis, it would be inadmissible under the parole evidence rule⁴⁶

The result is that one contracting party may enforce a standard-form contract against a party who misunderstood the effect of the form even though that misunderstanding was induced by a misrepresentation made by the party relying on the printed form. With very great respect to their Honours this conclusion is as unjustified in principle as it is unsupported by authority. To understand the reasons why oral evidence of such a misrepresentation may be adduced, however, requires an understanding not only of the way in which misrepresentation was formerly treated at law and in equity, but also of classical formation doctrine. This is necessary because the reasons for allowing in evidence of misrepresentation to rescind a contract are somewhat different from those which allow oral evidence to be given in a case like *Curtis v. Chemical Cleaning and Dyeing Co.*,⁴⁷ where, it will be remembered, it was held that a contracting party was not entitled to rely on an exception clause inserted by him into the contract as he had misrepresented its terms or effect.

For the sake of convenience this part of the article will be divided into two parts. Part A deals with the reasons why parole evidence is admissible to set aside a contract entered into as a result of an innocent misrepresentation. Part B will consider the slightly different grounds on which oral evidence is admitted in a case like *Curtis v. Chemical Cleaning and Dyeing Co.*

⁴⁶ *Supra*, note 4, 430-2, *per* McIntyre J.

⁴⁷ *Supra*, note 6.

A. *Rescission for Innocent Misrepresentation*

At first sight some of the statements of the parol evidence rule in the great treatises on the law of contract appear to suggest that there is no exception to the parol evidence rule to prove the making of an innocent misrepresentation. In the relevant passage in Williston's treatise, for example, no mention is made of such an exception.⁴⁸ The same is also true of the American *Restatement of the Law of Contracts*.⁴⁹ Why then is it generally thought that oral evidence of an innocent representation is admissible to set aside a written contract?⁵⁰ The reasons are, it is submitted, mainly historical and require an understanding of the developments that occurred in the substantive law of misrepresentation towards the end of the last century.

At common law the critical distinction in the substantive law was that between fraudulent and innocent misrepresentations. If the plaintiff could show that he had been induced to enter into an agreement as a result of the defendant's wilful deception he was entitled to sue in deceit for damages and to set aside the contract.⁵¹ If, on the other hand, he was induced by a non-fraudulent misrepresentation he had no claim for damages unless he could make out a warranty.⁵² It might, of course, be the case that the truth of the representation was imported into the contract as an implied condition of the

⁴⁸ S. Williston, *Contracts*, rev. ed. (1936), vol. 3, §634 is as follows: "The parol evidence rule does not become applicable unless there is an integration of the agreement or contract, that is, unless the parties have assented to a certain writing or writings as the statement of the agreement or contract between them. Accordingly, it may be shown by parol evidence not only that a writing was never executed or delivered as a contract, or that the validity of the agreement was impaired by fraud, illegality, duress, mistake, insufficiency of consideration, or failure of consideration rendering it void or voidable."

⁴⁹ American Law Institute, *Restatement of the Law of Contracts* (1932), §238: "Agreements prior to or contemporaneous with an integration are admissible in evidence (a) to establish the meaning of the integration when this is required for the application of the standards stated in §§230, 231;

(b) to prove facts rendering the agreement void or voidable for illegality, fraud, duress, mistake or insufficiency of consideration;

(c) to prove facts in a suit for rescission or reformation of the written agreement showing such mistake as affords ground for the desired remedy;

(d) to prove facts in a suit for specific performance showing such mistake, oppression or unfairness as affords grounds for denying that remedy."

⁵⁰ See Chitty, *Contracts*, 24th ed. (1977), para. 744; Treitel, *supra*, note 25, 135-6.

⁵¹ *Derry v. Peek* (1889) 14 App. Cas. 337, 347 (H.L.) *per* Lord Bramwell.

⁵² *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, 47-51 (H.L.) *per* Lord Moulton. This leaves out of account the subsequent development of the *Hedley Byrne & Co. v. Heller & Partners Ltd* [1964] A.C. 465 (H.L.) line of cases, and also the possibility of liability for "equitable fraud" arising out of special relationships as occurred in *Nocton v. Lord Ashburton* [1914] A.C. 932 (H.L.) and *Coleman v. Myers* [1977] 2 N.Z.L.R. 297 (N.Z.C.A.), *rev'g* [1977] 2 N.Z.L.R. 225 (N.Z.S.C.).

contract (this often occurred in marine insurance contracts)⁵³ and it was also possible that the contract could be treated as non-existent on the ground of common mistake arising out of innocent misrepresentation.⁵⁴ But in general an innocent misrepresentation gave the representee no rights. It is therefore not surprising that it is difficult to find cases which establish an exception to the parol evidence rule at common law allowing in oral evidence of innocent misrepresentation.

Although, as a general rule, equity followed the common law on this subject,⁵⁵ there were a number of refinements which were of significance in its treatment of oral evidence seeking to establish the making of an innocent misrepresentation. In the first place, the question whether a contract had been entered into as a result of the making of an innocent misrepresentation was a factor which a court of equity took into account in exercising its discretion whether or not to award a decree of specific performance.⁵⁶ Oral evidence of the making of an innocent misrepresentation was accordingly admissible to defend proceedings for specific performance of a written agreement. Thus in *Cadman v. Horner*⁵⁷ specific performance of a written agreement for the sale of land was denied on proof of the making by the plaintiff of certain oral representations as to the value of the estate that was the subject of the sale, forming no part of the written contract. Similarly, in *Viscount Clermont v. Tasburgh*,⁵⁸ specific performance of a written contract for an exchange of lands was denied on proof of the making of an innocent misrepresentation by the plaintiff that the defendant's tenants had consented to the exchange. The clearest exposition of the principle on which such cases proceeded is to be found in Lord Eldon's opinion in *Marquis Townshend v. Stangroom* where his Lordship said:

Upon the question as to admitting parol evidence, it is perhaps impossible to reconcile all the cases It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in Equity, when once the Court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law; but all the doctrine of the Court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the Court will not execute, must be struck out, if it is true, that, because parol evidence should not be admitted at Law, therefore it shall not be admitted in Equity, upon the question,

⁵³ *Blackburn, Low & Co. v. Vigors* (1886) 17 Q.B.D. 553, 562 (C.A.) per Lord Esher M.R., rev'd (1887) 12 App. Cas. 531 (H.L.). See J. Salmond & J. Williams, *Contracts*, 2d ed. (1945), 233-6.

⁵⁴ *Kennedy v. The Panama, etc., Royal Mail Co.* (1867) L.R. 2 Q.B. 580, 587 per Blackburn J.

⁵⁵ *Woollam v. Hearn* (1802) 7 Ves. Jun. 212, 32 E.R. 86 (Ch.); *Clowes v. Higginson* (1813) 1 V. & B. 524, 35 E.R. 204 (Ch.).

⁵⁶ See, e.g., *Davis v. Symonds* (1787) 1 Cox 402, 29 E.R. 1221 (Ex.).

⁵⁷ (1810) 18 Ves. 10, 34 E.R. 221 (Ch.).

⁵⁸ (1819) 1 Jac. & W. 112, 37 E.R. 318 (Ch.).

whether, admitting the agreement to be such as at Law it is said to be, the party shall have a specific execution, or be left to that Court, in which, it is admitted, parol evidence cannot be introduced. A very small research into the cases will shew general indications by Judges in Equity, that that has not been supposed to be the Law of this Court . . . I do not go through all the cases . . . In . . . *Joynes v. Statham* . . . [Lord Hardwicke] . . . states the proposition in the very terms; that he shall not confine the evidence to fraud; that it is admissible to mistake and surprise; and it is very singular; if the Court will take a moral jurisdiction at all, that it should not be capable of being applied to those cases; for in a moral view there is very little difference between calling for the execution of an agreement obtained by fraud, which creates a surprise upon the other party, and desiring the execution of an agreement, which can be demonstrated to have been obtained by surprise.⁵⁹

Secondly, as is indicated in the passage above, courts of equity had an extensive jurisdiction to grant relief where contracts had been entered into as a result of fraud or mistake, and parol evidence was admissible to lay the foundations for such claims.⁶⁰ The point of significance, so far as we are concerned, is the ambit that courts of equity gave to "fraud". Although this has been rather lost sight of at the present day, courts of equity formerly granted relief, either by way of compensation (order that the representation be made good) or cancellation, on the ground of fraud even though the party making the statement genuinely believed in the truth of that statement⁶¹ — or in modern terminology even though the misrepresentation was "innocent". Equity's notion of what constituted fraud is described as follows by Story in his treatise on *Equity Jurisprudence*:

Whether the party thus misrepresenting a material fact knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know or believe to be true is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a material fact by mistake, it is equally conclusive, for it operates as a surprise and imposition upon the other party.⁶²

⁵⁹ (1801) 6 Ves. Jun. 328, 333-7, 31 E.R. 1076, 1078-9 (Ch.).

⁶⁰ *Henkle v. Royal Exchange Assurance Co.* (1749) 1 Ves. Sen. 317, 318, 27 E.R. 1055, 1055 (Ch.) per Lord Hardwicke L.C.; *Baker v. Paine* (1750) 1 Ves. Sen. 456, 27 E.R. 1140 (Ch.); *Davis v. Symonds*, *supra*, note 56; *Shelburne v. Inchiquin* (1784) 1 Bro. C.C. 338, 350, 28 E.R. 1166, 1172 (Ch.) per Lord Thurlow; *Ball v. Storie* (1823) 1 Sim. & St. R. 210, 57 E.R. 84 (Ch.). And see J. Story, *Commentaries on Equity Jurisprudence*, 13th ed. (1886), vol. 1, paras 153-6; W. Kerr, *Fraud and Mistake*, 5th ed. (1920), 512, 521-2, 526, 531.

⁶¹ See, *inter alia*, *Hobbs v. Norton* (1682) 1 Vern. 136, 23 E.R. 370 (Ch.); *Hunsden v. Cheyney* (1690) 2 Vern. 150, 23 E.R. 703 (Ch.); *Pearson v. Morgan* (1788) 2 Bro. C.C. 384, 29 E.R. 214 (Ch.); *Burrowes v. Lock* (1805) 10 Ves. Jun. 470, 32 E.R. 927 (Ch.); *Pulsford v. Richards* (1853) 17 Beav. 87, 94, 51 E.R. 965, 968-9 (Rolls Ct) per Romilly M.R.; *Rawlins v. Wickham* (1858) 3 De G. & J. 304, 44 E.R. 1285 (Ch.); *Slim v. Croucher* (1860) 1 De G.F. & J. 518, 45 E.R. 462 (Ch.); *Re Overend, Gurney & Co.* (1867) L.R. 3 Eq. 576, 623-4 per Malins V.C.; *Reese River Silver Mining Co. v. Smith* (1869) L.R. 4 H.L. 64, 79; *Ramshire v. Boulton* (1869) L.R. 8 Eq. 294, 300-1 per Malins V.C.; *Eaglesfield v. Marquis of Londonderry* (1875) L.R. 4 Ch. 693, 704-6 per Jessel M.R.; *Mathias v. Yetts* (1882) 46 L.T. 497, 502 (C.A.) per Jessel M.R.

⁶² Story, *supra*, note 60, para. 193. And see *Torrance v. Bolton* (1872) L.R. 8 Ch. App. 118, 124 per James L.J.

*Slim v. Croucher*⁶³ is in every way representative of equity's approach. In that case a builder named Hudson, having completed the construction of four houses on a piece of land, asked the plaintiff's solicitors if any of their clients would lend him money on a mortgage of the houses. At the same time Hudson informed the solicitors that Croucher had agreed to grant him a lease of the land on which the houses were built. The solicitors read an agreement for a lease and asked for an assurance from Croucher that he would grant a lease according to the agreement. Croucher wrote back to the solicitors in the following terms: "Post Office, Shadwell, December 7, 1856. — Sir, — I am quite agreeable to grant a peppercorn lease of ground on which four houses are erected, and situate at Bromley to Mr. Hudson — I am Sir, yours etc. — J.T. Croucher."^{63a}

Subsequently Croucher granted Hudson a lease which was handed to the plaintiff as security. The plaintiff then advanced money to Hudson. It turned out that Croucher had previously demised the same premises for the same term to Hudson who had since assigned it for value. A bill was filed against Croucher and Hudson claiming that the plaintiff had been induced to advance monies by fraud, misrepresentation and concealment on the part of both the defendants; that Croucher had assisted Hudson in misleading and deceiving the plaintiff and praying that Croucher might be ordered to repay the sums advanced. Croucher denied the truth of the allegation of fraud, misrepresentation and concealment and stated by way of defence that at the time of granting the lease comprised in the plaintiff's security, he had forgotten the grant by him to Hudson of the prior lease of the same premises and had inadvertently granted the second lease. The plaintiff claimed to be entitled to be indemnified for the loss occasioned by taking the security of an invalid lease having relied upon Croucher's representation that he had the power to grant the lease. The Court of Appeal in Chancery (Lord Campbell L.C., Knight Bruce, Turner L.J.J.) held that even though the defendant had not been shown to have been guilty of wilful deception, or of having done more than forgotten the previous lease when he granted the second, he was liable for "fraud" and that this was a proper case for an order directing payment by the defendant of the sum which the plaintiff had advanced.

Thus courts of equity formerly held a representor to be liable in "fraud" for making a false statement as to a matter of fact even though the statements were made in the belief that they were true. The remedy available was moulded to fit the circumstances. Generally, it entailed a court ordering that the representation be made good:⁶⁴ but on occasions, a court might order

⁶³ *Supra*, note 61.

^{63a} *Ibid.*, 463.

⁶⁴ See, e.g., *Burrowes v. Lock*, *supra*, note 61; *Slim v. Croucher*, *supra*, note 61; *Pearson v. Morgan*, *supra*, note 61. See generally R. Meagher, W. Gummow & J. Lehane, *Equity: Doctrines and Remedies* (1975), paras 1709 *et seq.*; Jackson, *Estoppel as a Sword* [Part 1 & 2] (1965) 81 L.Q.R. 84, 223.

rescission,⁶⁵ or an injunction,⁶⁶ or even that a representor's security be postponed to the representees.⁶⁷ The important point for our purposes is, however, as Pollock pointed out, that "for a long time equity judges and text writers thought it necessary or prudent for the support of a beneficial jurisdiction to employ the term 'Fraud' as *nomen generalissimum*. 'Constructive fraud' was made to include almost every class of case in which any transaction is disallowed."⁶⁸

It was not until the developments that took place after the coming into force of the *Judicature Act*⁶⁹ that the modern law on relief for innocent misrepresentation as we know it emerged. Space prevents a full discussion of these developments in this article, but it suffices to say that after *Derry v. Peek*⁷⁰ decided that fraud required the absence of a genuine belief in the truth of the representation it became established that warranty aside, a plaintiff could not recover damages for innocent misrepresentation.⁷¹ As *Derry v. Peek* had decided nothing as to the right to rescind for nonfraudulent misrepresentations, however, former equity cases which had held that rescission of a contract was available even though the misrepresentation was innocent survived unscathed as authorities though, of course, they could no longer be explained in terms of equitable fraud.⁷² Even so it was for a long time doubted that there was a general right to rescind for innocent misrepresentation. It was thought that the common law rule illustrated in such cases as *Kennedy v. Panama Royal Mail Co.*⁷³ and *Riddiford v. Warren*⁷⁴ prevailed except in respect of certain particular classes of contracts, e.g., insurance contracts, suretyship and guarantee, sale of land, family settlements, the contract of partnership and, by analogy, contracts for the sale and purchase of shares.⁷⁵ In respect of these contracts the position was thought to be different though the character and stringency of the duties

⁶⁵ *Pulsford v. Richards*, *supra*, note 61, is a very useful exposition of the basic principles governing the granting of relief based on this principle of equity.

⁶⁶ *Piggott v. Stratton* (1859) 1 De G.F. & J. 33, 45 E.R. 271 (Ch.).

⁶⁷ *Ibbotson v. Rhodes* (1706) 2 Vern. 554, 23 E.R. 958 (Ch.); *Draper v. Borlace* (1699) 2 Vern. 370, 23 E.R. 833 (Ch.). See the remarkable decision in *Thomson v. Simpson* (1870) L.R. 9 Eq. 497, where the representee was given a priority over the other creditors of the representor (in liquidation).

⁶⁸ F. Pollock, *Principles of Contract*, 9th ed. (1921), 566-7.

⁶⁹ *Supreme Court of Judicature Act*, 1873, 36 & 37 Vict., c. 66 (U.K.).

⁷⁰ *Supra*, note 51.

⁷¹ *Heilbut, Symons & Co. v. Buckleton*, *supra*, note 52; *Rutherford v. Acton-Adams* [1915] A.C. 866 (P.C.). And see Salmond & Williams, *supra*, note 53, 232.

⁷² See, e.g., *Pulsford v. Richards*, *supra*, note 61; *Redgrave v. Hurd* (1881) 20 Ch. 1 (C.A.) and *Adam v. Newbigging* (1888) 13 App. Cas. 308 (H.L.).

⁷³ *Supra*, note 54.

⁷⁴ (1901) 20 N.Z.L.R. 572 (N.Z.C.A.).

⁷⁵ Pollock, *supra*, note 68, 599. And see *Riddiford v. Warren*, *ibid.*, 579-81 per Dennis-J. J.

imposed varied according to the specific risks of the type of contract in question. However, and one suspects mainly as a result of an *obiter dictum* of Lord Atkin's,⁷⁶ opinion gradually swung round to the view that the "equitable" right to rescind for innocent misrepresentation was of general application throughout the law of contracts.⁷⁷ Modern texts⁷⁸ usually cite a short passage in the judgment of Jessel M.R. in *Redgrave v. Hurd*⁷⁹ as establishing the broad equitable right to rescind for innocent misrepresentation. Yet, when viewed in its historical perspective it is clear, given the specific reference to Lord Cairns' speech in *Reese River Silver Mining*,⁸⁰ that Jessel M.R. was doing no more than pointing out that the right to rescind for misrepresentation was broader in equity than it was at law because of the differing conceptions of fraud that prevailed in the two jurisdictions. It is only to modern eyes brought up in the aftermath of *Derry v. Peek* that this passage appears to *establish* a broad equitable right to rescind for non-fraudulent misrepresentation. The truth is, however, that the right to rescind for innocent misrepresentation derives from the old equity cases on misrepresentation in which relief was given on the hypothesis that the representation was fraudulent. And this in turn explains why parol evidence has always been admissible to prove the making of the representation, for courts of equity always recognized "fraud" as an exception to the parol evidence rule.⁸¹

For these reasons it is respectfully submitted that the Supreme Court of Canada erred in *Bauer v. Bank of Montreal* in holding that the parol evidence rule precluded the appellant from relying on the assurance that the accounts would be reassigned to him to establish the making of a misrepresentation as to the nature and effect of the document. The claim being one for the rescission of the contract on the ground of misrepresentation, the parol evidence rule ought to have been held inapplicable.

B. *Curtis v. Chemical Cleaning and Dyeing Co.*

In *Curtis v. Chemical Cleaning and Dyeing Co.*,⁸² the plaintiff took a wedding dress to the defendants for cleaning and was asked to sign a document headed "Receipt". Before signing the document in question she

⁷⁶ *MacKenzie v. Royal Bank of Canada* [1934] A.C. 468, 475 (P.C.).

⁷⁷ See Salmond & Williams, *supra*, note 53, 240; Pollock, *Principles of Contract*, 10th ed. (1936), 525, 555; 11th ed. (1942), 432, 456, abandoning contrary opinion expressed in earlier editions.

⁷⁸ Chitty, *supra*, note 50, para. 392, fn. 81; Treitel, *supra*, note 25, 274, fn. 14.

⁷⁹ *Supra*, note 72, 13.

⁸⁰ *Reese River Silver Mining Co. v. Smith*, *supra*, note 61.

⁸¹ See, e.g., *Davis v. Symonds*, *supra*, note 56, 1223 *per* Eyre C.B. and the cases cited, *supra*, note 60.

⁸² *Supra*, note 6.

asked the assistant why she should do so and was told, quite innocently, that the defendants would not accept liability for certain specified risks including the risk of damage to beads and sequins with which the dress was trimmed. The writing in fact contained a clause excluding all liability for damage however caused. The dress came back indelibly stained. It was held that the defendants could not rely on the exclusion clause since their employee had represented the effect of the clause to be narrower than was in fact the case. Central to the decision must have been the finding that oral evidence of the misrepresentation was admissible. The *Curtis* decision is generally regarded as having been correctly decided,⁸³ though on the assumption that it did involve a contract in writing its relationship with the parol evidence rule has always remained obscure.⁸⁴ Is the Supreme Court of Canada in *Bauer v. Bank of Montreal* correct then in holding such oral evidence to be inadmissible by virtue of the parol evidence rule?

With great respect it is submitted that, in principle, the answer to this question must be "no". Suppose that A and B are conducting negotiations with a view to entering into contractual relations in respect of the cleaning of B's dress. Suppose that they are agreed in principle and that A says to B "those are my terms on the blackboard over there. Go and read them and if you assent to them tell me so and we will have a contract." B does so and returns. They specifically agree to contract on the terms written on the blackboard. In the absence of any vitiating factors, the contract will be held to contain the terms on the blackboard for B has manifested his assent to be bound by them.⁸⁵

Now suppose that B, instead of walking over to the blackboard, says to A "tell me what exempting terms there are and if they are reasonable I shall accept." A says to B "there is a term which exempts us from responsibility for risk of damage to beads and sequins with which dresses are trimmed. Otherwise the terms are all concerned with delivery dates, etc." As a result of this statement B does not go to the blackboard to read the terms, but agrees to contract on the terms contained on the blackboard. In these circumstances, if the blackboard contains a broad exclusion clause excluding liability for all damage to the dress, can it be said that B assented to be bound by it? It is submitted that the answer to this question is "no". On classical formation theory, A would be taken to have offered and B to have assented to an exception clause confined to excluding damage to beads and sequins.⁸⁶

⁸³ See Chitty, *supra*, note 50, para. 851; Treitel, *supra*, note 25, 177; Note, *supra*, note 9.

⁸⁴ *Supra*, note 7, *passim*.

⁸⁵ *Causser v. Browne* [1952] V.L.R. 1, 4 (S.C.) *per* Herring C.J.; *Harris v. Great Western Ry Co.* (1876) 1 Q.B.D. 515, 530-1, *per* Blackburn J.

⁸⁶ *Harris v. Great Western Ry Co.*, *ibid.*; Salmond & Williams, *supra*, note 53, 73. And see *De Tchihatchef v. The Salerni Coupling Ltd* [1932] 1 Ch. 330.

If one considers the terms on the blackboard to constitute a writing it seems self-evident that the writing does not constitute a true record of the bargain that the parties struck. In principle the exception clause on the blackboard should be deleted and the clause as represented to B inserted in its place in proceedings for rectification.⁸⁷ In such proceedings oral evidence will be admissible to lay the foundations for such a claim.⁸⁸ Accordingly, it is respectfully submitted that it is true to say that in our example A cannot rely on the exception clause having misrepresented its contents. Strictly speaking, however, the first step should be to seek rectification of the contract.⁸⁹

This appears to have been the conclusion that Munroe J. reached in *Royal Bank of Canada v. Hale*,⁹⁰ a case which on its facts is strikingly similar to *Bauer*. In *Hale* the defendants executed a guarantee in favour of the plaintiff bank for all direct or indirect liabilities owing by a certain company to the bank. The defendants believed that they were only guaranteeing a bank loan or direct debt made by the plaintiff to the company whereas under the terms of the guarantee the plaintiff sought to hold the defendants liable for indirect debts owed by the company to customers of the plaintiff and assigned by them to the plaintiff. It was held that as the defendants' understanding of the legal effect of the guarantee was induced by the bank's misrepresentations, albeit innocent, the defendants were not liable under the guarantee for the indirect debts. The defendants successfully resisted the plaintiff's claim by pleading (1) that the guarantee in question was understood and intended by both parties to relate only to direct debts in which case there had been mutual mistake permitting rectification, or, in the alternative, (2) that if the plaintiff did intend that the guarantees should apply to the indirect debts as well as to the direct debts, the defendants were

⁸⁷ *Braund v. Mutual Life and Citizens' Assurance Co.* (1926) 45 N.Z.L.R. 529 (S.C.); A contract for a combined life and accident insurance was effected between plaintiff and defendant upon the basis of the proposal form ordinarily employed by defendant. In such proposal form the term "accident" was defined in a general way, and was not limited by specific exceptions. Some time after the acceptance of the risk the defendant issued to the plaintiff a policy differing materially from the proposal in that it exempted defendant from liability in respect of a variety of accidents. The plaintiff did not read the policy, and had no knowledge of the nature and extent of these exemptions. He subsequently sustained an injury of a kind which fell within such exemptions, and in an action to recover under the policy it was held: (1) that the plaintiff when he received the policy without any notification of its departure from the terms of the proposal rightly assumed that it accorded substantially with such proposal; (2) that reasonable notice of the introduction of new terms had not been given to him; and (3) that the Court could rectify the policy so as to make it conform with the proposal.

⁸⁸ Treitel, *supra*, note 25, 140; Chitty, *supra*, note 50, para. 312.

⁸⁹ In such a case, failure to plead rectification will not necessarily be fatal: *Walker Property Investments (Brighton) Ltd v. Walker* (1947) 177 L.T. 204, 296 (C.A.); *West v. Hoyle* [1972] N.Z.L.R. 996 (N.Z.S.C.).

⁹⁰ *Supra*, note 6.

induced to execute the guarantee as a result of a unilateral mistake induced by a misrepresentation and were thereby entitled to equitable relief.

Munro J. admitted oral evidence of the misrepresentations because the proceedings were for rectification and found that the latter of the two alternatives represented the true situation. In holding that the bank could not rely on the written clause in the contract guaranteeing all indebtedness because it had misrepresented the contents and effect of the writing, he said:

There is ample authority founded in good sense, that the Courts will relieve a person of his Contract where a misunderstanding as to its true effect was induced, even though innocently, by the other party and where injustice would be done if performance were to be enforced.⁹¹

Accordingly, it is respectfully submitted that cases such as *Curtis v. Chemical and Dyeing Co.* can be supported in principle, and that the Supreme Court of Canada was wrong in *Bauer* not to allow effect to be given to oral evidence of a misrepresentation as to the contents and effect of the guarantee to prevent the respondent bank from relying on the full terms of the guarantee.

⁹¹ *Ibid.*, 150. It is of course well settled that as a general rule there must be a common mistake before rectification is permitted. Nevertheless, there are exceptions to this general rule and it is established that a unilateral mistake induced by fraud (fraud being understood in its broad equitable sense) will entitle the representee to rectification. For example, rectification will be permitted where one party believes that a particular term has been included in a contract and the other party omits the term from the concluded contract and that omission is made in the knowledge that the first party believes the term to be included. See *Roberts & Co. v. Leicestershire County Council* [1961] Ch. 555, *Thomas Bates and Son Ltd v. Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 (C.A.), and Meagher, Gummow & Lehane, *supra*, note 64, para. 2613. By analogy with the reasoning in *Roberts & Co. v. Leicestershire County Council*, a case in which one party enters into a written contract as a result of a misrepresentation by the other party as to its nature and effect should *a fortiori* be seen as a case of "fraud" in the equity sense, and rectification should again be permitted.