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THE UNITY OF THE PAROL EVIDENCE RULE

By John S. Strahorn, Jr.*

Voltaire once remarked that the Holy Roman Empire was neither holy, Roman, nor an empire. Dean Wigmore has achieved a similar destruction of the parol evidence rule by his statement† that it deals not merely with things parol, is not a rule of evidence, and is not a single rule. Professor Williston, in treating of the topic, accepts these conclusions, save the one denying the unity of the rule. ‡ It would seem from this disagreement that there exists a mooted problem as to the unity of the parol evidence rule. That there is such a difference of opinion makes the matter savor strangely of theological quibblings over the doctrine of the Trinity.

The present discussion proceeds upon the following premise: There exists a body of legal doctrine which determines the extent to which other facts shall have operative effect to establish the existence and terms of a transaction when the content of a writing has been offered for the same purpose. This body of doctrine attaches operative effect to these other facts in some instances and refuses it in others. Certain writers have generalized this body of doctrine into a single rule, called the parol evidence rule, thereby attempting to express the extent to which such body of doctrine denies operative effect to facts dehors a writing. Dean Wigmore has denied the capacity of this body of doctrine for a single generalization in strong language: "There is no one generalization for that rule—at least none which has any practical consequence."§

It is the thesis of this discussion that there is a parol evidence rule, that this body of doctrine can be expressed as a unity, and that it can be better comprehended by such treatment. Any generalization which will accomplish the purpose of summarizing

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*Associate Professor of Law, University of Arkansas School of Law, Fayetteville, Arkansas.
†Research Paper No. 150, Journal Series, University of Arkansas.
‡Wigmore, Evidence, 2d ed., sec. 2400. The other two points there made are (4) that the parol evidence rule is not all the rules that concern either parol or writing, and (5) that it does not involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.
§Williston, Contracts, sec. 632.
§Wigmore, Evidence, 2d ed., sec. 2400.
accurately this body of doctrine must aptly express the circumstances under which the rule denies consideration to extrinsic facts and it must reasonably imply the factors which permit such facts to be operative. It is the present writer's opinion that such a generalization exists and that it can be made to harmonize with and aptly express a valid analysis of the body of doctrine involved.

Using the world "rule" as meaning a possible summation of this body of doctrine, the instant discussion of the unity problem will proceed as follows: First, a treatment of the three phases of the rule which form the foundation for any possible unitary statement, namely, the effect, the policy, and the scope thereof, with a discussion of the form of words which best seems to epitomize each. Then there will be an arrangement of this terminology as a unit, with a discussion of the result, followed by certain general considerations and a summary. This treatment of the problem at stake will entail a discussion of much old matter, distinguished at most by a slightly different arrangement of familiar details. This is necessary to furnish a background for a discussion of the rule's unity.

I

Effect of the Rule

The theoretical effect of the rule on the conduct of litigation is to deprive certain facts extrinsic to the writing of the operative effect they would have but for the presence of the written fact covering the same subject matter. The practical effect of the rule is to debar certain evidence from consideration in a case where its purpose is to establish a fact declared irrelevant by the rule. When the extrinsic evidence has no other purpose than to establish a forbidden fact, it is debarred. When it has another valid purpose, it may be admitted for that purpose alone. The phrasing of the rule which is to take care of its "effect" might be stated: "No evidence can be considered . . ."

Professor J. B. Thayer and Dean Wigmore have sufficiently demonstrated that the rule, if any, is not a rule of evidence, but one of the substantive law, forbidding the fact sought to be proved rather than any particular means of proof. The rule

*There will be no attempt made in this paper to cite cases in support of the propositions discussed. What citation there is will be sporadic. The nature of the instant discussion requires a running summary of various propositions, and the exigencies of space forbid any attempt at complete citation.
is admittedly not a rule of evidence. Yet many think of it in terms of evidence. One wonders if the best way of stating it would not be to use familiar terminology in such a manner as to incorporate validly the nature of the rule as one of substantive law rather than one of the rules of evidence. Is it the use of the word “evidence” or the manner of such use which causes this rule to be confused with the true rules of evidence?

While this is the “parol evidence” rule, it seems best to express what is forbidden by it in terms of “all evidence” or the converse “no evidence.” To use “parol” requires further inquiry into the meaning of the word to learn that it is used in the sense of “extrinsic to the writing.” “No evidence” makes this clear at the start. In the situations to which the rule applies, all evidence besides the writing is forbidden. In the situations to which it does not apply, all is permitted. “Parol” can be further confused with “oral” or “verbal.” A word having the possible sense of “oral” might achieve an unfortunate confusion as to whether the rule applies only to oral testimony of extrinsic facts, as distinguished from written testimony, or whether it applies only to oral extrinsic facts. The true answer is that within the scope of the rule it applies both to oral and written testimony of oral and written facts.

In the Contracts Restatement the forbidden items are stated as “contemporaneous” and “prior” “agreements.” “Agreements” is of course peculiar to contract law. “Contemporaneous and prior” validly expresses the idea that the rule does not go to subsequent jural activity, but nevertheless leads to confusion. “Contemporaneous” is a dangerous word. Few things are actually contemporaneous. Those considered as theoretically contemporaneous are proved to be such only after considerable hairsplitting. The present writer favors a treatment of the rule which disposes of the effect and policy in as simple a manner as possible, leaving the hairsplitting for the scope where it belongs and where it cannot be avoided.

Does the further phrasing “can be considered” carry out a valid statement of the effect of the rule? It does if it makes it clear that the rule is one of substantive law, going to the ultimate

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5 Stephen's statement of the rule (see infra p. 47.) uses “no evidence” as expressing what is debarred.

6 McKelvey, Evidence, 3d ed., sec. 302 refers to the rule as the “oral evidence rule.”

7 Sec. 233.
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fact and not the evidential means. Certainly "no evidence can be considered (for X purpose) . . ." is the same as "no fact shall be relevant (for X purpose) . . ."

A practical phase of the instant discussion is whether or not objection must be made to facts forbidden by the rule at the time they are offered in evidence. If the rule is a rule of evidence, objection to forbidden facts must be made at their offering or it will be too late. If it is a rule of relevancy, objection can be reserved until the charge to the jury when the jurors can be instructed to give no operative effect to the forbidden fact. There can be objection to an irrelevant fact at the time of offering if it has no possible bearing on the case. But is it fair to require objection at the peril of having the fact considered as operative? Some jurisdictions require one to object to facts forbidden by the parol evidence rule when they are offered. Others more logically treat it purely as a matter of substantive relevancy. The latter treatment is theoretically valid. Evidence forbidden because of irrelevancy or the parol evidence rule may be useful for one purpose and not for another.

The rule does not debar the forbidden evidence entirely, but merely denies to it consideration for a certain purpose, and usually the only purpose. As there may be both a proper and improper purpose for this forbidden testimony, it may have to go to the jury safeguarded by instructions as to its proper use. Consequently, it seems unfair to require objection to be made to it at the time of offering, or to require use for all purposes because proper for one. Is a judge always ready to rule on the propriety of admitting extrinsic testimony for certain purposes at the time it is offered? Hearsay is hearsay and easily recognizable in any event when offered. The judge can as readily determine at nine o'clock as at noon whether a privileged communication is to be admitted. Rules of evidence would be applied in the same way in any case. But rules of relevancy vary from case to case and may require for their application knowledge of facts yet to be offered. To say "no evidence can be considered" seems to epitomize this phase of the rule and to prepare for the next problem, as to what is the purpose for which all facts are debarred or rendered irrelevant by the rule.

Policy of the Rule

The law has by various methods recognized what may be
called a human preference for the written act over the oral one. It is the policy of the rule to preserve the security of written transactions by making them superior to less formal acts. This policy is usually expressed tangibly by the statement that the parties are presumed to have merged all their preliminary negotiations into the writing, or that integration presupposes an intent to render insignificant all that has gone before.

Many kinds of transactions can be validly accomplished without paper and pen. Parties are permitted to allow their acts to be ascertained from a confused mass of oral mouthings if they wish. But, when they do choose to adopt paper and pen, they are thereby permitted to forget these oral acts and to look solely to the crystallized act in order to discern the extent of their transaction. When there are two oral acts covering the same subject matter, they go to a fact-finder on an equal basis for his or their determination as to the result. When one fact is written and the other oral, the former goes to the law-finder and the latter to the scrap-heap.

While one phase of the underlying policy of the rule is the preference for the written over the oral act, it can also be justified by other reasons for its effect on one of the two classes of facts a writing supersedes. The writing is said to supersede both prior and contemporaneous parol facts. As to the supremacy of the writing over prior facts, there is this second justification. Other things being equal, a subsequent act replaces a prior inconsistent one. Thus later statutes may repeal earlier ones, later wills may revoke earlier ones. By legal fiction a writing speaks as the utterance of the involved parties as of the instant of delivery. It thereby becomes a subsequent utterance which is inconsistent with certain prior ones, and replaces them as would any utterance of equal date. The writing's supremacy over contemporaneous parol acts must depend on its being the more important of two otherwise equal phenomena. It would seem that the rule merely crystallizes the application of the general principle mentioned above to a recurring situation by detailing the tangible rule applicable where the subsequent activity is a written utterance.

For our purposes the policy of the rule is to preserve intact the crystallized acts to be found in the content of the writing and

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8Hale, The Parol Evidence Rule, (1925) 4 Or. L. Rev. 91, 92. "The rule breathes the spirit of the statutes of frauds and of wills."
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the legal effect thereof. This is done by debarring evidence offered for the purpose of varying such legal effect. Thus far, the rule might be stated "No evidence can be considered for the purpose of varying the legal effect of that which the law says shall exclusively be the operative fact to determine a transaction."

To say "for the purpose of varying the legal effect" expresses the idea that the rule does not apply to all evidence, or to all evidence possibly at odds with the legal effect of a writing, but only to such evidence as is offered for the purpose of being at odds with this legal effect. What are some instances of this?

Evidence possibly "violative" of the rule may be admitted under directory instructions as to its use to aid in interpretation. Then, the extrinsic evidence may be needed as secondary evidence to prove the contents of a lost document, itself the integration which the rule protects. For the rule does not apply to transactions for which a writing has been offered in court, but to transactions which were once reduced to writing. This situation is, however, rather theoretical. A better example would seem to be when one side claims the transaction to be integrated and the other denies the integration but claims it is to be found from other facts. Both sets of evidence may have to go to the jury with instructions to disregard the extrinsic facts if the integration is found to be established.

SCOPE OF THE RULE

Consideration is here appropriate as to the extent to which a writing is an exclusive operative fact. The problem of the scope is that of determining to what fact situations the rule does not apply, that is, what facts satisfy the rule, or are permitted consideration despite it? What "written transactions" are to be secured by the rule? The two words "written" and "transaction" afford a suggestion of the analysis of the scope to be used here. There must be a "transaction" which is "written."

By "transaction," which has a "legal effect" to be preserved, is understood any "jural act," including contracts, wills, statutes,
verdicts, judgments, and deeds wherein changes in the legal status quo may or must be accomplished by documentary means.

By "written" is understood the assent of the parties involved to a crystallized form of words with the purpose that these words shall express the transaction as far as they go. "Written" may mean either that documents have been used as media of the creation of the transaction, as where a deed is delivered, or offer and acceptance are by letter; or where after an occurrence of these a memorial of the transaction is subsequently drawn up and assented to. The problem of the scope of determining what elements of a "written transaction" are debarred by the rule, might be attacked by detailing the theoretically most perfect situation to which the rule could apply. Thus, if a writing is the complete expression of a perfect, existing transaction, which is the only one between the parties and the only one in issue in the instant case and nothing has happened subsequent to the integration thereof, the rule applies at its utmost. Such a case requires only recourse to extrinsic facts to connect the parties in the writing with the parties in the instant litigation. Such a situation is unlikely. No transaction can be absolutely free from the necessity for some extrinsic evidence, and few approach the perfection detailed above.

As Dean Wigmore and Professor Corbin point out, a writing has in itself no intrinsic worth, and for it to have jural effect it must be connected with the parties and things in litigation. The question of the scope of the rule would be to determine what effect the rule has on this necessary search for extrinsic facts. Some extrinsic facts are necessary, others are forbidden by the rule. The scope problem is to set the sheep aside from the goats.

Starting with the general premise that recourse to extrinsic facts is always necessary despite the presence of an integration, the parol evidence rule furnishes us an exception to this premise in the form of a restriction on the use of certain extrinsic facts. It seems that the scope of the rule cannot be so well analyzed in


11 Arkansas State Fair Ass'n v. Hodges, (1915) 120 Ark. 131, 178 S. W. 936, reviewed in (1915) 29 Harv. L. Rev. 101 is an example of a statute as a transaction subject to the parol evidence rule. As to jury verdicts being subject to the rule, an extended discussion is to be found in 5 Wigmore, Evidence, 2d ed., sec. 2345-56.

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terms of what is restricted as in terms of what is permitted despite the rule. To group the fact situations permitted both by the general premise and by the rule would seem to enable a picking out of the boundaries and limits of the rule. The analysis to be used here will be in terms of extrinsic facts permitted by the rule. All other facts are debarred. The question will be how to approach an analysis of the situations in which the rule permits the consideration of extrinsic evidence.

The parol evidence rule is applied in a situation where both a written operative fact and a fact extrinsic to it have been offered for consideration. The problem of the rule is to settle the conflict between the writing and the fact. What effect does X writing have on Y fact?

The rule proscribes extrinsic facts because they tend to contradict operative writings. So the first step is to see whether this writing is operative and whether there is present or absent some element, the presence or absence of which makes it impossible for this writing to have the operative effect claimed for it by its proponent. The next step is to see whether this writing by its content excludes the proffered fact. If the content of the writing does not conflict with the purport of the proffered extrinsic fact, the latter is capable of being considered as far as the rule is concerned.

For the rule to apply, two elements must concur, namely, that the writing is an operative fact and that it is operative to the same end as the proffered fact. Evidence to show the writing not operative, or to show facts not in conflict with it would not be forbidden by the rule. If the writing is operative and complete, it excludes everything. If not, an excursion beyond the scope of the rule is necessary to discover the permitted details.

Dean Wigmore's analysis of the rule into the four components of the jural act, Creation, Integration, Solemnization, and Interpretation is valuable for its recognition of the need of analyzing it in terms of all the elements of a transaction rather than in terms of those which could have been incorporated into the writing.

32 The rule, of course, applies when action is brought on a prior promise, possibly superseded by a writing. If so, the opponent need but offer the written obligation, whereupon both it and the extrinsic fact will be in the case and a normal parol evidence situation will be presented. See 2 Williston, Contracts, sec. 631.

14 An excellent example of the use of "operative" terminology in connection with the parol evidence rule is found in Corbin, Conditions in the Law of Contract. (1919) 28 Yale L. J. 739, 764-68.
Certainly a better understanding of the rule about parol terms which could have been incorporated into the writing is achieved by comparison with similar terms which are not capable of integration. The arrangement to be used here is based largely on the analysis of Dean Wigmore. The two main subdivisions are suggested by the two more important of his, Creation and Integration. The other two are not considered by the present writer as important enough to deserve separate space. Interpretation, as will be suggested, is but a phase of Integration. Solemnization, if it deserves space at all, could be taken care of under Creation. Other lesser departures in terminology and arrangement will be discussed later.

The analysis of the scope of the rule used here will comprehend six groups or categories of fact situations, herein called "limits" under which will be listed the kinds of extrinsic facts which are permitted despite the rule. The six limits will be grouped under two general heads, each of which comprehends one of the general problems involved in the application of the rule.

These two headings represent the twin problems of the existence of a transaction and the terms thereof. They represent separable questions involved both in all transactions and in written ones. Neither the factors bearing on existence nor those bearing on terms can be completely expressed in writing. In actual practice most of the factors bearing on existence are extrinsic while most bearing on terms are contained in the writing if any. The distillation between the two is as convenient for discussing the parol evidence rule as for transactions in general.

The first one is the problem of the presence or absence of some element which keeps the content of the writing from having the operative effect claimed for it. The question is whether the writing has become and remained a valid transaction. Does the transaction exist? What of its external sufficiency? The next heading, "terms," will be called "expression" for purposes of the parol evidence rule. To what extent is the writing an expression of the terms of the transaction? What of its internal sufficiency?

**Outline**

A. **Existence (External Nature).**—The rule permits the consideration of a fact dehors the writing where it is offered to show the presence or absence of some element, the presence or absence of which negatives the existence of the jural situation claimed
to be established by the writing. This evidence to show that the content of the writing has not the operative effect claimed for it may be considered to prove that:

1. No transaction was ever created, ("creation.")

2. An imperfect transaction was created, ("imperfect.")

3. The transaction, once created, has since validly accomplished a certain change in form, ("termination.")

B. Expression (Internal Nature).—The rule permits the consideration of a fact actually not in conflict with the legal effect of the content of a writing, where the proffered fact covers a detail not provided for by the writing because:

4. The fact is rendered necessary by the content of the writing, in order to enforce the transaction. ("insufficient.")

5. The parties have never assented to the particular writing as superseding the particular fact, because the fact is collateral to the writing, ("collateral.")

6. The writing is not an operative fact in the transaction being litigated in the instant case, ("independent.")

These six "limits" are not exceptions to the rule but rather groups of facts which are permitted despite the rule. The use of them satisfies the rule. The only real exception to the rule will be discussed later. Before that there will be grouped under the six headings the fact situations which have been adjudicated and which belong there respectively.

II

Existence of Transactions

The parol evidence rule assigns an exclusive effect to operative writings, causing the rejection of facts themselves possibly otherwise operative. It applies only to operative writings, and then only to the extent of their content. For a writing to be operative there must concur the existence or non-existence of certain extrinsic facts the existence or non-existence of which is essential to give to the writing operative effect. There must exist a

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15 By "creation" and each of the other words found in parentheses after the six categories is meant a short name, expressing the purport of that category, and by which it will be called in the ensuing discussion.

16 Thus the Restatement of Contracts, Section 233, uses such terminology: "except as stated in sections 236 and 237, the integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject matter; and also, unless the integration is void or avoidable and avoided, all prior oral or written agreements relating thereto. If void or avoided, the integration leaves the operation of prior agreements unaffected."
transaction in which the writing is operative, namely, several facts must concur to cause this transaction to exist at the time action is brought in the instant case.

This problem of whether there exists a transaction in which the writing is operative is looked at from three angles: (1) Is there something present which prevents any transaction from ever having arisen? (2) Was the transaction, if created, perfect and capable of continued existence without destruction at the option of less than all concerned? (3) Has anything happened since the creation of the transaction to destroy the operative effect once caused by this writing and the other then existing operative facts?

This form of attack may seem confusing, inasmuch as jurisdictions and opinions vary as to whether certain items make a transaction void or voidable. This is one of the differences between the "creation" category and the "imperfect" category. But it is thought best to have the "imperfect" category placed between complete non-creation and subsequent activity, in that the factors allowed under it savor of both. The factors permitting the avoidance of the transaction occur before the writing, while the election to avoid occurs afterward. Voidability is at once non-creation and termination and serves as an intermediate concept between the two.17

The placing of "termination" with "creation" is a departure from Dean Wigmore's analysis as he considers "termination" a phase of the completeness of expression or integration. The present writer thinks of the problem of expression as one of the relative extent to which a writing records and supersedes what has happened before and up to the time of its execution. That question is one of determining whether the parties have intended the particular writing to cover the proffered fact. They do not and cannot intend their writing to supersede what is to happen later. It seems idle to include as a matter of their legal intent something which they never could have actually intended. With "expression" limited as it is here, the main problem therein is one of analyzing the form of the words in the writing in the light of surrounding circumstances to see whether it conflicts with the proffered fact. The problem of existence is one of looking to see whether there are facts, the presence or absence of which keep the writing from being an operative item and from causing the

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17 For this reason "creation" is here used in a more restricted sense than it is by Dean Wigmore. He uses it to include what is here distributed between the "creation" and "imperfect" categories.
legal result claimed for it in court. Then, to place "termination" with "creation" enables the phrase "no evidence" to be used, which avoids the confusion incident to "prior and contemporaneous."

1. Creation of Transactions.—It does not violate the rule to show some fact which negatives entirely the existence of the transaction in which the writing might have been operative. These facts fall into four groups:

A. Facts which show that the transaction by its nature was not intended by the parties to cause a legal result. Thus it may be shown that the transaction is in reality one of charity, friendship, or jest. Sham transactions logically belong in the same category although some jurisdictions punish the perpetrators thereof by enforcing the contract.\(^{18}\) This seems unnecessary. If the sham transaction between A and B is intended to deceive X, it would seem to suffice to let X set up the fraud on him as a defense to whatever liability he assumed in reliance on the sham. The state can punish A and B criminally, if necessary. There seems no need to punish one of the parties by allowing the other to enforce the writing against him.\(^{19}\) Then, evidence to show that a writing is actually evidential and not operative is admissible. Such a case would be to show that a writing, apparently a release, is actually a receipt. If a signature to a paper was appended solely to witness an obligor's signature, the true situation may be shown even though the signature in question is apparently that of an obligor.

B. Facts tending to show that the writing, or some other essential fact, is not the act of the party whose act must have occurred to give the transaction the desired effect. Thus it may be shown that the document is a forgery, that it has been materially altered, or that a verdict was rendered without the necessary assent of the entire jury. It may be shown that the paper was delivered on an unperformed condition precedent which does not clash with any express term of the writing.\(^{20}\) It may be shown

\(^{18}\) Wigmore, Evidence, 2d ed., sec. 2406, suggests that the reprehensible sham transactions should be enforced as a punishment.

\(^{19}\) Coffman v. Malone, (1916) 98 Neb. 819, 154 N. W. 726, L. R. A. 1917B 258, favorably reviewed in (1916) 16 Col. L. Rev. 159, was a case refusing to enforce a written sham contract.

\(^{20}\) Pym v. Campbell, (1856) 6 El. & Bl. 370 is the classical case on this point. The matter of parol proof of an escrow is treated in the following articles: Ballantine, Delivery in Escrow and the Parol Evidence Rule, (1920) 29 Yale L. J. 826; Corbin, Conditions in the Law of Contract, (1919) 28 Yale L. J. 739, 764-68; Hale, The Parol Evidence Rule, (1925) 4 Or. L. Rev. 91, 111-19. The first named article, Ballantine, (1920) 28 Yale L. J. 834 et seq., treats the parol proof of an escrow as an exception to the parol evidence rule. This is based on consideration of the delivery of the writing
that an agent purporting to have authority had no such, or that
the writing purporting to be final and adopted was merely a memo-
randum or preliminary negotiation and never assented to by the
parties in question either as an act or as an integration thereof.

C. Facts tending to show the incapacity of one of the actors
in a transaction to assume the liability apparently imposed. To
the extent to which personal incapacity is considered as making
a transaction void, mention of it is appropriate here as well as
in the "imperfect" category.

D. Facts offered to show surrounding circumstances which
prevent the writing from having the normal jural effect possibly
discoverable from its content. Thus, destruction of the subject
matter of a sale, or mistake, or that the contract was made on
Sunday, or was usurious or illegal, or had no consideration, or
that there was a failure of consideration, or impossibility, or
uncertainty, or that a judgment was rendered against a person
over whom there was no jurisdiction may be shown.

These four parts of the first category deal with extrinsic
facts offered to show that a writing has not the operative effect
it appears to have or can be shown to have. Facts to show that
a writing does have operative effect are dealt with in the fourth
category, that of insufficiency of expression. It may be said for
the first category, that the scope of the rule includes only writings
which are a part of a legal transaction that has achieved valid
existence, and that the rule does not forbid the evidencing of
non-contradictory facts to disprove this existence.

2. Imperfect Transactions.—The word "imperfect" is used
as a generic term to cover three groups of situations, in all of
which a transaction has been created but where, by virtue of some
extrinsic facts, its existence is so imperfect as to permit one party
or less than all to throw off all or part of the liability imposed
or have it judicially altered. The following arrangement is sug-
gested by the Contracts Restatement:21

(a) Facts to show that the transaction is voidable and has been
avoided for any reason which the law permits, such as infancy,
fraud, duress, illegality, alteration, and insanity. (b) Facts to
show that a party is entitled to a judicial declaration for substituted

under such circumstances as creating a legal transaction. Were the initial
premise unassailable the conclusion would stand. There seems to be
reasonable argument contra, that the rule of Pym v. Campbell does not
present an exception to the parol evidence rule.

21Sec. 234, parts B, C, D.
or removed liability by reformation or rescission because of mistake. (c) Facts to defeat a suit for specific performance because of mistake, unfairness, or oppression.

All of these factors are available, whether they go to the original creation of the transaction or to the later adoption of the writing as an integration, should the two be separate. Such result will follow within the limits of the rules of the substantive law herein involved. The statement sometimes found that the parol evidence rule does not apply in equity is inaccurate. What is meant is that in certain actions, solely equitable, certain extrinsic facts to show a transaction imperfect will be considered to achieve the ends of equity. The name "imperfect" seems aptly to summarize both voidability and capacity for judicial reformation, rescission, or denial of specific performance. This expresses the idea that a transaction exists though it is less of a transaction than a perfect one.

It might be said, to summarize this category, that the rule applies only to the extent to which the transaction is free from destruction or alteration by reason of its imperfections.

3. Termination of Transactions.—The rule permits the consideration of facts occurring subsequent to the writing in question, which tend to show that the transaction has ceased to effectuate the jural result it once did. Termination of the legal effect may be shown by facts evidencing: (a) Performance, or termination in a manner provided by the transaction as created; (b) subsequent happenings, independent of the will of the parties, which destroy the jural effect of the transaction, such as Act of God, bankruptcy, impossibility, supervening incapacity, and similar defenses; and (c) subsequent substituted act of the parties such as rescission, alteration, novation, waiver, or reintegration, or any of the recognized subsequent jural acts of the parties which stand by themselves and which replace prior inconsistent acts. One writer has suggested that there should be a statutory extension of the statute of frauds to require subsequent alteration of written contracts to be in writing. This seems an unnecessary relict of the older rule that a deed could not be varied by parol and entirely out of harmony with the lesser need for a statute of frauds in our present day legal system.

To summarize this category, the transaction must continue to cause the legal result it originally did, and if something subsequent

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to the writing has terminated its effect to any extent, evidence of such facts may be considered. The rule applies only to the extent to which the writing creates or represents the creation of a transaction which has remained in existence at the time it is sued on.

For the first three categories, and the first general heading it might be said that the scope of the rule is: "A written transaction which has achieved and continued valid existence."

III

THE EXPRESSION OF THE TERMS OF TRANSACTIONS

If the first parol evidence problem is solved, and the writing has escaped having its operative effect destroyed by the extrinsic facts entitled to consideration under one of the first three categories, the next problem is as to the extent to which the writing provides for and thereby supersedes details which have occurred before and up to the time of its execution. From the hypothesis that a writing alone means nothing, we have a general premise that some extrinsic facts are always necessary which are in any case the proof that the writing is the act of the parties and the proof of the identity of the beneficiaries of the transaction. These can never be sufficiently encompassed in the written expression of the transaction. Proof of these the rule always permits.

Thus the rule cannot be said to apply to "written transactions," because there can be no such thing as a completely written transaction. At most, the rule applies to the "written part of a transaction." The question of expression would then seem to be one of the extent to which a transaction is written, i.e., expressed in writing by a crystallized form of words to which the parties have assented for the purpose of superseding previous dealings on the same subject matter.

Before going into a discussion of when a proffered fact will be debarred by a writing, there might also be a discussion of what writings constitute the "written part of a transaction" which is protected by the rule. The following statements have been offered: "When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial . . ."235 "The parol evidence rule assumes agreement upon the writing in question as a complete statement of the bargain."242

Could not a beginner deduce from such statements that the parol

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242 Williston, Contracts, sec. 636.
evidence rule could protect at most but one piece of paper involved in a transaction and then only if it happened to be absolutely complete and perfect? The present writer feels that the writings protected by the rule are "the one or more writings or parts of writings which the parties have expressly or impliedly assented to as accurately expressing the particular terms included within the content of their words." This is the "written part of the transaction." Are not the above statements dealing with the ideal situation rather than with normal daily transactions?

The question is as to what facts may be considered, and what may not, because they conflict with the "written part of a transaction." As far as the parol evidence rule is concerned, any fact may be considered so long as it does not vary the legal effect of the "written part of a transaction." These facts, entitled to consideration because not at variance with the legal effect of the "written part of a transaction" can be grouped under headings which readily shade off into each other and which will be here classified in three groups under convenient titles. These facts include interpretative facts and parts of the transaction not covered by the writing, collateral transactions based on the same consideration and on different considerations, transactions between parties other than the ones in litigation, and facts to contradict non-transactional writings.

The present writer would place the problem of interpretation as a phase of the question of relative sufficiency of expression for two reasons: (1) There seems to be very little difference between recourse to interpretative facts to give effect to a form of words and recourse to other facts to fill in the gaps in a transaction because the written form of words incompletely expresses the transaction. Is not either a matter of supplying from less reliable sources what the parties failed to include in the crystallized form of words to which they assented? (2) That in order to solve the problem of whether a given writing debars a proffered fact because the term sought to be established is provided for by the writing, there must be a judicial declaration of the meaning of the content of the writing before there can be any application of the parol evidence rule one way or another. Is not Professor Williston's statement that the parol evidence rule fixes the subject matter of interpretation inappropriate? Does it not convey the idea that the application of the parol evidence rule is finished

252 Williston, Contracts, sec. 631.
before there need be any recourse to the interpretation rules? It seems that there cannot be any application of the parol evidence rule without an interpretation of the form of words in the writing to see whether the proffered fact is provided for therein. To determine what varies the legal effect of the "written part" requires a determination of whether both writing and fact can have legal effect to the same end. Is not this an ad hoc interpretation?

One cannot speak of the legal effect of an operative writing, as a writing by itself can have no legal effect. But a writing can furnish part of the legal effect of a transaction. Thus, one can speak of the legal effect of the written part of a transaction. What is the legal effect of the written part of a transaction, or what part of the legal effect of a transaction is furnished by the written part of it? The legal effect of the written part of the transaction comprehends: (1) A positive effect—enforceability to all the "terms" expressed by the writing, or to be implied in fact or in law therefrom. (2) A negative effect—the exclusion and non-existence of any other unnecessary terms which would be included in such a document by normal men acting under the same circumstances. Any fact offered for the purpose of varying a term in class 1, or of adding a term in class 2 would vary the legal effect of the written part of the transaction.

What is a "term" of a transaction? A "term" of a transaction is a minute detail of the result caused by the coincidence of operative facts. "Terms" has come to mean the several groups of words tangibly describing the several minute details of the jural situation resulting from the creation of the transaction.

For purposes of the parol evidence rule, terms are divided into those found in the writing and those not. Those found in the writing include (a) Expressed terms which are those some part of which is laid down by words used by the parties, (b) terms implied in fact by the words used, and (c) terms implied in law by the words used. Those terms not found in the writing are (a) those necessary to an enforceable transaction and (b) those not intended to be covered by the writing.

4. Insufficiency of Expression.—The rule forbids facts offered to vary the legal effect of certain writings. Facts which are permissible under this category and which furnish some detail essential to the enforceability of the written transaction carry forward the legal effect of the writing rather than vary it and
so are by hypothesis not affected by the rule. The parol evidence rule, unlike the statute of frauds, does not purport to lessen the number of enforceable transactions. Rather it attempts to see that the better grade of transaction is enforced as against the lesser. So “bolstering” evidence is favored where necessary. The purport of this category is expressed by the same words as for the policy, that the rule applies only to evidence which varies the legal effect.

The facts permitted under this category are those without which the written transaction cannot be enforced. They will be subdivided as follows:

A. Facts to establish definite necessary terms of the transaction.

When a written expression of an ordinary contract shows no consideration, the true consideration may be shown, even though it carries along an oral promise. When the writing is an acceptance, the offer must be shown, and vice versa. The privilege of evidencing consideration for a written promise that shows none is satisfactory enough where a consideration is an essential operative fact. But suppose the writing is sealed and in a jurisdiction which preserves the common law lack of necessity for consideration in such event? Or suppose it is governed by the law of a jurisdiction which has the Uniform Written Transaction Act or a similar statute dispensing with consideration for written promises in certain cases? Then recourse to the erstwhile necessary element can no longer be justified by necessity. The search is for necessary extrinsic facts and consideration seems unnecessary. The answer would probably be that the writing integrates and supercedes but one side of the transaction and that the counter-promises are “collateral” and may be shown.

This is akin to the question that would arise when the writing shows one consideration, but the parties wish to prove another. Here a distinction is made between a recital of the performance of consideration, usually the payment of money, and a written term of a consideration to be. The former may be contradicted, being merely an evidential recital and not an operative term, but the latter may not be. Thus it is seen that the rule applies only to the operative parts of writings and not to their evidential parts.

A term of a transaction is not “necessary” simply because it is not expressed in the writing. If it is to be implied from the content of the writing, it may not be varied any more than if it is

Contracts Restatement sec. 236 (2).
completely expressed. The conventional example of this is the case of a promise to pay money with no time specified in the writing but with a parol agreement on a specific date. The rule keeps this parol agreement from being valid, because there is an implied term of payment at a reasonable time which cannot be varied by the extrinsic fact.

As to terms conclusively implied in law, such as the contract resulting from a blank indorsement of a negotiable instrument, the result is simple. When the legal implication is a conclusive one, none can deny the justice of the result which forbids the varying of the term. But suppose the legal implication is set up by a rebuttable presumption? Can facts extrinsic to the writing be used to rebut the presumption? The Uniform Sales Act has many "rules for ascertaining the intention of the parties"27 as to the time at which title passes in a sale of goods. They provide that a certain result shall follow from certain facts "unless a contrary intention appears." The most typical example is that which provides that an agreement upon specified goods shall pass title immediately. Suppose the writing merely contains the essential elements to raise this presumption, can extrinsic facts be used to show that the parties intended title to pass later?

A different provision of the Sales Act28 would seem to permit recourse to the "conduct of the parties . . . and the circumstances of the case" to ascertain the intention of the parties. Then, is there any difference between a term implied in law and one implied in fact? Is not either a judicial addition to the language of the parties based on their actual words? The difference would seem to be that a fact implication permits a fact-finder to draw a certain inference while a legal implication requires such inference to be drawn.

B. Facts expressly called for by the content of the writing.

If the writing itself demands explicitly that other facts be secured, the evidencing of these facts is permitted by the rule. Thus, the well known doctrine about incorporation of other documents into a will permits the use of these documents despite the rule. A letter accepting "your offer" permits recourse to the letter or spoken word containing the offer. It does not seem satisfactory to call them parts of the same integration any more than to refer to contemporaneous writings in such a manner as does the Con-

27Uniform Sales Act, sec. 19.
28Uniform Sales Act, sec. 18 (2).
tracts Restatement. To state that the rule permits recourse to facts called for by the operative writing seems to take care of the situation when we remember also that the true effect of the "contemporaneous" execution of different writings is to disprove any intent that one shall supersede the matter contained in the other.

Another example would be the filling in of a blank in a writing. When this is permitted, it is but recourse to extrinsic facts explicitly called for. This is clearly so in the case of a writing which is but the memorial of a transaction otherwise created. When the writing is a medium of creation, the case may run afoul of some other rule, declaring the transaction void for uncertainty because of the blank.

C. Facts impliedly called for by the content of the writing.

Herein are the facts usually found necessary for purposes of "interpretation." To make a transaction enforceable, the words of the parties have to be translated into the language of the tribunal and into details sufficiently minute for the court and jury to grasp and use. These facts are impliedly called for by the content of the writing, because there exists a need for such facts when the content of the writing is unable by its own force to achieve the necessary end which such facts will serve. Custom, usage, standards of interpretation, sources of interpretation, all furnish the facts permitted here despite the rule.

The concept of the "incomplete" writing has given rise to no little quibbling. The dispute seems to be between permitting recourse only to the face of the writing to discover incompleteness and permitting recourse to facts dehors the writing for that purpose. To avoid such confusion, the present article hopes to avoid the word "incomplete." There seem to be two components of that concept, recognizing in their spheres the two extremes. The one of the "face-of-the writing" test seems to be taken care of by the "insufficient" category, permitting recourse to such facts as are called for by the writing. The "incompleteness" which must be shown, if at all, dehors the writing seems to fit in with the "collateral" category and to depend on being a matter not intended to be covered by the writing.

5. Collateral Facts.—Into this category are deposited all of the most formidable problems to be found under the parol

29Comment to section 233.
30An article by Dean Hale, The Parol Evidence Rule, (1925) 4 Or. L. Rev. 91, 96-107, treats of the wavering of the Oregon court on this point.
evidence rule. For it is here that the legal bugaboo known as the intent of the parties is met with. Any legal concept which purports to hinge on the so-called intent of human beings is doomed to confusion. This phase of the parol evidence rule is no exception.

The functioning of the rule hinges on the actual or presumed intent of the parties to assent to a crystallized group of words as expressing their transaction. At best this intention has some limits and cannot be extended to make the writing supersede all things. Facts which the parties did not intend to be superseded by the writing are collateral to it. There are present here the two problems, (1) was the writing assented to, and (2) what is its legal effect, positive and negative?

To the extent to which the writing goes it would not seem hard to show assent thereto as this crystallized expression. The signing and delivery of a document by a party should show his satisfaction with it. That the writing, or some part of it, is necessary to the enforceability of a transaction under which the party claims should do as well. That the document was a formal one is helpful. The more formal a document, the easier to show assent, though the less would be its debarring legal effect. The less formal the document, the harder to show assent, but the more it debars after it is assented to. Thus a private letter may not have been intended as an integration, but if so, its content can more easily be held to exclude a collateral term than a formal adoption contract, presumed to have been intended as an integration and yet restricted in scope by its nature.

The writing having been assented to, the next matter is, how far has it been assented to? That is, what is the legal effect of the writing in the light of the "necessary" extrinsic facts? The positive legal effect, enforceability to the expressed, implied in law, or implied in fact terms is the easier angle to attack. It merely requires a determination of whether the writing and the proffered fact have legal effect to the same end, or bear on the same term. Dean Wigmore suggests as a test that if the particular element covered by the proffered fact is mentioned at all in the document, the latter supersedes it. What about the addition of terms not mentioned at all in the document and not necessary to its enforceability?

In this connection it might be wise to eliminate first the easier problem. Where the extrinsic fact is a parol promise based on a
different consideration than the one supporting written promises by
the same promisor, the rule does not forbid the fact. Not only
can it be said that this negatives any intent to exclude the fact,
bu it approaches an "independent" transaction, covered by the
sixth category. In addition it meets the test applied to promises
based on the same consideration.

It is as to these promises based upon the same consideration as
the written one that we have the lowest depths of confusion incident
to the rule. All other matters fade into insignificance when com-
pared to it. The answer is not satisfactory, but none such seems
possible. The Contracts Restatement expresses best the test when
it declares that to be collateral and hence not superseded which
"... is such an agreement as might naturally be made as a separate
agreement by parties situated as were the parties to the written:
contract." Such an objective test is of little value for certainty,
but is as reasonable as can be. It again reminds us of the futility
of requiring objection to the extrinsic fact at the time of its being
offered in evidence. To apply this test requires a temporary con-
sideration of the proffered fact and many other facts possibly
not then in the case.

What of a writing which itself stipulates that it is the whole
contract between the parties? Such effort might show assent to the
writing, although one doubts whether it can receive a strict appli-
cation in every case. It can never accomplish proof of those
things always resting in parol. It could hardly negative contracts
based on a different consideration. Might there not still be some
terms which would be expressed in parol despite such a stipula-
tion? The use of such a phrase is but a stronger case for the
relative completeness of expression.

When writings are executed contemporaneously or refer to
each other by incorporation, this is evidence to rebut the pre-
sumption that either was intended to contain all and goes to show
a non-intent that either should supersede the subject matter of the
other.

To summarize this category, there could be used a phrase that
might also apply to the fourth, that the rule applies only to the
written part of a transaction. What is the written part is always
a disputable question.

6. Independent Transactions.—Herein will be treated the con-
tradicction of writings which were never assented to by the exact

31Sec. 236 (1) (b).
same parties to the instant litigation and which never were part of any of their immediate transactions. If the writing is not an operative fact in any transaction between any persons, the rule does not apply at all. Writings, at most, which are but evidential may be contradicted. Thus receipts and other admissions may be contradicted. The rule applies only to operative writings, those which furnish the "legal effect of . . . a transaction."

A harder case is one in which a writing is operative between the parties to it, but one in which they are not the identical parties to the instant case, in which the writing is offered. X and Y have a written transaction. A and B are in litigation. The XY writing is offered in the AB case, and the question arises whether A or B shall be permitted to offer facts for purposes forbidden X and Y by the parol evidence rule. Courts and writers are not agreed as to the application of the rule to strangers to the document.

A theoretical answer is that when the transaction between X and Y is offered in the AB case, the rule applies and neither A nor B can vary the writing any more than can X and Y. The practical answer of many courts is that the rule does not apply except in controversies between the parties to the writing. Some courts add a very cogent rider, "unless claiming under the writing." This last phrase gets closer to making practical decisions square with the correct theory of the rule although it is not wholly accurate.

The rule applies only to operative writings—writings operative in the instant case. If A and B "claim under" the XY writing, it is because the XY writing is operative in the AB case, and is an operative fact by adoption. If it is not "claimed under," it is not operative in the AB case. Then A or B may contradict it because it is at most evidential.

An example of a writing operative as to some parties and evidential as to others would be a judgment recovered by a creditor against the principal debtor when offered in a suit against the surety. As between creditor and principal, the judgment finally determines the amount due. When offered against the surety, he may contradict the judgment and show a different amount due. It is operative in the first instance and evidential in the latter.

An example of a writing operative as to parties not expressly assenting is a binding written extension of time by creditor to principal. The case arises when the writing is in form an extension of time, with a parol term omitted that would make it a covenant
not to sue, and hence no defense to the surety. The parol stipulation which would turn the extension of time into a covenant not to sue cannot be shown in a suit against either the principal or the surety. In such instance the surety's defense hinges on what is the enforceable contract between principal and creditor. The writing is all of it.

Then there is the much mooted borderline situation of the written release executed to one tort-feasor with an accompanying parol stipulation which would turn it into a covenant not to sue, consequently reserving the right to sue the other tort-feasor. A is injured by the joint tort of B and X. He negotiates with B, orally agrees on a covenant not to sue B, and signs a writing, in form, an absolute release. A sues X, X sets up the release, and A wishes to bring in the parol stipulation to prove it nothing more than a covenant not to sue. A recent line of cases permits this, mainly basing their result on the well known phrase that the rule does not apply to strangers to the document unless claiming under it.

Mainly from these cases, Professor Harris in a recent article finds and approves of a definite exception to the "scientific theory" of the parol evidence rule. Dean Wigmore tacitly admits that such cases do violence to the theory of the rule although he disapproves the result. Professor Williston criticises the cases on theory by comparison to the situation where a creditor extends time to the principal.

It is the present writer's opinion that these joint tort-feasor cases are perfectly consistent with the theory of the parol evidence rule and do not form an exception thereto. To follow Professor Harris's example it might be well to compare the scientific statements of the writers with the practical dictum of the courts. Professor Williston says, "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." Dean Wigmore says, "... the rule will still apply to exclude extrinsic utterances, even as against

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32 Harris, Does the Parol Evidence Rule Apply When One of the Parties to the Controversy is a Stranger to the Contract, (1927) 22 Ill. L. Rev. 274.
33 In approving a case which held the parol evidence rule applicable in such situation. Natrona Power Co. v. Clark, (1924) 31 Wyo. 284, 225 Pac. 586, noted in (1924) 19 Ill. L. Rev. 205.
34 Williston, Contracts, sec. 647.
35 Williston, Contracts, sec. 647.
other parties, provided it is sought to use those utterances for the very purpose for which the writing has superseded them as a legal act."\(^{36}\) Corpus Juris says, "The rule . . . applies only in controversies between the parties to the instrument and those claiming under them. . . ."\(^{37}\)

In the light of this let us compare the joint tort-feasor situation with the extension of time to the principal. When a creditor extends time to the principal, why does that discharge the surety? Because the whole obligation on which the surety is liable has been totally destroyed by the transaction between creditor and principal, embodied in the writing. The surety is using the writing for the very purpose for which the parties to it used it and so the utterances are rendered nugatory by the writing. The issue in dispute is "what are the obligations of P and C," for on them hinges S's obligation.

But when one tort-feasor is permitted to set up a release to another, a different underlying reason is present. When A releases B and sues X, A may contradict the release, because it is not then an operative fact, but merely an evidential one of the real operative fact which is compensation of the injured party. The reason for allowing one tort-feasor to set up a release to another is because the injured person has been paid and is entitled only to one payment and no more. The operative fact is the one of payment, and as between A and X, the release is merely a receipt, an evidential admission subject to all contradiction.\(^{38}\)

As between A and B the release is both a receipt for payment and an enforceable promise to stay out of court. As to X it is but a receipt and may be contradicted by any evidence to show it is a qualified receipt for less than the complete satisfaction which can avail X. These hairsplitting technicalities result not from the nature of the parol evidence but from the rules of torts and suretyship which permit a fine line to be drawn between covenants not to sue on one side and extensions or releases on the other. In the AX case the issue is not what are the obligations of A and B to each other, but whether A has been paid anything. In that case the parties are not using the utterances for the same purpose they would in a suit by A vs. B.

\(^{36}\) Wigmore, Evidence, 2d ed., sec. 2446.
\(^{37}\) 22 C. J. 1292.
\(^{38}\) The writers on torts seem to agree that the true reason for holding that a release to one tort-feasor releases another is the satisfaction of the injured party rather than the destruction of the obligation sued on, 7 Jaggard, Torts, sec. 117; Cooley, Torts, 2d ed., 160.
To make the line of criticism complete, it might be well to repeat Professor Harris's point that the result reached in the tort-feasor cases does not make sense with the language used by the courts.\(^{29}\) They say "the rule applies in controversies between parties to the document and those claiming under it." When A issuing X and X sets up A's release to B, is it not a controversy between a party to the document and one claiming under it? Does not X claim under the document executed to B? It would seem so. If this be true, the rule should be applied in such a case to exclude the extrinsic fact which would turn a release into a covenant not to sue.

It would seem that there is a valid distinction between the tort-feasor cases and the suretyship cases, and that they are actually consistent with the scientific theory of the rule, and not an exception to it. Then it would seem that the courts reach a correct result but do not follow out the erroneous statement of principle which they themselves lay down.

What statement of principle will cover this? When the written part of a transaction is an operative fact in the instant litigation, it cannot be varied by the parties litigating any more than by the original parties to the transaction. For this category the scope of the rule might be said to be "a transaction in issue in the instant case," using "in issue" as meaning "an operative fact." In the suretyship case, the transaction between principal and creditor is in issue, while in the tort-feasor case it is the fact of payment to the injured party that is in issue, evidenced by the transaction between him and the other tort-feasor. It is the policy of the rule to protect only the transactions being litigated.

IV

It is submitted that these six categories with one exception cover the entire territory of extrinsic facts that are admitted in a case where a writing is offered as an operative fact. They are groups of facts which the rule by its nature does not forbid. The analysis of these facts will be used as the basis for the unitary statement of the rule to follow.

Will not the following eclectic combination of statements

\(^{29}\)Harris, Does the Parol Evidence Rule Apply When One of the Parties to the Controversy is a Stranger to the Contract, (1927) 22 Ill. L. Rev. 274, 283.
announced in previous times suffice for a unitary statement of the parol evidence rule:

"No evidence can be considered for the purpose of varying the legal effect of the written part of a transaction in issue which has achieved and continued valid existence."

Before going into a discussion of the validity of this phrasing, it might be well to see whether there exist any genuine exceptions to the rule as here stated, that is, are there any further kinds of facts which are permitted by courts that cannot be crammed into one of the six categories used above.

It seems to the present writer that there exists but one well recognized exception to the parol evidence rule. That is the one 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. Thus, it is held in many jurisdictions that an absolute deed may be shown to be a mortgage or deed of trust, that an apparent principal or joint maker may be shown to be a surety and that one signing apparently in his sole capacity was actually signing as an agent. 40

These situations are similar, because in each the general transaction remains entire; but the parties are shown to bear to each other a different relation, with all the varying legal incidents that may result from this changed relation. While various courts and writers attempt to justify this for reasons which satisfy the rule, yet the damning word "except" creeps into their language. The present writer considers it an exception and nothing less though a justifiable exception probably based on a recognition of the inequality existing between the money lender and his victim. This seems to be the only true exception to the rule as it can be stated. The writer is unable to agree with Professor Ballantine's theory that the escrow principle is one and Professor Harris's that the non-application of the rule to third parties is another.

There would seem to be two objections to the validity of the phrasing of the parol evidence rule as used here: (1) that the generalization used here is not a workable one, and (2) that the generalization used here cannot be denoted a "rule" because it hinges on other "rules" and legal precepts for its application; or, to put it tersely, that the phraseology used here expresses neither a unit nor a rule. They will be discussed in that order.

Dean Wigmore has suggested that there is no possible generalization of practical consequence for the parol evidence rule. Is the one used here of practical consequence? It is neither new nor radical. It is based largely on the two classical statements of the rule laid down in the past, those of Greenleaf and Stephen. Greenleaf says:

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

Stephen states in more detail:

"When any judgment of any court or any other judicial or other official proceeding, or any contract or grant, or any other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of such document be contradicted, altered, added to or varied by oral evidence."

The phrasing suggested above includes most of the better elements of these two, with some alterations to meet the demands of the scientific theory of the rule, and the addition of a word or two to make the treatment complete. Of this phraseology Stephen furnishes "no evidence," while "can be considered for the purpose of varying" is a more "scientific" treatment of Greenleaf's "inadmissible to contradict or vary," because it eliminates the damning word "inadmissible" which is reserved by the writers for the true rules of evidence. Thus far the effect of the rule is incorporated into the statement.

"Varying the legal effect" takes care of the policy of the rule and is a substitute for Greenleaf's "vary the terms." "Written part of a transaction in issue" expresses the second general division of the scope of the rule and more accurately expresses what Greenleaf covers with "written instrument" and Stephen by

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42Stephen, Digest of Evidence, Art. 90.
43Ballantine, Delivery in Escrow and the Parol Evidence Rule, (1920) 29 Yale L. J. 826, 835, gives the following statement of the rule: "The parol evidence rule that oral testimony will not be admitted to vary or to contradict the purport of a legal instrument which has once been delivered and made operative."
44"Scientific" is here used in the sense of conforming to the "scientific" theory of the rule which recognizes it as one of the substantive law rather than one of evidence.
"reduced to a document." It is not "documents" or "instruments" that are protected, but the documentary part of transactions.

"Which has achieved and continued valid existence" at once takes care of the first three categories of the scope and expands on Greenleaf's "valid," while contracting Stephen's rather lengthy description of the various transactions subject to the rule.

The statement used here expresses a definite result and at the same time incorporates all the phases of the analysis of the rule used. It starts with the assumption that no evidence can be considered when an operative writing has been offered and then delimits the kinds of facts which are permitted by the rule. All others are debarred.

The other objection is that a valid "rule" cannot hinge on another rule. Dean Pound defines a rule as that which "prescribes a fixed and definite result for a fixed and definite situation of fact." If this means that no rule can depend on another rule, there are very few rules in existence. Thus, if it be a rule that "a wife may not testify against her husband," we must assume the marital relation or lack of it as a "fact" in order to apply the rule, although such "fact" actually depends on legal precepts for its determination. If it be a rule that "when A kills B with malice aforethought, he is guilty of murder," we must assume the malice or lack thereof as a fact to apply the rule, although they depend on legal precepts also. The present rule involves reference to several subsidiary rules for its application but differs only as a matter of degree from others requiring less recourse. Can it not be said that the parol evidence rule is a single central one depending for its application on other rules which supply the six kinds of facts permitted by the rule? If the statement of it used here does not express a "rule"—broad though it be, it states a most narrow principle.

To summarize: The parol evidence rule epitomizes a well recognized body of doctrine. Its effect is to debar certain evidence from consideration. Its policy is to protect the preferred type of legal transaction. It debars the evidence which would destroy the preferred transaction. The scope of the rule, expressed in six "limits" or categories, is "the written part of a transaction in issue which has achieved and continued valid existence." The rule permits evidence to show that the writing never had legal effect.

or that it had an imperfect legal effect, or that its legal effect has been validly terminated. Facts may be considered when they are necessary to the transaction, or not intended to be covered by the writing, or entirely independent of it. There is but one well recognized exception, that which permits a different relation of the parties to each other to be shown. All other permitted facts are usable because they are beyond the scope of the rule and not in violation of it.

To say "no evidence can be considered for the purpose of varying the legal effect of the written part of a transaction in issue which has achieved and continued valid existence" seems to express all this. Despite the fact that it requires recourse to other rules for its application, this rule stands above them as a separate one depending on them for its support. E pluribus unum.