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# EVIDENCE-PAROL EVIDENCE RULE-ADMISSION OF PAROL EVIDENCE TO SHOW CONTRACT WAS SHAM

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EVIDENCE—PAROL EVIDENCE RULE—ADMISSION OF PAROL EVIDENCE TO SHOW CONTRACT WAS SHAM—Plaintiffs, executors, brought a bill in equity for an accounting on a contract between defendant and one Broder, deceased, dated April 27, 1944, as modified by a writing dated July 24, 1944. In support of a motion to dismiss, defendant offered parol evidence to show that the writing dated July 24, 1944 was actually executed December 31, 1944 and was not intended to bind the parties, but was designed to effectuate a scheme by which certain advancements to be made to Broder for services rendered in 1945 would be treated as salary paid to Broder during 1944 for purposes of defendant's income tax return. The entire arrangement was made conditional upon approval by defendant's tax lawyer. Broder died before the tax lawyer had an opportunity to approve the scheme. The trial court admitted the parol evidence and granted defendant's motion to dismiss the bill. On appeal, *held*, affirmed. Parol evidence was admissible to show that the writing dated July 24, 1944 was executed and delivered conditionally. *Smilow v. Dickerson*, (Pa. 1947) 54 A. (2d) 883.

All courts agree that admission of parol evidence to show conditional delivery of a written contract does not violate the parol evidence rule.[1] Such evidence is said not to vary or contradict the terms of a written contract, because no contract exists until delivery is completed by the happening of an oral condition precedent. The parol evidence rule, being a rule of integration, has no application to a writing without legal effect.[2] A majority of American courts have relied on the same reasoning to support another so-called exception to the parol evidence rule; namely, that parol evidence is admissible to show that a

[1] 9 WIGMORE, EVIDENCE, 3d ed., § 2410 (1940); 3 WILLISTON, CONTRACTS, rev. ed., § 634 (1931). The leading case is Pym v. Campbell, 6 El. and Bl. 370, 119 Eng. Rep. 903 (1856).

[2] In applying the conditional delivery rule courts have not always reached consistent results. An oral "condition" may be characterized as "precedent" by some courts, "subsequent" by others. Also, a distinction is often attempted between conditional delivery and conditional obligation. See 9 WIGMORE, EVIDENCE, 3d ed., § 2410 (1940); Corbin, "Conditional Delivery of Written Contracts," 36 YALE L. J. 443 (1927).

writing purporting to be a contract was executed to deceive some third person and was never intended to bind the parties.[3] The parol evidence, it is said, is offered to show that no contract has been made.[4] Prior to the decision in the principal case, the Supreme Court of Pennsylvania had rejected the majority view and had refused to admit parol evidence showing that the contract was a sham.[5] The same position has been taken by a few other courts.[6] These decisions have been commended by some legal writers, who criticize the "sham contract" rule as poor public policy in that it encourages dishonest men to make fictitious contracts and enables litigants to assert incredible defenses to actions on written contracts otherwise indefensible.[7] In the principal case the court, without referring to its previous decisions dealing with sham contracts, upheld the admission of the parol evidence on the theory that since the entire scheme was subject to the approval of defendant's tax lawyer, such approval was a condition precedent to the delivery of the contract dated July 24, 1944. It is submitted that the court has misapplied the conditional delivery rule. The writing was a pure fiction, intended to deceive the officials of the Bureau of Internal Revenue, and the parties intended that it should have no legal effect. If the writing was never intended to be "delivered," it seems anomalous to say that approval of the scheme by the tax lawyer was a condition precedent to its delivery. Of course it is not necessary for a court that is committed to the admission of parol evidence in both the conditional delivery and sham contract situations to distinguish the two, especially since the argument for admitting the evidence is the same in each case. Heretofore, however, the Pennsylvania courts have rejected the sham contract exception to the parol evidence rule. By ignoring its previous decisions concerning sham contracts,[8] the court in the principal case goes a long way toward overruling them.

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[3] Bernstein v. Kritzer, 253 N.Y. 410, 171 N.E. 690 (1930); Grierson v. Mason, 60 N.Y. 394 (1875); Coffman v. Malone, 98 Neb. 819, 154 N.W. 726 (1915); and cases cited in 33 MICH. L. REV. 410 (1934) and 38 HARV. L. REV. 239 (1924).

[4] Grierson v. Mason, 60 N.Y. 394 (1875).

[5] Evans v. Dravo, 24 Pa. St. 62 (1854); Hendrickson v. Evans, 25 Pa. St. 441 (1855); Winton v. Freeman, 102 Pa. St. 366 (1883).

[6] Graham v. Savage, 110 Minn. 510, 126 N.W. 394 (1910); Town of Grand Isle v. Kinney, 70 Vt. 381, 41 A. 130 (1898); Supreme Lodge Knights of Pythias v. Dalzell, 205 Mo. App. 207, 223 S.W. 786 (1920).

[7] See 33 MICH. L. REV. 410 (1934). Professor Wigmore would limit the sham contract exception to the parole evidence rule to those situations where the pretense is a morally justifiable one, as to calm a lunatic or to console a dying person. 9 WIGMORE, EVIDENCE, 3d ed., § 2406 (1940).

[8] See note 5, supra.