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## Contracts - The Parol Evidence Rule - Exceptions; The Partial Integration and Collateral Contracts Doctrines *Durham v. National Pool Equipment Co. of Va.*, 205 Va. 441 (1964)

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quite possibly prove to satisfy this end while preserving the reliability of strict contract law. The Illinois Court of Appeals in *Pretzel v. Anderson*<sup>20</sup> achieved such by stating that the owner had both the right and the power to terminate the agency without liability, but if the broker proved a certain sum of money or energy expended in the attempt to sell prior to the revocation he might recover on the basis of *quantum meruit*. Thereby the principles of law were not sacrificed and a remedy was given in equity where one was necessary but none was provided by law.

The decision in *Hummer v. Engeman*, as recited by the Supreme Court of Appeals of Virginia, does not preclude a *quantum meruit* recovery per se but makes no mention of its availability to the broker. The failure of the respondent to raise this issue may well explain the omission of this point in the court's opinion, yet a statement in this regard, even in the form of dicta, would have done much to clarify and define the nature of listing agreements. "It is for the law to recognize an obligation as arising from a promise as soon as justice requires."<sup>21</sup> By leaving the obvious question unanswered, *Hummer v. Engeman* falls short.

*Robert P. Wolf*

**Contracts—THE PAROL EVIDENCE RULE—EXCEPTIONS; THE PARTIAL INTEGRATION AND COLLATERAL CONTRACTS DOCTRINES.** Plaintiff, George L. Durham, brought an action for damages for breach of an alleged oral indemnification contract against the National Pool Equipment Company of Virginia, defendant. This alleged contract concerned the maximum cost of a swimming pool constructed for the plaintiff's motel by the defendant. The defendant denied the allegation concerning the oral contract. The defendant, in turn, contended that the entire agreement between the parties was embodied in two written contracts. The trial court struck the plaintiff's evidence concerning the oral contract upon the defendant's motion. The lower court said the oral agreement was "completely inconsistent" with the written contracts and inadmissible because of the parol evidence rule. The plaintiff excepted to the striking of this evidence. The Supreme Court of Appeals of Virginia upheld the plaintiff's contention that the parol evidence rule did not apply

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20. 162 Ill. App. 538 (1911).

21. Ballantine, *Acceptance of Offers For Unilateral Contracts by Partial Performance of Service Requested*, 5 MINN. L. REV. 94 (1921).

to this case. The Supreme Court of Appeals ruled that the oral contract was not inconsistent with the written contracts. This ruling was made on the grounds that no provisions had been made for actual construction of the pool or its maximum cost.<sup>1</sup>

The Supreme Court of Appeals of Virginia applied the partial integration doctrine in making its decision. The doctrine states in essence:

Where the entire agreement has not been reduced to writing, parol evidence is admissible, not to contradict or vary its terms but to show additional independent facts contemporaneously agreed upon in order to establish the entire contract between the parties.<sup>2</sup>

This doctrine had its beginning in the case of *Brent v. Richards*.<sup>3</sup> The *Brent* case was recognized in few subsequent cases.<sup>4</sup> The courts often distinguished the case as one involving a reciprocal contract where only one party reduced his obligation to writing.<sup>5</sup> There was some belief that the case was overruled by *Slaughter v. Smither*.<sup>6</sup> The *Durham* case relied heavily upon the doctrine initiated by the *Brent* case and recognized that doctrine as an important exception to the parol evidence rule.<sup>7</sup>

The Supreme Court of Appeals of Virginia further reasoned that the oral agreement was made collateral to the written contracts. The oral agreement also related to a subject separate and distinct from those of the written contracts.<sup>8</sup> This reasoning relates closely to the collateral contract doctrine initiated by the leading case of *Sale v. Figg*.<sup>9</sup> The collateral contract doctrine states:

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1. *Durham v. National Pool Equipment Co. of Va.*, 205 Va. 441, 138 S.E.2d 55 (1964).
  2. *High Knob, Inc. v. Allen*, 205 Va. 503, 138 S.E.2d 49 (1964).
  3. 43 Va. (2 Gratt.) 539 (1846), in this case an oral option to repurchase a slave was upheld along with a written bill of sale.
  4. *Tuley v. Barton*, 79 Va. 387 (1884); *Whitaker v. Lane*, 128 Va. 317, 104 S.E. 252 (1920).
  5. *Towner v. Lucas*, 54 Va. (13 Gratt.) 705 (1857); *Rector v. Hancock*, 127 Va. 101, 102 S.E. 663 (1920).
  6. 97 Va. 202, 33 S.E. 544 (1899); cf. *Harriss, Magill & Co. v. John H. Rodgers & Co.*, 129 S.E. 513 (1925), a dissent by J. Christian.
  7. *High Knob, Inc. v. Allen*, *supra* note 2, 205 Va. at 506.
  8. *Trout v. Norfolk & Western Ry.*, 107 Va. 576, 59 S.E. 394 (1907); *Adams v. Seymour*, 191 Va. 372, 61 S.E.2d 23 (1950).
  9. 164 Va. 402, 180 S.E. 173 (1935), in this case an oral contract made between vendor and vendee of property prior to the signing of the deed was upheld. The oral contract provided that the vendor would make certain repairs and provide a title insurance policy.

Under this doctrine the parol evidence rule does not exclude parol proof of a prior or contemporaneous oral agreement that is independent of, collateral to, and not inconsistent with the written contract, and which would not ordinarily be expected to be embodied in the writing.<sup>10</sup>

The Virginia Supreme Court of Appeals has been reluctant in applying the more liberal doctrines of the *Brent* and *Sale* cases. The Court accepted a more conservative view of the parol evidence rule in the case of *Slaughter v. Smither*.<sup>11</sup> This conservative view had been strictly adhered to in most cases.<sup>12</sup> Such cases involved negotiable instruments,<sup>13</sup> deeds,<sup>14</sup> written releases,<sup>15</sup> oral warranties to repair,<sup>16</sup> oral agreements not to sue<sup>17</sup> or compete,<sup>18</sup> and exclusive licenses.<sup>19</sup>

There seem to be two tests by which the court might determine the applicability of the parol evidence rule. The first test is a subjective one. The court must look into the intent of the parties at the time the agreement was made.<sup>20</sup> The court has full discretion in determining the intent<sup>21</sup> and must judge intent by some external standard.<sup>22</sup> This

10. High Knob, Inc. v. Allen, *supra* note 2, 205 Va. at 506.

11. *Slaughter v. Smither*, *supra* note 6, 97 Va. at 206, the Supreme Court disallowed an oral contract not to compete and stated what has been regarded as the conservative view: ". . . to permit the parties to lay a foundation for adding to the contract by oral testimony that they agreed that part only of the contract should be reduced to writing would open the door to the very evil the rule was designed to avoid. The only evidence of the completeness of a written contract, as a full expression of the terms of the agreement, is the contract itself. Where parties have deliberately put their mutual engagements into writing, in such language as imports a legal obligation, it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance; and consequently all parol testimony of conversations held between them, or declarations made by either of them, whether before, after, or at the time of the completion of the contract, will be rejected.

12. *Stewart-Warner Corp. v. Smithey*, 163 Va. 476, 175 S.E. 882 (1934); *Cox v. Parsons*, 165 Va. 575, 183 S.E. 440 (1936); *Pulaski National Bank v. Harrell*, 203 Va. 227, 123 S.E.2d 382 (1962); see, Moreland, *The Parol Evidence Rule in Virginia*, 3 WASH. & LEE L. REV. 185 (1942), 7 VA. L. REV. 84 (1920).

13. *Rector v. Hancock*, *supra* note 5; *Cox v. Parsons*, *supra* note 12.

14. *Trout v. Norfolk & Western Ry.*, *supra* note 8.

15. *Harvey v. R. F. & P. Ry.*, 162 Va. 49, 173 S.E. 351 (1934).

16. *Farmer's Manufacturing Co. v. Woodworth*, 109 Va. 596, 64 S.E. 986 (1909).

17. *Towner v. Lucas*, *supra* note 5.

18. *Slaughter v. Smither*, *supra* note 6.

19. *Stewart-Warner Corp. v. Smithey*, *supra* note 12.

20. *Cohn v. Dunn*, 111 Conn. 342, 149 Atl. 851 (1930).

21. *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U.S. 510, 12 S.Ct. 46 (1891); *Harrison v. McCormick*, 89 Cal. 327, 26 P. 830 (1891).

22. *Tuley v. Barton*, *supra* note 4; *Crawford v. Jarrett*, 29 Va. (2 Leigh) 631 (1831); *Richardson v. Planters' Bank*, 94 Va. 130, 26 S.E. 413 (1896).

involves a close look at the conduct and language used by the parties and the circumstances surrounding their negotiations.<sup>23</sup> The second test which might be used by the courts is an objective one. The court relates the actions of the actual parties involved to what normal parties would have done in an identical situation.<sup>24</sup> If the oral terms would have normally been included in the writing the parol evidence rule applies. If the oral agreement was separate and distinct from the written agreement and not dealt with in that agreement the parol evidence rule would not apply.<sup>25</sup> The court would then allow the jury to determine if the oral terms were made as a matter of fact.<sup>26</sup>

The latter test has been accepted more favorably by Virginia courts in conjunction with the following rule on admissibility of parol evidence:

Where it is not apparent from the writing itself that something is omitted to be supplied, where the writing is perfect in itself and is capable of a clear and intelligible exposition from the terms of which it is composed, a complete integration will be presumed.<sup>27</sup>

The Virginia Supreme Court of Appeals did not use this objective test in the *Durham* case. The Court interpreted the case in light of the intent of the parties. An application of the conservative test might have rendered a different decision. *High Knob, Inc. v. Allen*<sup>28</sup> was decided on the same day as the *Durham* case. Both the partial integration and collateral contract doctrines were invoked in the *High Knob* case.

23. *Cohn v. Dunn*, *supra* note 20; *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1 (1906); see, 9 WIGMORE, EVIDENCE § 2430 (3d ed. 1940).

24. *Gianni v. Russell*, 281 Pa. 320, 126 Atl. 791 (1924); *Wagner v. Marcus*, 288 Pa. 579, 136 Atl. 847 (1927); *Mitchill v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928); see, 4 WILLISTON, CONTRACTS § 638 (3d ed. 1957); RESTATEMENT, CONTRACTS § 240(b) (1932).

25. *Seitz v. Brewers' Refrigerating Machine Co.*, *supra* note 21; *Trout v. Norfolk & Western Ry.*, *supra* note 8.

26. *Cornett v. Rhudy*, 80 Va. 710 (1885); *Tyler v. Chesapeake & Ohio Ry.*, 88 Va. 389, 13 S.E. 975 (1891).

27. *Wheeler v. Wardell*, 173 Va. 168, 3 S.E.2d 377 (1939); *Jones v. Franklin*, 160 Va. 266, 168 S.E. 753 (1933); *Coal Rivers Collieries v. Eureka Coal and Wood Co.*, 144 Va. 263, 132 S.E. 337 (1926); *Hopkins v. Le Cato*, 142 Va. 769, 128 S.E. 55 (1925); *Fentress v. Steele & Sons*, 110 Va. 578, 66 S.E. 870 (1910); *Hughes v. Tinsley*, 80 Va. 259; see, MARSHALL, FITZHUGH & HELVIN, THE LAW OF EVIDENCE IN VA. AND WEST VA. § 246 (1st ed. Michie 1954); MORELAND, *supra* note 12, at 202.

28. *High Knob, Inc. v. Allen*, *supra* note 2, in this case the Supreme Court allowed parol evidence to be admitted to show that an oral collateral agreement concerning water supply was made outside of the deed.

The Supreme Court used a subjective test in that case and the parol evidence rule was not applied.

In light of the *Durham* and *High Knob* cases a more progressive outlook may be taken by the Virginia courts toward the parol evidence rule. This will be accomplished by a greater utilization of the partial integration and collateral contracts doctrines as exceptions to the parol evidence rule.

*Jerry Franklin*

**Contracts—INFANT BOUND AS THIRD PARTY BENEFICIARY.** Plaintiff's father entered into a contract for medical service with the defendant Ross-Loos Medical Group, the agreement providing coverage for the plaintiff, Robin Doyle, an unemancipated minor, and including a provision for settling disputes by arbitration. A malpractice claim was brought under the policy on behalf of the infant daughter; Ross-Loos referred the matter to arbitration as set forth in the contract. The board of arbitrators found against the infant on the evidence and the lower court entered judgment for the defendant, denying the plaintiff's contention that Robin Doyle, as a minor, could avoid the contract and award and bring a common law action. In *Doyle v. Giuliucci*<sup>1</sup> the California Supreme Court affirmed the findings, holding that the best interests of the child would be served by maintaining the integrity of the contract.

Several previous decisions seem to lay down the rule that should have been decisive here, *i.e.*, the concept that an infant may avoid an arbitration clause in a contract to which he is a party.<sup>2</sup> However the California court held that while an infant may perhaps not bind himself to arbitration in a contract, his parents, in fulfilling a legal duty to provide medical care to the child, can bind the minor as a third party beneficiary. Yet, similarly, it has also been well established,<sup>3</sup> even in ancient law,<sup>4</sup> that a guardian may not commit his ward's interests to arbitration for the same reasons that the minor himself may not. The only uncertainty

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1. *Doyle v. Giuliucci*, 43 Cal. Rptr. 297, 401 P.2d 1 (1965).

2. *Millsaps v. Estes*, 137 N.C. 535, 50 S.E. 227 (1906); *Jones v. Payne*, 41 Ga. 23 (1870); *Jones v. Phoenix Bank*, 8 N.Y. 228 (1853).

3. *Hume v. Hume*, 3 Pa. St. 144 (1846); *Fowler v. Lewis*, 36 W.Va. 112, 14 S.E. 447 (1892).

4. FL. 1. 4, t. 8, s. II, art. 1. (V). (Code of Justinian).