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Contracts—Consistent Oral Condition Precedent To Written Merger Agreement Unaffected By Parol Evidence Rule

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cluded.[4] The term "at your risk" although seemingly agreed to by the parties, could not be construed to include defendant's conscious refusal to free plaintiff's property from an attachment issued against the defendant; nor was the plaintiff estopped by his authorizing defendant to employ counsel to protect plaintiff's interests.

The decision is sound and equitable once the court satisfied itself that a bailment for mutual benefit was created by what ensued between the parties. Certainly, a party may not disregard his responsibilities under a contract founded on mutually adequate consideration and escape liability so easily. Indeed, a bailee could not reasonably insist that, although he knew that goods were seized under the belief that they were his, he did not have to do anything except notify the bailor that the goods were seized under erroneous process. The facts especially warrant the holding that a person cannot profit by his "intentional" wrong. It was far more practical for the plaintiff to recover damages in a suit in the United States than to interpose a claim in an Italian court to discharge the property from attachment even though what seemingly results is a forced sale by which the bailee was bound. The buyer still is presumptively capable of recovering from plaintiff the full purchase price and 50% of its lost profits as part of their agreement to rescind the original sale from plaintiff to defendant.

M. A. K.

CONSISTENT ORAL CONDITION PRECEDENT TO WRITTEN MERGER AGREEMENT UNAFFECTED BY PAROL EVIDENCE RULE

Plaintiff agreed with the defendant and others to merge a partnership and various corporations into a single holding company, in order to attain greater strength and more efficient operation. The written merger agreement had as one of its terms the condition that all stock should be subscribed to within five days and accepted within twenty-five days or the obligations of the parties would be terminated. This condition was fulfilled, but the defendant refused to contribute the agreed consideration on which basis the plaintiff alleged a breach of contract and brought suit seeking specific performance and an accounting. The defendant pleaded, as an affirmative defense, the failure of an orally agreed upon condition precedent and offered parol evidence to prove the plea. The oral condition pleaded was that the merger agreement was not to become effective unless the parties were able to raise $672,500 of so-called equity expansion funds. The trial court, admitting the evidence over plaintiff's objection, found as a fact the failure to obtain the funds and entered judgment dismissing the complaint. The intermediate court affirmed without

4. The Appellate Division decided that the arrangement between the parties was to be treated differently than the usual bailment contract because the goods were actually in the customer's possession with plaintiff-seller's knowledge and consent and subject to plaintiff's further orders, and also because the goods were kept there "at your (plaintiff's) risk."

opinion. On appeal by permission, *held,* affirmed. Proof of an oral condition precedent will not be refused under the parol evidence rule unless there has been a showing that it was in fact in conflict with some term of the written instrument. *Hicks v. Bush,* 10 N.Y.2d 488, 180 N.E.2d 425, 225 N.Y.S.2d 34 (1962).

The parole evidence rule, generally stated, excludes in civil actions evidence of prior or contemporaneous negotiations that might vary, explain, or contradict the recited terms of a completely integrated document.[1] The rule is thought to have had its origin in the early use of the seal, by which all above it was deemed incontrovertible.[2] The reason for the rule as it has developed and is now a part of modern law, is that there is an assumed intention of the parties, evidenced by the written contract, to place themselves beyond the uncertainties of oral testimony, and the courts are not disposed to defeat this presumed intention of the parties.[3] The instrument itself is a better record of the agreement than the recollections of men, so much the product of subjective interpretation. The rule precludes the many problems likely to result from the death or absence of a party, and the practical problems of perjury and fraud. Once committed to writing let the writing speak for itself, might have been the watchword of the many contributing formulators of the rule. It is not difficult to perceive, however, that unqualified application of the rule might well cause undue hardship. It is a fact of life that parties in their desire to effect an end often agree to many things, part of which are recorded, and part of which, for one reason or another, are not recorded. Does the rule command the Court to ignore the facts, and hold that the parties are not entitled to what they agreed on, but what their written instrument indicates they agreed on? The law is not so harsh. Its development has admitted of at least two exceptions[4] where the admission of evidence extrinsic to the written instrument does not do violence to the policies behind the rule. Not the least among the exceptions is that which allows for consideration of oral conditions precedent.[5] A condition precedent is not a part of a written contract,[6] and indeed is not a

1. Thomas v. Scutt, 121 N.Y. 133, 27 N.E. 961 (1890); Fisch, New York Evidence § 41 (1959); Richardson, Evidence § 578 (8th ed. 1955); Restatement, Contracts § 237 (1932).

2. Fisch, supra note 1, at § 42.

3. Lese v. Lamprecht, 196 N.Y. 32, 89 N.E. 365 (1909); Thomas v. Scutt, supra note 1; Richardson, supra note 1, at § 580.

4. I.e., proof of noncontractual relation for failure of consideration; fraud, duress, mistake, and undue influence; illegality of subject matter or consideration; material alterations, conditional delivery of contract; and incomplete writings. For a thorough consideration of each of the foregoing, see Richardson, supra note 1, §§ 583-590.

5. Saltzman v. Barson, 239 N.Y. 332, 146 N.E. 618 (1925); Grannis v. Stevens, 216 N.Y. 583, 111 N.E. 263 (1916); Reynolds v. Robinson, 110 N.Y. 654, 18 N.E. 127 (1888); 4 Williston, Contracts § 634 (3d ed. 1961).

6. Black, Law Dictionary 366 (4th ed. 1951):
A condition precedent is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been agreed on, before the contract shall be binding on the parties.

part of a contract at all, for the parties promise only to contract *"if."* The *"if"* is that the condition be fulfilled, and if it is not, the contract does not come into being.

The law is now well settled in New York, that the court will receive evidence of an oral condition precedent, if, and only if it does not conflict with a written term of the instrument.[7] Here there is an exception to the exception, again based on the policy behind the rule. The presumption that the parties have freely chosen the written term from among all the alternatives carries with it the rejection of all oral terms in conflict with those written. It may be argued that all oral conditions precedent are contradictory and in conflict with a written instrument by the very fact of their existence outside an instrument which they control. But the courts require something more than this level of conflict; they require what might be termed "real" conflict.[8] There must be actual conflict, in that the acceptance of one requires the rejection or destruction of the other. In *Fadex* the Court held that an oral condition precedent, which made the existence of the contract dependent on the availability of supplies, was in conflict with a written term affirmatively stating that they were available.[9]

The law being settled, the sole question for the Court's determination was, whether the oral condition precedent conflicted in any way with its written instrument. The plaintiff urged upon the Court the contention that the oral condition was irreconcilable with the written condition that the stock all be subscribed to within five days and accepted within twenty-five days. In short, he argued that the one could not stand as a condition precedent, when there was another condition precedent in the written instrument.[10] In rejecting this argument the Court reasoned that the two conditions were not in conflict, since each dealt with an unrelated problem. They were both conditions precedent, but there is no prohibition against having more than one condition precedent to the existence of a contract.[11] The use of two conditions precedent seems only to forestall eventual effectiveness of the instrument until that time when both conditions are met. Businessmen may well prefer to keep certain of their relations out of writing, as a matter of business security, expediency or perhaps even personal privacy. The Court properly held that such a desire is not incompatible with the policy behind the parol evidence rule, and such agreements will not be barred from the pleadings. The law remains unchanged on this subject, the case adding only the more specific point that independent oral and written conditions precedent do not conflict by the mere fact of their mutual existence.

D. R. K.

7. Fadex Foreign Trading Corp. v. Crown Steel Corp., 297 N.Y. 903, 79 N.E.2d 739 (1948); see also Restatement, Contracts § 241 (1932).
8. See, e.g., Restatement, Contracts § 241, illustration (1932).
9. Fadex Foreign Trading Corp., supra note 7.
10. Hicks v. Bush at 493, 180 N.E.2d at 428, 225 N.Y.S.2d at 38.
11. See, e.g., Golden v. Meier, 129 Wis. 14, 107 N.W. 27 (1906); 3 Corbin, Contracts 541, 542 (1960).