

WRITTEN CONTRACTS WITH AN ORAL ELEMENT

G.H.L. FRIDMAN*

I

An interesting feature of the law of contract in modern times is the treatment accorded to contracts in writing, where there is also an oral statement or representation purporting to affect the relations between the parties. Various situations can arise:

- (a) The written contract can purport to be the exclusive repository of the terms agreed between the parties and yet something is said by one party (or his servant or agent — of which more later) that suggests *another*, or a possibly contradictory “term” of such contract.
- (b) The written contract may not be so exclusive, and there may also have been an oral statement that, once again, expands, or even is repugnant to the written terms.
- (c) The written contract may not cover everything that could, or is meant to, happen with respect to the agreement between the parties, and there may be some additional oral statement that should be taken into account.

Thus, the court may be faced with the interpretation of a contract that is alleged to be made up of *express* written and oral terms or of one alleged to be contained in *express* written terms and *implied* unwritten ones. The issue is: How far may a court look to such extrinsic statements as constituting a part of the contract, regulating the terms of the agreement between the parties?

Where the extra term is not express but implied there are many problems.¹ Recent English decisions, in the House of Lords and the Court of Appeal, involving a difference of opinion between Lord Denning, M.R. and the House (ultimately resolved — at least thus far — in favour of the views expressed by their Lordships) reveal that, where custom or previous dealing between the parties are not in issue, a term may only be implied where it is necessary to give effect to the underlying meaning of the parties' contract and not on the ground that it would be reasonable and just to do so in the opinion of the court.² The test is what the parties intended, not what a court thinks that they might or ought to have intended. While this is a matter of some interest and importance (as indeed is the whole question of implied terms at common law), it raises matters that I do not wish to pursue here. I am concerned not with what are, to cite

*G.H.L. Fridman, Professor of Law, The Faculty of Law, The University of Western Ontario.

1. See Fridman, *Law of Contract* (1976) pp. 257-264.

2. *Liverpool City Council v. Irwin*, [1976] Q.B. 319; [1976] 2 All E.R. 329; *Shell U.K. Ltd. v. Lostock Garage*.

Keats' expression, "unheard melodies" but with those which are "heard". The former may well be sweeter, as the poet stated; to the contract lawyer, however, they fall into a different category — when they refer to implied terms — from the latter, insofar as these refer and relate to express oral statements purporting to affect a written contract.

It should be made plain at the outset that the common law does not seem to have stated, in specific words, that there can not be a contract that is partly written and partly oral. Contracts within the Statute of Frauds — or any similar enactment — might require to be in writing, or evidenced in writing, for them to be enforceable, or even, in modern times, under certain statutes, valid, as contrasted with enforceable.³ Even in such instances, all that was needed was that the *essential* terms be in writing or in the requisite signed memorandum.⁴ Presumably, other, less essential terms could be oral, though it might be difficult to have them accepted by a court as being part of the contract.⁵ This might be because of the Statute of frauds. Or it might have been because of something else, a doctrine of the common law which affected all *other* contracts beyond those within the Statute. This doctrine is the "parol evidence" rule.⁶ Under this, it was not possible to permit the introduction of evidence at a trial involving an action on a contract, if the effect of such evidence was to prove the existence of non-written terms in a contract that were contradictory of, or repugnant to the written terms. The parties, having provided for their agreement to be in writing, appear to have been presumed to have put everything that was relevant and was intended to govern their relationship into the writing; consequently it could not be alleged subsequently that there was something else that was not included, unless this was by way of interpretation or clarification. One important qualification, of equitable not common law origin, may be noted. If some mistake was alleged to have occurred in the way the agreement between the parties had been written down, it was possible, on equitable grounds, to obtain *rectification* of the written contract, after oral evidence had proved the relevant mistake. This, however, was not so much a qualification of the written terms by proving some extraneous oral one, as a revision of the written terms in the light of evidence of operational error. It was, in many respects, a matter of clearing up clerical errors, rather than altering or adapting a

Ltd., [1977] 1 All E.R. 481.

3. Fridman, *op. cit. supra* note 1 pp. 201-210, 217-219, 230-232, 235-236.

4. *Ibid.* at pp. 211-214. Note the alternatives under the Sale of Goods Act: *Ibid.* at pp. 232-234.

5. *Ibid.* at pp. 211-212.

6. *Ibid.* at pp. 245-248.

contract by the admission of other additional or contradictory terms.⁷

The parol evidence rule — patently designed to promote certainty and to prevent frauds being perpetrated upon innocent parties⁸ — may have acted so as to bar acceptance of some general notion that parties might contract orally and in writing in respect of the same contract (outside the areas within, e.g., the Statute of Frauds). Not surprisingly, therefore, the common law seems to have drawn a rigid line between written contracts and oral ones. And this appears to have had nothing to do with any possible provision in the writing that it alone contained all the terms. Even if the contract said nothing of the kind, the courts appear to have invoked the same doctrine, as a matter of law, rather than of construction. It is also hardly surprising that in the last hundred years or so this rigid, or seemingly rigid, dichotomy has been seen as stultifying.

I would point out that I am not concerned with cases of wholly parol contracts in which the legal character or quality of an oral statement was in issue. As is well-known, the problem in many, if not all, such instances is whether such statement was a “mere” representation or whether it could be construed as a term of the contract. In such cases the real issue was as to the nature of the terms of the contract.⁹ Representations would have no effect, at least at common law, unless they were fraudulent and induced the making of the contract. An innocent, even negligently made, representation would provide the injured party with no redress. Equity made inroads upon this, by means of the development of the possibility of rescission (and indemnification) for innocent misrepresentation.¹⁰ The common law produced its own solution at long last by extending the scope of the law of negligence.¹¹ In England, the legislature eventually enacted the *Misrepresentation Act*, in 1967, under which innocent misrepresentations, even if not terms of a contract, can have various effects, including that of forming the basis for a claim in damages. Thus far, Canadian legislatures have not followed the example of the United Kingdom Parliament. They have, of course, absorbed the common law and equitable developments. Hence Canadian courts are still perplexed by the distinction between representations that never achieve a higher status, and statements that are to be construed as terms of a

7. *Ibid.* at pp. 621-628.

8. Cp. the language used in *Shore v. Wilson* (1839-1842), 9 Cl. F. 355, cited in *Tsang Chuan v. Li Po Kwai*, [1932] A.C. 715; cp. *Williston on Contracts* (3rd Ed. 1961) vol. 4 s. 631.

9. *Fridman, op. cit. supra* note 1 on pp. 239-243.

10. *Ibid.* pp. 118-121, 611-613.

11. *Hedley Byrne v. Heller*, [1964] A.C. 465.

parol contract.

Where there was some written contract, however, the English courts were ultimately led to accept the possibility that an oral representation made or given alongside the written contract might have some legal validity and effect, despite the parol evidence rule. They did this by the invention of the idea of "collateral contracts".¹² The potential growth of this concept was, to some extent, hampered, at least in theory, by the language of Lord Moulton in the case of *Heilbut, Symons v. Buckleton*¹³ in 1913. Notwithstanding his lordship's words, however, English courts were still prepared, in suitable cases, to construe an oral statement that was *dehors* a written contract as a separate, distinct obligation, having contractual force, such that its breach could give rise to an action quite apart from the written contract to which it was collateral or subservient.¹⁴ So far as Canada is concerned, while this doctrine was accepted and applied, the more recent decision of the Supreme Court of Canada in *Hawrish v. Bank of Montreal*,¹⁵ may have had the effect of making it more difficult for courts in Canada to hold that a collateral promise made orally to procure the acceptance of a written contract is to have any contractual effect. The gravitational pull of the parol evidence rule, as it were, has been too strong to permit the full and free flight of the collateral contract doctrine.

The reason for this was stated succinctly by Judson, J., delivering the judgment of the court: "My opinion is that the appellant's argument fails on this ground that the collateral agreement allowing for the discharge of the appellant cannot stand as it clearly contradicts the terms of the guarantee bond which state that it is a continuing guarantee"¹⁶. The appellant had tried to persuade the court to accept an alleged collateral agreement under which he was only binding himself to guarantee an existing overdraft of \$6000 and only until other guarantees were obtained. The court rejected this contention because the written

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12. *Lindley v. Lacey* (1864), 17 C.B.N.S. 578; *Morgan v. Griffith* (1871), L.R. 6 X. 70; *Erskine v. Adeane* (1873), L.R. 8 Ch. App. 756; *De Lassalle v. Guildford*, [1901] 2 K.B. 215. For the view that this doctrine is now outmoded, see McLauchlan, "The Inconsistent Collateral Contract" (1976) 3 Dalhousie L.J. 136.
 13. [1913] A.C. 30, at p. 47.
 14. Indeed this has been done to get around the Statute of Frauds: *Jameson v. Kimmel Bay Land Co.* (1931), 47 T.L.R. 593; to avoid an illegal contract *Strongman (1945) Ltd. v. Sincock*, [1955] 2 Q.B. 525; *Mouat v. Betts Motors Ltd.*, [1959] A.C. 71; to entitle a plaintiff to sue a third party: *Andrews v. Hopkinson*, [1957] 1 Q.B. 229. Compare the language of Lord Denning M.R. in *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.*, [1965] 2 All E.R. 65 at p. 67; *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 2 All E.R. 5 at p. 13; compare Ormrod L.J., *Ibid.* at pp. 19-20.
 15. [1969] S.C.R. 515; McLauchlan, *loc. cit.* supra note 12 at pp. 149-150, suggests that the decision is correct because no collateral contract was made out on the facts: this view is very questionable. Note the, seemingly, contradictory decision in *Ouchar v. Bryan's Car Corner Ltd.*, [1975] W.W.D. 123, an oral statement as to the return of a car if it did not work showed that there was a condition precedent to the effectiveness of the written contract.
 16. [1969] S.C.R. 515 at p. 520.

contract of guarantee specifically provided that the appellant guaranteed the present and future debts and liabilities of the principal debtor up to the sum of \$6000 and was a continuing guarantee to secure the ultimate balance owed by the debtor. It should also be noted that the written guarantee stated that the guarantor acknowledged that no representation had been made to him by the bank, the creditor. In other words, that the written contract excluded the possibility of any other, extrinsic terms — a point to which a return will be made later on in this discussion.

Leaving that aside for the moment, what must be stressed is that here was a case in which the Supreme Court expressed the view that collateral contracts could not openly contradict the written contract to which they were supposed to be collateral. My argument is, however, that there are many cases in which that was precisely what was the situation and courts were prepared to accept such collateral contracts, and enforce them, even though, in so doing, they were providing a remedy when, under the written contract, none was truly permissible or possible. They appear to have done this, however, in cases involving some exclusion or limitation or liability on the part of a contracting party in the written contract, and then the removal of such exclusion or limitation (or the re-introduction of potential liability) in an oral statement made at the same time as, and even, in one New Zealand case,¹⁷ *prior to* the making of the written contract. This is not necessarily true of all cases but it is true of a good many. Courts, in effect, were breaching the parol evidence rule in a roundabout manner — even though what they were doing was in clear conflict with that rule. In more recent times, however, I would suggest, particularly in the light of the recent English case of *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*,¹⁸ they may be achieving the same result by the newer, and even more direct route of holding that a contract can be partly written and partly oral — thus giving the “go-by” to the parol evidence rule. Such cases raise not only the question of reconciling the parol evidence rule and the collateral contracts doctrine in cases in which the written contract does not specifically exclude any other terms, but also the problem of what to do when the contract does contain such an exclusion, and the extent to which someone other than the principal contracting party can make effective oral representations that can have the consequence of altering the written terms.

17. *Coffey v. Dickson*, [1960] N.Z.L.R. 1135, distinguishing *Hopkins v. Tanqueray* (1854), 15 C.B. 130, and relying on the House of Lords decision in the Irish Case of *Schawel v. Reade*, [1913] 2 I.R. 64.

18. [1976] 2 All E.R. 930.

II

In the past thirty years there can be found many English cases in which a court has given effect to an oral statement which contradicts what is contained in a written contract. There are those in which the statement was treated as a collateral promise or contract (either in the form of a *condition* or in the form of a *warranty* — using those terms to mean what they mean, or perhaps used to mean, in the context of contract generally).¹⁹ The statement was a separate binding obligation, which remained effective despite the fact that the principal contract stated that the goods were accepted “with all faults”,²⁰ or that the only conditions that applied to the contract were those contained in the written document,²¹ or that the party making the statement undertook no responsibility or liability under the written contract.²² Sometimes, however, it seems that the oral statement was treated as an integral part of the written contract, even though it repudiated, or made nonsense of the language of the written document. For example, in *S.S. Ardennes (Cargo Owners) v. S.S. Ardennes (Owners)*,²² there was an oral representation that the ship would go straight to London, although the bill of lading was to a different effect. It was held that the oral statement governed; hence there was liability when the ship did not go to London and damage resulted to the cargo owners. So, too, with respect to the use of the basement in *Walker Property Investments (Brighton) Ltd. v. Walker*.²⁴ There an oral statement was held to be part of the contract which was otherwise in writing. It was so held either on the basis of a collateral warranty, or on the ground that the term as to use of the basement, and garden, had been omitted by mistake from the written agreement. In *City & Westminster Properties (1934) Ltd. v. Mudd*,²⁵ which concerned the question whether the tenant could use the demised premises as a dwelling-house as well as a shop, when the written lease specifically stated that they were to be used only as a shop for business purposes, the tenant raised the issue of the effect of an oral statement by a representative of the landlord that there would be no objection to the tenant’s residing on the premises if he signed the new lease that was to be agreed between the parties. On this basis the tenant signed the

19. Fridman, *op. cit.* supra note 1 at pp. 278-286.

20. *Couchman v. Hill*, [1947] K.B. 554.

21. *Harling v. Eddy*, [1951] 2 K.B. 739.

22. *Curtis v. Chemical Cleaning & Dyeing Co.*, [1951] 1 K.G. 805.

23. [1951] 1 K.B. 55.

24. (1947), 177 L.T. 204; contrast *Hutton v. Watling*, [1948] Ch. 398, where the oral term agreed between the parties was not admitted to affect the written document.

25. [1959] Ch. 129.

lease, which included language that prevented the use of the premises for lodging, dwelling or sleeping. Later, the right of the landlord to forfeit the lease upon discovery that the tenant was living on the premises, came before the court. Harman, J. held that the tenant was protected from eviction. Rejecting a number of arguments, including rectification and waiver, the judge decided in favour of the tenant on the basis of something that was akin to estoppel on the one hand and collateral warranty on the other — although he would not agree that the case fell within the ambit of *Central London Property Trust Ltd. v. High Trees House Ltd.*,²⁶ in which Lord Denning, then a trial judge, had re-created the doctrine of equitable estoppel;²⁷ nor did he utilise the line of cases which enshrined the collateral contract doctrine. The basis for the decision was, rather, that the promise not to enforce the covenant against the tenant's use of the premises otherwise than as a shop gave rise to a separate contract, since it was on the faith of that promise that the tenant entered into a contract, i.e., a new lease, with the landlord.²⁸ Perhaps Lord Denning was guilty of a slight reconstruction when he included this case in the category of those "in which oral promises have been held binding in spite of written exempting conditions", in his judgment in *Evans v. Merzario*.²⁹ Nevertheless the *Mudd* case can be cited as an illustration of the lengths to which a court may be willing to go in order to give effect to an oral statement that must have played some part in producing the eventual agreement of the party to whom the statement was made, to some later contract (just as a New Zealand judge, Richmond, J., did in a subsequent case³⁰).

Perhaps the most striking illustration, at least until the *Evans* case, is to be found in *Mendelssohn v. Normand Ltd.*,³¹ a case which has been treated as authoritative in Canada. There a statement by a garage attendant had the effect of ousting the otherwise applicable repudiation of liability for what happened to cars and their contents left on the premises. This exclusion had been contained on the back of the ticket which the plaintiff obtained each time he parked. It was also stated that there could be no variation on the terms unless in writing, signed by the

26. [1947] K.B. 130.

27. On which see Fridman, *op. cit.* supra note 1 at pp. 192-196.

28. McLauchlan, *loc. cit.* supra, note 12, at pp. 140-141, suggests that the *Mudd* case is the "sole authority" which contradicts the idea that a collateral contract must be consistent with the principal contract. He suggests that the Supreme Court of Canada may be able to reject its decision in the *Hawrish* case and follow that in *Mudd*.

29. [1976] 2 All E.R. 930 at p. 933.

30. *Coffey v. Dickson*, [1960] N.Z.L.R. 1135. This case is not cited by McLauchlan, *loc. cit.* supra note 12: it suggests that he is not correct in stating that New Zealand courts are bound to uphold the requirement of consistency, by virtue of the decision in *Lysnar v. National Bank of New Zealand Limited*, [1935] N.Z.L.R. 129.

31. [1970] 1 Q.B. 177.

garage company's manager. Lord Denning, M.R., refused to apply such written exclusion of liability because the printed condition was repugnant to the express oral promise or representation.³² Phillimore, L.J., was prepared to accept the validity of the oral statement and its relevance on one of three grounds: that it was a representation, a collateral term of the contract, or because the contract was partly oral and partly written.³³ The case involved a number of different points, and the basis for decision is far from clear in that different views were expressed by the three members of the court.³⁴ What does appear, however, is that the court was prepared, even anxious, to hold that the written exemption did not operate when the oral statement had been made. The attitude of the court is exemplified by Lord Denning's language:

There are many cases in the books when a man has made, by word of mouth, a promise or representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate the representation by reference to a printed condition . . . ; nor is he allowed to go back on his promise by reliance on a written clause The reason is because the oral promise or representation has a decisive influence on the transaction — it is the very thing which induces the other to contract — and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation 'It is illusory to say — we promise to do a thing, but we are not liable if we do not do it'. To avoid this illusion, the law gives the oral promise priority over the printed clause.³⁵

Now this, it seems clear, is at once a repudiation of the parole evidence rule and a statement of the law that is quite inconsistent with the approach adopted by the Supreme Court of Canada in the *Hawrish* case.³⁶ *Ex hypothesi* in all these cases the oral statement, whether as representation, collateral contract, or otherwise, is inconsistent with the written contract. Yet, as Lord Denning makes plain, it is given effect to *because* it is inconsistent in that way!

This is brought home even more forcefully by the decision in the *Evans* case.³⁷ The plaintiffs were importers of goods from Italy. The defendants were their forwarding agents, who arranged for the carriage of such goods to England. The latter always arranged for the plaintiffs' goods to be shipped under deck because of the possibility of rust. Then there was a proposal to switch to container transportation. The plaintiffs insisted

32. *Ibid.* at p. 184.

33. *Ibid.* at p. 186.

34. Cp. *Fridman, op. cit. supra* note 1 at pp. 290-291, 294.

35. [1970] 1 Q.B. 177 at pp. 183-184; citing Devlin J. in *Firestone Tyre & Rubber Co. Limited v. Vokins & Co. Limited*, [1951] 1 Lloyd's Rep. 32 at p. 39.

36. *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515.

37. *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*, [1976] 2 All E.R. 930.

nevertheless that their goods be shipped under deck. The defendants gave the plaintiffs an oral assurance to that effect. On the faith of this assurance the plaintiffs agreed to the change to container transport, and gave the defendants an order for the transport of an injection mounding machine in a container. Through an oversight by the defendants, the container holding the machine was shipped on deck. At the beginning of the voyage there was a swell which caused the container to fall off deck and the machine was lost overboard. The plaintiffs sued the defendants for the loss of the machine. They claimed that the carriage of the container on deck was a breach of the contract of carriage. The defendant answered by referring to the written contract, in the form of printed standard conditions of the forwarding trade. Under this, the defendants had complete freedom with respect to the transportation of the goods, subject to express *written* instructions from the plaintiffs (it will be recalled that the discussions vis-a-vis transportation under deck were all oral). The defendants were also exempted from liability for loss or damage to the goods unless such loss or damage occurred while the goods were in their custody and by reason of their wilful neglect or default. Thus the case raised what might be called "classical" questions with respect to (a) conflict between written and oral terms and representations, and (b) the overriding of an exculpatory or privative clause by an extraneous statement.

There appear to be three different approaches to the issues in this case emerging from the judgments. Lord Denning, M.R., considered that the language of Lord Moulton in *Heilbut, Symons v. Buckleton*³⁸ was entirely out of date, in view of the 1967 Act and the doctrine of "collateral contracts". The case before the court was another instance of such a contract binding the parties even though it was not consistent with a written exempting condition.³⁹ Roskill, L.J., thought that the notion of "what the lawyers sometimes call a collateral oral warranty" only applied where the contract was a contract in writing; it did not apply to the situation where a contract was partly oral, partly in writing and partly by conduct. The doctrine of collateral oral warranty was applicable

... where the original promise was external to the main contract, the main contract being in writing, so that usually parol evidence cannot be given to contradict the terms of the written contract.⁴⁰

This device was not required for the solution of the problem

38. [1913] A.C. 30 at pp. 47-51.

39. [1976] 2 All E.R. 930 at p. 933.

40. *Ibid.* at p. 934.

where the contract was not wholly in writing. There was no need to invoke it "in order to seek to adduce evidence which would not otherwise be admissible", because when a contract was partly in writing, partly oral and partly by conduct the court was entitled to look at, and should look at all the evidence from start to finish to see what was the bargain between the parties.⁴¹ The learned judge went on to point out that, if effect were given to the exemption clause in the written part of the contract, the defendants' promise not to ship the container on deck would be illusory. Hence it was not possible to permit the exemption clause to override the express oral promise.⁴² Geoffrey Lane, L.J., seems to have adopted a distinctly different point of view. The terms of the printed contract had become part of each individual contract between the parties as a result of the past course of dealings between them (which raises shades of the criticised decision of the House of Lords in *McCutcheon v. McGrayne*⁴³). But there was a new express term included in the contract that was now before the court, in consequence of the undertaking by the defendants as to where the container would be placed. The effect of the agreement between the representatives of the respective parties as to this matter "was to remove from the new term the restrictions or exemptions contained in those trading conditions" (i.e. the conditions in the printed form). "Any other conclusion would be to destroy the business efficacy of the new agreement from the day it started".⁴⁴

Thus, to Lord Denning, resolution of the conflict was on the basis of the doctrine of "collateral contracts"; to Roskill, L.J., it was by declaring that the contract was never intended to be wholly written, hence the parol evidence rule did not apply; to Geoffrey Lane, L.J., it was a matter of reconciling a written term with an oral one on the ground of either "previous dealings" or "business efficacy". *Tot judices, quot sententias!* Somehow or other, however, the court was able to exclude the operation of the exculpatory clause. Nor, as Roskill, L.J., pointed out, did this necessitate the invocation of the doctrine of "fundamental breach".⁴⁵ It was a question of construction. Of course, unless the court had held the promise that the goods would be shipped under deck to have been a "contractual" and binding promise, the fundamental breach notion would have been inapplicable since that, presumably, only comes into play when there has

41. *Ibid.* at p. 935.

42. *Ibid.*: also relying on the language of Devlin J. in the *Firestone* case, *supra* note 35.

43. [1964] 1 All E.R. 430: on which see Fridman, *op. cit.* *supra* note 1 at pp. 261-262, and cases there cited.

44. [1976] 2 All E.R. 930 at p. 936: which calls to mind the doctrine of implying terms on the basis of business efficacy: Fridman, *op. cit.*, *supra* note 1 at pp. 258-260. This may not be entirely consistent with the "previous dealings" approach!

45. On which see Fridman, *op. cit.* *supra* note 1 at pp. 298-309, 535-540.

been a "deviation" from proper performance of the contract. And if the promise to ship the goods under deck had not been contractual, it would not have been part of the proper performance of the contract. So there would have been no deviation and, consequently, no fundamental breach to preclude the operation of the exemption clause. The facts of this case illustrate how closely interwoven are the doctrines of collateral contract, fundamental breach, and construction of contract. Indeed, might it not be said that all these issues (and, perhaps, also many more) are really and truthfully matters of construction — even though, in the end result, they produce decisions of substantive law.

III

The Supreme Court of Canada accepted the collateral contract doctrine, as it had been stated in English cases of the nineteenth century, in *Byers v. McMillan*⁴⁶ in 1887. Since that date, there have been many instances in which Canadian courts have held that a written contract was subject to the overriding effects of some collateral agreement between the parties, even when the written contract purported to limit the liability of a party and to exclude all other terms and conditions. The theory on which such decisions were based was that the oral agreement was the inducement to a party to enter into the written agreement and, before a court would hold that by entering the written agreement a party had precluded himself from relying on an oral representation, when the written agreement stated that such party could not rely on such a representation, the language of the written agreement must be sufficiently clear that the average man entering into such contracts would know, on reasonable consideration, that he was debarring himself from relying on the representation. This was how it was expressed by Lamont, J., in a Saskatchewan case, *Eisler v. Canadian Fairbanks Co.*,⁴⁷ in which an oral warranty as to the effectiveness of a gas engine operated to provide the buyer with a remedy notwithstanding the exclusion of all other terms than those contained in the written agreement. Following such authorities the Saskatchewan Court of Appeal arrived at a similar result in a similar kind of case, *Francis v. Trans-Canada Trailer Sales Ltd.*⁴⁸ in 1969. A Manitoba court was able to come to a comparable conclusion on a different ground in *Fleischhaker v. Fort Garry*

46. (1887), 15 S.C.R. 194.

47. (1912), 8 D.L.R. 390 at pp. 393-394; cp. *Brownsberger v. Harvey* (1909), 12 W.L.R. 596.

48. (1969), 6 D.L.R. (3d) 705.

*Agencies Ltd.*⁴⁹ This case involved a contract which, in some ways, purported to be a sale and purchase of radios and, in other respects, was a more complex arrangement turning upon the possibility that the radios would be leased to a third party. In consequence, although the order form, upon which the sale aspects of the agreement were based, excluded all warranties and representations, except the specific manufacturer's guarantee contained in the form, it was held that this document did not contain the whole of the contract made by the parties. Hence the oral representation on which the plaintiff relied for his remedy, when the radios were unworkable, was considered to be an integral part and term of the contract. In the circumstances of this case, the court held, a fraud would have been perpetrated if the vendor had been permitted to rely on the clause in the written order form so as to exclude his liability. Of course, this case could be explained in terms of the peculiar arrangement between the parties, that it was not a simple, straightforward ordinary instance of a contract of sale regulated by a written contract. It does at least show that Canadian courts, like their English counterparts, were prepared to escape from the tyranny of the concept of written contracts and the parol evidence rule, in an appropriate instance.

A case which exemplifies the stricter approach, however, in which a party was *not* allowed to rely upon an oral statement that contradicted the written documents in which the contract was contained, is *Spelchan v. Long & W.A. Long Constructing & Equipment Co.*,⁵⁰ in which the British Columbia Court of Appeal looked back, as it were, to an earlier Supreme Court of Canada case,⁵¹ and forward to the later Supreme Court decision in the *Hawrish* case⁵² which has earlier been mentioned. In the *Spelchan* case the plaintiff put in a written order for the purchase of a tractor from the defendant. This order, i.e. offer to purchase, was accepted by the defendant. The plaintiff then signed a written conditional sales agreement, as required by the order form. Clause 15 of this agreement excluded all warranties, conditions, etc., except those specifically mentioned in the conditional sales agreement. However, before the plaintiff signed the agreement, an agent of the defendant had made the oral representation that the tractor was rebuilt (a statement that turned out to be untrue — although there was no evidence of fraud). The plaintiff sued for breach of warranty, basing his action upon the oral repre-

49. (1958), 11 D.L.R. (2d) 579.

50. (1956), 2 D.L.R. (2d) 707.

51. *Case Threshing Machine Co. v. Mitten* (1919), 59 S.C.R. 118.

52. [1969] S.C.R. 515.

sentation, not upon the conditional sales agreement. The majority of the court, over a long and powerful dissent by O'Halloran, J.A., held that his action failed. The combined effect of the written order form, accepted by the defendant, and the conditional sales agreement signed by the plaintiff, was to exclude the effective operation of the oral statement made by the defendant's agent, even though it had been instrumental in persuading or encouraging the plaintiff to buy the tractor. It would seem that in this case, as contrasted with the case of *Francis v. Trans-Canada Trailer Sales Ltd.*,⁵³ the written contract had effectively excluded any extrinsic representations, as stated by Lamont, J., in the *Eisler* case.⁵⁴ And yet it seems a very narrow line; one which even the judges of the court in the *Spelchan* case found hard to draw, so hard, indeed, that they were in disagreement as to the correct decision.

Nonetheless, the language of the cases indicates that, even where a written contract does purport to exclude any possibility of some extrinsic, oral term affecting the relations between the parties, this may not be the result. Although it may be harder for a party seeking to rely on such an oral term to prove his case, and convince the court that the oral term should be binding and have contractual, or something like contractual effect, it will not be impossible for him to do so, at least in theory. That is perhaps what is so strange about the decision of the Supreme Court of Canada in the *Hawrish* case. The court did not refer to the "Lamont test" — if I may call it such. It did not discuss the many cases in Canada in which effect had been given to such an extrinsic, oral term. Indeed the impression is gleaned that the acceptance of the collateral contract doctrine in *Byers v. McMillan*⁵⁵ must be reviewed in the light of the language of Lord Moulton in *Heilbut*, *Symons v. Buckelton*.⁵⁶ Yet if that case is no longer as authoritative as once it was — according to Lord Denning in the *Evans* case⁵⁷ — the effect of it upon *Byers v. McMillan* must be re-assessed. On that basis, the reasoning of the Supreme Court in the *Hawrish* case leaves much to be desired. Has the Supreme Court been outflanked once again⁵⁸ by a later decision of an English court, the effect of which is to isolate a Supreme Court decision, and reveal it as being totally

53. *Supra* note 48.

54. *Supra* note 47.

55. *Supra* note 46.

56. *Supra* note 38.

57. *Supra* note 37 at p. 933.

58. Cp. Fridman, "The Supreme Court and the Law of Obligations" (1976), 14 Alberta L.R. 149 at p. 153.

unconnected with developments that have gone on around it? I would suggest, with great respect, that this is what has happened and that the attitude expressed in the *Hawrish* case is now no longer acceptable and should be rejected, in favour of the more flexible, liberal approach that was inherent in the language of Lamont, J., in 1912, prior to the *Heilbut, Symons* case, and which is now rescucitated by the language of the English Court of Appeal, or at least Lord Denning, in the *Evans* case. All of which would, or should, mean that the task of a party seeking to introduce evidence of an oral agreement or representation affecting a written contract has been made that much easier to perform.

The purists, of course, might well argue that the adoption of such an approach could well mean the obliteration of any distinction between written and parol contracts, save for those instances in which the Statute of Frauds or some other, more modern enactment, requires a written document. Did such a distinction ever really exist? Was the only true difference that between contracts under seal and all others? One can readily accept that, in the case of a contract contained in a sealed instrument, it would be inconsistent, and possibly even dangerous, to admit oral, extrinsic evidence that might alter the nature and contents of such a contract. The stringency and technicality of the law relating to documents under seal are not apposite to other forms of contract. At a time when even the sacrosanct doctrine of consideration is being undermined or disregarded by newer notions of estoppel and unconscionability, it does not seem to be such a shocking thing to suggest that the parol evidence doctrine is not such a bastion of orthodoxy that it may not be ignored or disdained. *Au contraire!* It would appear to be more in keeping with modern notions of interpreting the real intentions of the parties, almost, if not entirely, subjectively understood and arrived at, to say that a written contract, without too much difficulty, may be affected by some oral statement that can either become a term of the agreement between the parties despite the existence of the writing or can be utilised to understand and interpret the true effect of such writing. Indeed, if this were generally accepted, it might be possible to "retire" the doctrine of "collateral contracts", its work having been achieved. It was always, it may be suggested, a somewhat artificial doctrine of the law, giving rise to problems *a propos* consideration, form, etc. It served a useful purpose in the days when the parol evidence rule was at its height; its invention helped to establish the early breaches in the

parol evidence rule. More recently, having regard to newer developments, the same results may be achieved by different, perhaps more open and direct, means.⁵⁹

IV

There remains one final issue to be raised. Given that an oral statement or representation can have the kind of effect that has been discussed above, what must be the status of the person making such statement or representation if it is to have such effect? Clearly if it is made by the principal contracting party, there is no problem. It will bind him, if it is binding at all. What if it be made by someone else? This, naturally, will be the situation where the principal contracting party is a corporation. The question then becomes one of agency. Yet the courts appear to have ignored the issue to a large extent, although, upon occasion, almost casually, and without any significant analysis or discussion, the court has stated, or assumed, that the person making the statement in question, by so doing, could bind the principal contracting party.

Such was the case with the auctioneer in *Couchman v. Hill*⁶⁰ (in which, however, the owner of the cow also made the statement in issue). It was the case with the employee at the dry cleaners in *Curtis v. Chemical Cleaning & Dyeing Co.*⁶¹ It was the case with the garage attendant in *Mendelssohn v. Normand Ltd.*⁶² In this instance, at least, the court adverted to the problem by saying that the attendant had "ostensible authority" to make the statement that he would lock the car, although the garage company required patrons to leave their cars unlocked. Hence the company was bound by such statement, when it became part of the contract between the car owner and the garage company, as previously discussed. In the *Spelchan* case,⁶³ although, in the end, as already noted, the oral statement had no contractual effect, there was no question but that the agent who made it to the plaintiff had authority to do so and would have bound the defendant company if the statement had been capable of having binding effect.

What sort of people, employees that is to say, have the power to alter, vary or affect a written contract, often in a standard

59. Cp. *McLauchlan, loc. cit. supra* note 12 at pp. 176-177. Thus, in *Findlay v. Couldwell & Baywood Motors*, [1976] 5 W.W.R. 340, a pre-contractual representation as to the purpose for which a vehicle was wanted was used to show that the exemption clause in a written contract did not cover a fundamental breach.

60. [1947] K.B. 554.

61. [1951] 1 K.B. 805.

62. [1970] 1 Q.B. 177.

63. *Supra* note 50.

form, that has been prepared in advance by a contracting party, so as to deal with all possible transactions, whenever they arise, and with whomsoever they may be made? And upon what occasions? The answers to these questions must be sought not in the general law of contract, but in the specific law of agency. Thus, to have the power to make an effective, binding contract, whether in writing or by virtue of some oral statement or representation that is given contractual effect in accordance with what has been said earlier, the person making the contract or statement in question must be an agent duly appointed or held out as such, with the requisite authority, by the principal contracting party.⁶⁴ That is what is so surprising about the decision in the *Mendelssohn* case. That an auctioneer is an agent with authority to contract and bind the owner of property being auctioned (subject to what will be said later) is undeniable.⁶⁵ Even the employee at the dry cleaners may be said to be an agent vis-a-vis the making of contracts to clean clothes; that is why the employee is there (though it may be said to be debatable — even if it has not been debated — whether such employee can validly change the type of contract which the cleaning company wishes, and is prepared, to make with a customer who brings in clothes to be cleaned). What of the garage attendant, who is, one would suggest, a somewhat lowly type of employee, to whom it may be thought the company would not be willing to allot or entrust the power to make contracts that bind the company. Courts in the past have held that chauffeurs, and similar employees, have not had the agency power so far as concerns the purchase of even necessary goods for the car, horse, or similar property of the employer, unless there was a specific, express delegation of such power on a particular occasion.⁶⁶ By putting the attendant in charge, which presumably means for the purpose of admitting or rejecting potential customers, taking money, etc., does the company confer on such attendant the “apparent” authority to make contractual, or contractual-like arrangements? The Court of Appeal thought it did. However, would it be likely that the company intended that the attendant should be so empowered, or should look as if he were? Especially since the ticket stated that variations of the contract had to be in writing and signed by the company’s manager. I suggest that, in taking this view, the court was looking at the situation much as it might have done if the question had been one of

64. Fridman, *Law of Agency* (4th ed. 1976) at pp. 164-165.

65. *Ibid.* at p. 31.

66. *Richardson v. Cartwright* (1844), 1 Car. & Kar. 328; *Spooner v. Browning*, [1898] Q.B. 528. Contrast the situation of the chauffeur in a tort case, involving vicarious liability, *Poland v. Parr & Sons*, [1927] 1 K.B. 236.

vicarious tort liability rather than one of contract. There is no doubt that in tort situations the liability of an employer is wider than it is where a contract is involved. Admittedly, to the customer of the garage, it may look as if the attendant has the "right" to say, e.g., that he will lock up the customer's car. Does this also entail the conclusion that, by so doing, the attendant has made a significant change in the nature and content of the contract of bailment made between the customer and the company when the former leaves his car in the latter's garage, knowing of the term that cars must be locked when they are left?

When nothing has been expressly or impliedly stated as to the powers of an agent to vary, or otherwise affect a written contract by some oral statement or act on the part of the agent, then the issue is whether the contracting party is legitimately entitled to conclude that the employee in question has the authority of an agent, i.e., the usual, or the apparent authority of someone in his position.⁶⁷ That may well depend upon whether, in business terms, the employee is the sort of employee whom reasonable people would take to be entitled to make the sort of contract that was involved. Is he a mere functionary, just a device, as it were, even though human as opposed to mechanical (as in many modern car-parks) for admitting customers, or tending to their needs and requirements? Or is he an instrumental participant in the process of contracting? The pity is that, as already noted, courts have not taken this issue very seriously in this context. That an important difference can result is indicated by other cases, in which the question has been whether express notice to a contracting party that the agent does not have the power to vary a written contract, or to depart from a standard, printed procedure, has sometimes meant that the oral or other statement or representation by the agent has not affected the written contract.

Thus in the English case of *Overbrook Estates Ltd. v. Glemcombe Properties Ltd.*,⁶⁸ a catalogue for an auction expressly stated that the auctioneers were given no authority to make or give representations or warranties in respect of the property to be auctioned. In those circumstances it was held that the principal, the owner of the property, was not bound by an oral statement made by the auctioneer in response to a question from a potential buyer, who purchased the property on the strength of that response (which turned out to be wrong, though not given fraudulently). Here there was no "ostensible" autho-

67. Cp. Fridman, *op. cit.* supra note 64 at pp. 98-103, 109-112.

68. [1974] 3 All E.R. 511.

rity to vary the contract, as there had been in the *Mendelssohn* case. But in both cases there was express notice to the contracting party of the lack of authority on the part of the servant or agent. In the *Mendelssohn* case only a document signed by the company's manager could alter the contract. There are Canadian cases to the same effect, which, admittedly, are not concerned with oral representations altering written contracts, but with the question of varying contracting procedures (which, in the circumstances is a closely allied issue). One of these is *Jensen v. South Trail Mobile Ltd.*⁶⁹ There the agent was required to obtain the approval of an officer of the company before he could accept an offer to purchase certain goods. This requirement was known to the other contracting party because it was stated on the written form which contained the contract. The agent said orally that he had received the necessary approval and signed the document himself on behalf of the company. He knew that he had not obtained the approval. In those circumstances it was held that the company was not bound by what the agent had done. There was no contract between the customer and the company. In *Cypress Disposal Ltd. v. Inland Kenworth Sales Ltd.*⁷⁰ the situation was similar. The plaintiff signed an order form for the purchase of two trucks from the defendant company. It contained a clause requiring the defendant to pay \$300 per day for late delivery, if the trucks were not delivered by a stipulated date in the contract. The written form provided that the contract did not bind the company until acceptance by one of its officers. The manager of the company declined to accept the "late delivery" clause and told the salesman who had negotiated with the plaintiff. No communication was made to the plaintiff. The salesman did not tell the truth to the plaintiff but forged the plaintiff's signature to another form, which excluded the clause in dispute, telling the plaintiff that the original offer, with a modification agreeable to the plaintiff, had been accepted. The trucks were not delivered in time and the plaintiff sued on the "late delivery" clause. The truth about the salesman's forgery became known. It was held that the company was not liable. Since it had never agreed to the clause in issue, and was not bound by the salesman's acceptance, because he had no authority to accept, as was known to the plaintiff, there was no binding contract between the parties so far as the "late delivery" clause was concerned.

It must be noted that in both these cases there was a vigorous dissent by one member of the court. McDermid J.A. dissented in

69. (1972), 28 D.L.R. (3d) 233.

70. (1975), 54 D.L.R. (3d) 588.

the *Jensen* case: Seaton J.A. in the *Cypress Disposal* case. The majority in each case followed the decision of the Privy Council in *Russo-Chinese Bank v. Li Yau Sam*.⁷¹ There the contracting party had expert knowledge of banking practice; hence he ought to have known that the person with whom he negotiated lacked the requisite authority to dispense with the approval of the manager of the bank. The minority in these cases preferred the majority decision of the Manitoba Court of Appeal in *Berryere v. Fireman's Fund Ins. Co.*⁷² In that case two members of that court held that an agent in a similar position could bind his principal. The other contracting party was entitled to assume that the agent had implied (query: ostensible?) authority to communicate the company's acceptance of a proposal of insurance to the motorist seeking cover. Hence the company was bound, even though the motorist had had a previous accident, which meant that the agent could not accept his proposal of insurance without reference to some other official, and this was known to the motorist. The majority of the Manitoba court regarded the agent as having been given a very broad authority. Guy, J.A., thought that there would be "chaos and confusion" if common law principles were modified to permit someone to rely on the assurance of a man who had no power to give such an assurance, and his lack of power were known to the one relying on him.⁷³ It was this minority view in the Manitoba case which was accepted by the Alberta court in *Jensen* and the British Columbia court in *Cypress Disposal*. Essentially, however, as is evident in the dissenting judgment of Seaton, J.A., in the latter case, the question is one of policy: who should bear the loss? Seaton, J.A.,⁷⁴ chose to answer that in the terms first employed by Holt, C.J., in the old case of *Hern v. Nichols*:⁷⁵

... seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser, than a stranger.

This, with all respect, is more than the language of vicarious tort liability (with which, in effect, the case was dealing) than of the law of contract and the effect of agency upon contract. The reliance of Seaton, J.A., upon the English *contract* cases of *Financings Ltd. v. Stimson*⁷⁶ and *Robophone Facilities Ltd. v. Blank*⁷⁷ is both more reasonable and more acceptable. These

71. [1910] A.C. 174.

72. (1965), 51 D.L.R. (2d) 603.

73. *Ibid.* at pp. 618-619.

74. *Supra* note 70 at p. 612.

75. (1701), 1 Salk. 289.

76. [1962] 3 All E.R. 386.

77. [1966] 3 All E.R. 128.

cases were concerned with the question of when, if at all, a contract had been accepted and with the possibility that an agent (i.e., salesman) could have had authority to accept an offer without any express communication from the principal company. However neither of these cases was directly and specifically concerned with the question which arose in the Canadian cases now being discussed. Hence their authority in this respect is dubious. What emerges from the majority judgments in the Canadian cases, and the reasoning behind them, is that there must be some express authorisation to vary the written document or some apparent authority, resulting from an act of "holding out" on the part of the company employing the agent, before any change in the contract as written will be effective and binding. Once the other contracting party is put on notice as to the limitations upon the agent's authority he is unprotected by what the agent does, even if the agent is acting fraudulently, and there is no reason for the contracting party dealing with him to suspect anything or to doubt the validity of what the agent is doing.

If this explanation of these cases is correct, what becomes of the approach made by other courts to the specific problem of altering or varying a written contract by some oral representation or statement? Is the true and only distinction whether the contracting party, misled by such statement or representation, has been alerted to the lack of authority on the part of the employee who makes it? Or can it be argued that only where he has knowledge that such employee *can* make such alterations, or the employer has made the employee appear to have such a power, and it is reasonable for the contracting party to draw such conclusion, that the statement will have contractual effect? If the latter is the more valid approach, then, I would suggest, it will mean a greater extension of the application of the doctrine of agency by estoppel. But in view of some inconsistent decisions, in Canada and England, it is hard to establish any settled doctrine. It still remains an unsolved issue as to how far contracting parties should be allowed, indeed encouraged, to act on the assumption that a statement, which contradicts the clear language of a written document that is the contract being made, is going to be contractually effective, even though it is not made by the principal party or by some person in a significant managerial position whose authority is undisputed. I consider this question to be as difficult, if not more difficult than the initial problem of determining whether an oral statement or representation should be permitted to affect a written contract.