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Evidence - Admissibility of Parol Evidence to Show a Written Contract to Be a Sham

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tract he had a period of about fifteen days within which he could legally withdraw from the union. When he exercised this option, pressure was placed upon the Company to fire him. It was this pressure which constituted the unfair labor practice under section 158(3) of the Federal Act,[18] and which in turn gave the Federal Board jurisdiction of the case.

Prior to the decision in the principal case, the conflict between state and federal jurisdiction in the matter of union certification had been clearly resolved. While it is perhaps unfortunate that this case was dismissed with a terse per curiam decision, nevertheless it cannot be said to be in conflict with previous decisions. The *Algoma* case had left 'open' to state regulation, those fields of unfair labor practices not intended to be covered by the Federal Law. The principal case simply limits in one more instance those so-called 'open' fields. While the new Labor-Management Relations Act does contain a provision allowing the Federal Board to cede its jurisdiction to State Boards under certain circumstances, the tendency of the courts today, plus the rather complete condification of the new Act, indicates that federal jurisdiction will be upheld whenever possible.

RICHARD P. BUELLESBACH

Evidence — Admissibility of Parol Evidence to Show a Written Contract to Be a Sham—The plaintiff contractor alleged that the defendant made an oral agreement with him whereby he was to construct a house for the defendant's daughter and son-in-law on a cost plus basis. Later the plaintiff was induced to enter into a written contract with the daughter and son-in-law for the specified consideration of $12,500, with the understanding, however, that the written agreement would not be binding; it was only to keep the defendant's brother from learning the cost of the house or for whom it was to be built. The defandant denied that an oral agreement existed, contending that the written agreement embodied the complete contract except that he had orally agreed to pay the plaintiff an additional $2,500 as a gratuity to induce completion of the building. The plaintiff sued for the difference between the amount the defendant had paid and the consideration specified in the oral contract. *Held:* Parol evidence was admissible to show that the written contract was to be of no binding force and was entered into only as a sham. *Mardon et. al. v. Ferris, 43 N.W. (2d) 904 (Mich., 1950).*

[18] 29 U.S.C. 158(3) "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . ."

It is a settled rule that parol evidence is not admissible to vary, modify, or contradict a written contract.[1] It is equally well settled that the parol evidence rule applies to building contracts as well as to other agreements.[2] The general rule prohibiting a change or variance in a written contract does not necessarily indicate that a contract, whole and complete on its face, cannot be entirely overthrown by parol evidence.[3]

There is disagreement among authorities upon the question whether parol evidence is admissible to show a written contract is a sham, i.e., that the purpose at the time of the execution was not to express a contractual relation between the parties. Some jurisdictions contend that such evidence is inadmissible since the contract, regular and complete on its face, was entered into for the purpose of deceiving or inducing some third person to perform a certain act. Other courts following the contract theory hold that a written contract, although appearing complete, can never in fact be binding if it was the intention of the parties not to be so bound.[4] Wigmore would allow the introduction of parol evidence showing a written contract to be a sham only when its purpose is morally justifiable, i.e., contracts to calm a lunatic or console a dying person.[5] Other courts refuse to admit parol evidence, stating simply that it would upset the sanctity of written contracts.

In the case of *Booye v. Ries*,[6] parol evidence was excluded which would have shown that the written agreement was entered into only to induce the defendant's father to make a loan. The court did not discuss the effect of fraud upon a third person. The Minnesota court has refused to admit this evidence where the purpose involved a fraud upon a third person. *Graham v. Savage*[7] involved an oral compensation for services agreement between the plaintiff salesman and the defendant employer. The defendant requested the plaintiff to sign a written contract for a smaller sum, for the express purpose of showing the other salesmen that the plaintiff was not drawing a larger salary. It was agreed at the execution of the written contract that it was to have no effect and the oral agreement would remain binding. The court would not allow the introduction of parol evidence since the avowed purpose of the contract was to deceive or defraud. The court would not make, "an exception in aid of such an illegitimate purpose and in violation of common honesty."

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[1] 32 C.J.S. 784, sec. 851.
[2] 32 C.J.S. 824, sec. 904.
[3] 20 Am. Jur. 955, sec. 1094.
[4] Williston on Contracts, Vol. 3, p. 1822, sec. 634.
[5] Wigmore on Evidence, Vol. 9, p. 16, sec. 2406 (1940).
[6] 102 N.J.L. 322, 134 A. 86 (1926).
[7] 110 Minn. 510, 126 N.W. 394 (1910) : See also 19 Ann. Cas. 1022.

A New York case[8] involving fraud upon a third person allowed the admission of parol evidence, "to show that the writing which purported to be an agreement was not, in fact, intended by the plaintiff and defendant as such." This case was reversed on appeal, but on the ground that the parol agreement was void under the statute of frauds. The New York court in an earlier decision said:

> "This is in avoidance of the instrument and not to change it, and I do not see why the testimony was not as competent in this case as it would be to show that a written instrument was obtained fraudulently, by duress or in an improper manner. Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony. . ."[9]

In the majority of cases the parties to the oral and written contracts are identical. In the instant case, however, the beneficiary of the oral agreement contracted in writing with one of the parties to the oral agreement. The Michigan court indicates that this would not change the rule. With this result the Texas court[10] is in accord, although the court did not consider the change of parties as affecting the rule. In the instant case the court places a limitation upon the rule, however, asserting that if one of the parties had been an innocent purchaser for value if would be inequitable to hold the written contract a sham.

JOHN J. WITTAK

Constitutional Law — Bible Reading in Public Schools — A New Jersey statute requiring daily reading of five verses of the Old Testament of the Holy Bible without comment, and permitting repetition of the Lord's Prayer in each public school classroom, was challenged as to its constitutionality under the First and Fourteenth Amendments of the United States Constitution. *Held:* The statute did not contravene the "establishment of religion" clause of the First Amendment nor the "privileges and immunities" clause of the Fourteenth Amendment, since such reading was not designed to inculcate any particular dogma, creed, belief, or mode of worship. *Doremus et al v. Board of Education of Borough of Hawthorne et al., 5 N.J. 435, 75 A. (2d) 880 (1950).*

The court distinguished this case from the *Everson*[1] and *McCollum*[2] cases on its facts and then proceeded to an interpretation of the First

[8] Nightingale v. J. H. & C. K. Eagle Inc., 141 App. Div. 386, 126 N.Y.S. 339 (1910).

[9] Grierson v. Mason, 60 N.Y. 394, 397 (1875): See also Coffman v. Malone, 98 Neb. 819, 154 N.W. 726 (1915); 1917 B.L.R.A. 263.

[10] Bernard v. Fidelity Union Casualty Co., Tex. Civ. App., 296 S.W. 693 (1927).

[1] Everson v. Board of Education of the Township of Ewing et al., 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711, 168 A.L.R. 1392 (1947).

[2] Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, et al., 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649, 2 A.L.R. (2d) 1338 (1948).