9/29/70

Memorandum 70-108

Subject: New Topic - Parol Evidence Rule

On two previous occasions, the staff has presented suggestions sent to the Commission that the Parole Evidence Rule be studied by the Commission. These suggestions have originated from law professors, legal writers, and others. The Commission has declined to study this topic.

I recently sent a request to each member of the Stanford Law Faculty asking for suggestions as to topics that would merit study by the Commission. In response, I received a letter from Professor John Hurlbut (now teaching at Hastings Law School) that includes the following:

> In the light of those rather recent decisions and opinions off the pen of C. J. Traynor, is the time not ripe for a study of the Parole Evidence Rule and a restatement and revision of our code provisions?

We do not bring this suggestion to your attention because we are particularly concerned that the Commission decided not to study this topic. However, we do believe that you will want to know that we have received an additional suggestion that we study the Parole Evidence Rule.

As the staff indicated in the previous Memorandum (Memorandum 70-63), we believe that we have adequate background research studies on this topic in the form of several law review articles. If the Commission decided to undertake a study of the topic, we would request the Harvard Student Legislative Bureau to attempt to draft legislation that would revise the California law so that it would state the law as it actually is in view of the court interpretations of the existing statutes.

In case you wish to request authority to study this topic, we attach Exhibit I which is a draft request for authority to study the topic that could be included in our Annual Report.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT I

A study to determine whether the parol evidence rule should be revised.

The parol evidence rule determines the provability of a prior or contemporaneous oral agreement when the parties have assented to a written agreement. The California statutory formulation of this rule was enacted in Section 1856 of the Code of Civil Procedure[1] in 1872.[2] Since that date, the rule has acquired a substantial

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1. Section 1856 provides:

> 1856. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
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> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
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> 2. Where the validity of the agreement is the fact in dispute.
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> But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

2. Variations on the theme stated in Section 1856 appear in Civil Code Code Sections 1625, 1639, and 1640:

> 1625. The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument.
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> 1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.
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> 1640. When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded.

judicial gloss, reflecting a variety of purposes and policies and resulting in a maze of conflicting tests and exceptions.[3] The Uniform Commercial Code, enacted in California in 1963, contains a significantly different, more modern version of the rule to apply to commercial transactions.[4] A study should be made to determine whether the conflict between these statutory statements of the rule should be eliminated and the extent to which the parol evidence rule should be revised.[5]

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3. See Masterson v. Sine, 68 Adv. Cal. 223, 65 Cal. Rptr. 545, 463 P.2d 561 (1968); Sweet, Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule, 53 Cornell L. Rev. 1036 (1968); Note, Chief Justice Traynor and the Parol Evidence Rule, 22 Stan. L. Rev. 547 (1970).

4. Cal. Commercial Code § 2202 provides:

> 2202. Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
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> (a) By course of dealing or usage of trade (Section 1205) or by course of performance (Section 2208); and
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> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

5. As stated in Note, Chief Justice Traynor and the Parol Evidence Rule, 22 Stan. L. Rev. 547, 563 (1970): "It is time for the California state legislature to step in and rid the California Codes of the confusion for which they have become legendary. The provisions concerning parol evidence should either be rewritten or amended to conform to Chief Justice Traynor's three opinions."