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## EVIDENCE—PAROL EVIDENCE TO SHOW USURY

## I. INTRODUCTION

Recent editions of this publication have contained comments upon the parol evidence rule in Missouri,<sup>1</sup> and upon Missouri's usury statutes.<sup>2</sup> Subsequent to the publication of those articles, the St. Louis Court of Appeals rendered its decision in *Reich v. Pine Lawn Bank & Trust Co.*,<sup>3</sup> a case dealing with the admissibility of parol evidence in contradiction of the terms of a written instrument, to show a usurious exaction of interest.<sup>4</sup> The decision was apparently one of first impression in Missouri.

The case falls squarely between the purview of the two aforementioned articles, presenting a combination topic with which neither of the articles dealt. In view of that fact, and in view of the somewhat questionable nature of the decision, it was felt that additional comment upon the area would be worthwhile. It will be the purpose of this article, therefore, to investigate not only the decision itself, but the rules which have been applied by other jurisdictions in similar situations as well.

## II. GENERAL BACKGROUND

It has been said of parol evidence to show the illegality of a written instrument:

The rule forbidding the introduction of parol evidence to contradict, add to, or vary a written instrument does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law. No instrument is so sacred, when tinctured with illegality, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal or vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law.<sup>5</sup>

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1. Comment, *The Parol Evidence Rule In Missouri*, 27 Mo. L. Rev. 269 (1962).

2. Comment, *Usury—Effectiveness of the General Usury Statutes of Missouri—Sections 408.050 and 408.070*, 26 Mo. L. Rev. 217 (1961).

3. 356 S.W.2d 545 (St. L. Ct. App. 1962), *motion for rehearing or to transfer to Supreme Court denied*.

4. There may be cases in Missouri which have permitted parol evidence without the question as to its propriety being raised at trial, thus leaving the issue as to what the court would have ruled unanswered. For instance, one case, without discussing the parol evidence rule, said: "Where, as in this case, the contract does not import usury on its face, the facts and circumstances in the case must show that the lender had a purpose in his mind to get more than the legal rate of interest for the use of the money." *Hansen v. Duvall*, 333 Mo. 59, 62 S.W.2d 732 (1933).

It is difficult to see how these "facts and circumstances" could be shown without parol testimony; yet the question was apparently not raised. If the matter is not brought up at trial, either by objection or by motion, it cannot be the basis of a reversal on appeal. *Fischman-Harris Realty Co. v. Kleine*, 82 S.W.2d 605 (St. L. Ct. App. 1935).

5. 10 R. C. L. *Evidence* § 256 (1916). *Accord*, *Murray v. Murray*, 293 S.W.2d 436, 441 (Mo. 1956); *Benas v. Title Guaranty Trust Co.*, 216 Mo. App 53, 267

Since usury is an object usually forbidden by statute, the above doctrine has been applied as the basis for the generally accepted rule that for the purpose of showing usury in a written contract, parol or extrinsic evidence is admissible, even though it may directly contradict the terms of the writing.<sup>6</sup> Otherwise, the very purpose of the law in forbidding the exaction of usury would be defeated by unscrupulous persons using well-contrived instruments to forestall subsequent inquiries respecting the true nature of the transaction.<sup>7</sup> It has been said that any evidence surrounding an allegedly usurious transaction, and so connected therewith as to throw light

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S.W. 28 (St. L. Ct. App. 1924); *Smith v. Bailey*, 200 Mo. App. 627, 209 S.W. 945 (K.C. Ct. App. 1919).

6. *Houghton v. Burden*, 228 U.S. 161 (1913); *Topping v. Trade Bank*, 86 F.2d 116 (2d Cir. 1936); *In re Straschnow*, 181 Fed. 337 (2d Cir. 1910); *Consumers Credit Serv. Inc. v. Craig*, 75 A.2d 525 (D. C. Mun. App. 1950); *National Equip. Rental, Ltd. v. Stanley*, 156 F. Supp. 548 (E.D.N.Y. 1957); *Sewal v. Nolan Bank*, 204 Ala. 93, 85 So. 375 (1920); *Mowery v. House*, 355 S.W.2d 275 (Ark. 1962); *Heidelberg So. Sales Co. v. Tudor*, 229 Ark. 500, 316 S.W.2d 716 (1958); *Crisco v. Murdock Acceptance Corp.*, 222 Ark. 127, 258 S.W.2d 551 (1953), *cert. denied*, 346 U.S. 910 (1953); *Fagerberg v. Denny*, 57 Ariz. 179, 112 P.2d 578 (1941); *Martyn v. Leslie*, 137 Cal. App.2d 41, 290 P.2d 58 (Dist. Ct. App. 1955); *Weiss v. Brandt*, 137 Cal. App.2d 710, 290 P.2d 626 (Dist. Ct. App. 1955); *Abbot v. Stevens*, 133 Cal. App.2d 242, 284 P.2d 159 (Dist. Ct. App. 1955); *Penzier v. West American Fin. Co.*, 133 Cal. App. 578, 24 P.2d 501 (Dist. Ct. App. 1933); *Reading v. Weston*, 7 Conn. 409 (1829); *Wicker v. Trust Co.*, 109 Fla. 411, 147 So. 586 (1933); *Jackson v. Commercial Credit Corp.*, 90 Ga. App. 352, 83 S.E.2d 76 (1954); *Olson v. Caulfield*, 32 Idaho 308, 182 Pac. 527 (1919); *McGill v. Ware*, 5 Ill. 21 (1842); *I. C. Bank & Trust Co. v. Geary*, 274 Ill. App. 327 (1934); *France v. Munro*, 138 Iowa 1, 115 N.W. 577 (1908); *Seekel v. Norman*, 71 Iowa 264, 32 N.W. 334 (1887); *Lear v. Yarnell*, 3 A. K. Marshall 419 (Ky. 1821); *Roasenda v. Zabriskie*, 18 La. 346 (1841); *Wetter v. Hardesty*, 16 Md. 11 (1860); *Midland Loan & Fin. Co. v. Lorentz*, 209 Minn. 278, 296 N.W. 911 (1941); *Lewis v. Willoughby*, 43 Minn. 307, 45 N.W. 439 (1890); *Yeager v. Ainsworth*, 202 Miss. 747, 32 So.2d 548 (1947); *State ex rel. Beck v. Associates Discount Corp.*, 162 Neb. 683, 77 N.W.2d 215 (1956); *Koehler v. Dodge*, 31 Neb. 328, 47 N.W. 913 (1891); *Denyse v. Crawford*, 18 N.J.L. 325 (Sup. Ct. 1841); *In re Reif's Will*, 262 App. Div. 968, 30 N.Y.S.2d 47 (1941); *Pugh v. Scarboro*, 200 N.C. 59, 156 S.E. 149 (1930); *Ohio Ins. Co. v. Shotts*, 6 Ohio Dec. Reprint 813 (C. P. 1879); *Fidelity Sec. Corp. v. Brugman*, 137 Ore. 38, 1 P.2d 131 (1931); *Bokser v. Lewis*, 383 Pa. 507, 119 A.2d 67 (1956); *Richman v. Watkins*, 376 Pa. 510, 103 A.2d 688 (1954); *Simpson v. Penn Discount Corp.*, 335 Pa. 172, 5 A.2d 796 (1939); *Rainwater v. Bonnette*, 151 S.C. 474, 149 S.E. 254 (1929); *Fellows v. Christensen*, 28 S.D. 353, 133 N.W. 814 (1911); *National Bond & Inv. Co. v. Atkinson*, 254 S.W.2d 885 (Tex. Civ. App. 1952); *Griffith v. Gadberry*, 182 S.W.2d 739 (Tex. Civ. App. 1944); *Saltmount Oil Corp. v. Imperial Crown Royalty Corp.*, 98 S.W.2d 418 (Tex. Civ. App. 1936); *Richeson v. Wood*, 158 Va. 269, 163 S.E. 339 (1932); *Ostiguy v. A. F. Franke Const. Inc.*, 55 Wash.2d 350, 347 P.2d 1049 (1959).

*Contra*, *Allen v. Turnham*, 83 Ala. 323, 3 So. 854 (1888); *Butterfield v. Kidder*, 25 Mass. (8 Pick.) 512 (1829); *Blindman v. Industrial Loan & Thrift Corp.*, 197 Minn. 93, 266 N.W. 455 (1936), 22 CORN. L. Q. 250, 21 MINN. L. REV. 470 (1937); *Rush v. Chattanooga Du Pont Employees' Credit Union*, 358 S.W.2d 333 (Tenn. 1962); *Mallory v. Columbia Mortgage & Trust Co.*, 150 Tenn. 219, 263 S.W. 68 (1924).

7. *Houghton v. Burden*, 228 U.S. 161 (1913); *National Equipment Rental, Ltd. v. Stanley*, 156 F. Supp. 548 (E.D.N.Y. 1957); *Sewal v. Nolan Bank*, 204 Ala. 93, 85 So. 375 (1920).

upon it and disclose or tend reasonably to show its true character, is admissible. This is true even though the contract is in writing and appears on its face to be fair and legal.<sup>8</sup> Likewise, there is authority to the effect that it is always permissible to show that a transaction, ostensibly lawful, actually constituted a usurious loan and was made with intent to evade the statute.<sup>9</sup> A defendant, raising the defense of usury and contending that a completed loan transaction differs from that contemplated by the terms of his application, should be allowed to explain the negotiations for the loan from their inception.<sup>10</sup>

Resort to parol evidence to determine the question of usury does not in any way depend upon the existence of an ambiguity in the contract,<sup>11</sup> although the ambiguous nature of the agreement may furnish an additional reason for permitting parol as well as written evidence as to the entire transaction.<sup>12</sup> It should be noted, however, that cases following the general rule permitting parol evidence to show usury do so only where the party offering the evidence for such purpose is defending the action, or is seeking to recover usurious payments he has previously been required to make. The rule does not extend to the situation where the proffering party seeks to prove that the contract was made according to a certain form in order to evade the usury laws, and the testimony would tend to prove the actual agreement, for breach of which the proffering party is now suing.<sup>13</sup>

### III. REICH v. PINE LAWN BANK & TRUST CO.

In the *Reich* case, the plaintiff borrowers pursued the remedy for usury provided by Section 408.050, RSMo 1959. Plaintiffs alleged that the defendant bank, after first orally agreeing to loan \$20,000, to be repaid after one year, used a scheme to defraud plaintiffs and to exact usury in connection with the said loan. The alleged scheme consisted of first requiring the plaintiffs to sign a \$20,000 note and deed of trust repayable after six months, which note the plaintiff borrowers considered as the document representing their obligation. Thereafter, plaintiffs were required to sign an additional note for \$24,000 which was payable in installments over a five year period, with the explanation that the additional note was needed only for the purpose of satisfying the loan committee of the bank. When the plaintiff sought to repay the balance of the loan after one year, the bank insisted on receiving a portion of the interest to the date of maturity of the five-year note. The bank could admittedly demand this interest if the \$24,000 note was the legitimate obligation of the plaintiffs, since there was no optional prepayment

8. *Peightal v. Cotton States Bldg. Co.*, 25 Tex. Civ. App. 390, 61 S.W. 428 (1901).

9. *Penziner v. West American Fin. Co.*, 133 Cal. App. 578, 24 P.2d 501 (Dist. Ct. App. 1933).

10. *United States Bond and Mortgage Corp. v. Loughran*, 239 App. Div. 786, 263 N.Y.S. 464 (1933).

11. *Martyn v. Leslie*, 37 Cal. App.2d 41, 290 P.2d 58 (Dist. Ct. App. 1955); *Clemens v. Crane*, 234 Ill. 215, 84 N.E. 884 (1908).

12. *Weiss v. Brandt*, 137 Cal. App.2d 710, 290 P.2d 626 (Dist. Ct. App. 1955); *Hillier v. Muth*, 132 Cal. App. 486, 23 P.2d 46 (Dist. Ct. App. 1933).

13. *F. V. Collins Inv. Co. v. Mills*, 254 S.W. 999 (Tex. Civ. App. 1923).

clause.<sup>14</sup> The plaintiffs' testimony showed, however, that at the time of the transaction they understood that they had signed a \$20,000 note which could be repaid after six months and within one year, and that the \$24,000 five-year note was represented by the bank's president to be required, not as the documentation of their obligation, but merely as a means of satisfying, or fooling, the bank's loan committee.<sup>15</sup> Thus, if the plaintiffs' testimony were true, the bank had exacted usury by charging interest under the terms of the five-year note in excess of 8 percent of the loan, which amounts the plaintiffs would be entitled to recover. Although the defendant bank offered contradicting evidence, the trial court relied upon plaintiffs' evidence and gave a verdict in their favor.

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14. It is apparently settled law in Missouri that where there is no optional prepayment clause in a note, it is not usurious for a lender to require payment of interest, or a part thereof, to the date of maturity of the note, even though the loan is liquidated before maturity and the amount paid exceeds the lawful rate of interest computed to the date when the loan was paid. See *Hansen v. Acceptance Finance Co.*, 270 S.W.2d 143 (K. C. Ct. App. 1954).

15. The opinion, at page 547-48, summarizes the plaintiff's testimony as follows:

Plaintiff Gilbert Reich testified that on May 1, 1957, he made a request for a \$20,000.00 loan at the Pine Lawn Bank and Trust Company. This request was made through Douglas Dodds, President of the bank. His purpose for securing this loan was to consolidate certain other outstanding loans. He was then permitted to testify, over defendant's objection, that such testimony tended to impeach the writing evidencing the loan, that he requested a one-year loan of \$20,000.00 and that Mr. Dodds agreed to make it in that amount for a period of one year, with interest at four (4%) percent. He further testified that Mr. Dodds told him that payments of \$400.00 per month would have to be made, to which he agreed. He also stated that his agreement with Mr. Dodds was, that the amount due at the end of the year would be paid off by a refinancing method or a renewal; that Mr. Dodds said he would make a loan at the end of the year combining all his various loans, or would obtain such a loan for him and that, in view of these statements, he went ahead and obtained from defendant the \$20,000.00 loan. He further testified that at the time he made the loan Mr. Dodds caused him to execute the \$20,000.00 note, which he examined, only to observe that it was for \$20,000.00. He signed the Deed of Trust. He further stated that after the two above mentioned papers were signed Mr. Dodds gave him the \$24,000.00 note for his signature; that he asked Mr. Dodds for an explanation of this note and was told it was taken to satisfy the loan committee at the bank. He further testified he did refinance his loans at the end of the year by securing a loan of \$70,000.00 from the Citizens Bank and Trust Company of Maplewood, which reduced his yearly payoff from \$17,000.00 to approximately \$9,000.00. Prior to making the loan at the Maplewood Bank, Mr. Reich requested Mr. Dodds to release the deed of trust securing his loan at the Pine Lawn Bank, and permit him to continue to pay the \$400.00 per month, but Mr. Dodds would not agree to release the deed of trust. The Citizens Bank and Trust Company would not make the loan to plaintiffs unless the deed of trust was released. Plaintiff then paid the loan at defendant bank by a check of Citizens Bank and Trust Company for \$17,599.42. Before securing this check, Mr. Reich ascertained from the bookkeeper at defendant Bank the amount necessary to liquidate the loan. Mr. Reich objected to the amount. He thought it excessive but finally paid it. . . .

On appeal, the bank contended that the trial court should not have permitted the plaintiffs' parol testimony to contradict the terms on the face of the \$24,000 five-year note. The St. Louis Court of Appeals distinguished a case where parol evidence was admitted to show that notes called for sums in excess of the actual amounts loaned, thus enabling the lender to exact usurious interest,<sup>16</sup> a case where parol evidence was held admissible to show that a sum which the contract showed as a commission paid to appellant as agent of the borrower was in fact paid to appellant as lender, thus constituting the transaction usurious,<sup>17</sup> a case where defendant was permitted to show by parol evidence, for the purpose of avoiding a real estate sale contract on the ground of fraud, that the plaintiff in negotiating the contract had misrepresented the size of the lot which was the subject of the contract,<sup>18</sup> and a case which held the parol evidence rule inapplicable in an action based on fraud in the procurement of a sale.<sup>19</sup> The court concluded:

The foregoing cases are not, in our judgment, in point on the question presented on this appeal. There is no contention that plaintiffs did not receive the full amount of the loan, \$20,000.00, nor is this a suit in equity to rescind or set aside the contract for fraud unrelated to the subject of the contract. On the contrary, *it is an attempt to show fraud directly related to the subject of the contract* which resulted in requiring plaintiffs to pay usurious interest. Parol evidence is not admissible under such circumstances. . . . In our opinion the court erred in admitting testimony concerning the alleged oral agreement and testimony with reference to the alleged false representations.<sup>20</sup> (Emphasis added.)

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16. *Securities Inv. Co. v. Rottweiler*, 7 S.W.2d 484 (St. L. Ct. App. 1928). The court had there said, at 486:

Disregarding the form which the transaction took, and looking only to its substance, as we must, the conclusion appears inescapable to our minds that the actual amounts of the loans was shown by clear and convincing proof to have been required by defendant Rottweiler, with the understanding that it was to be paid, or, in other words, exacted by him, for the purpose of securing for himself a greater rate of interest than that allowed by law, and was, therefore, usurious.

17. *State v. Sargent*, 241 Mo. App. 1085, 256 S.W.2d 265 (St. L. Ct. App. 1953). See also *Stewart v. Boone County Trust Co.*, 230 Mo. App. 120, 87 S.W.2d 223 (St. L. Ct. App. 1935) and cases cited therein.

18. *Burch v. Schmelig*, 300 S.W.2d 838 (St. L. Ct. App. 1957). In that case the court said, at 843:

It is quite true, as appellants contend, that it is a well settled rule of law that where a person signs a contract he is conclusively presumed to know its contents, and to have accepted the terms thereof, and that all prior negotiations are merged into the written instrument. But there is an exception to this general rule in the case of fraud. In such cases the party does not sue upon the contract or any warranty therein, but seeks to avoid his undertaking on the ground that by false representations he was induced to enter into the contract, and for that reason he should be relieved from his obligation and placed in status quo. Parol evidence in support of such plea is admissible. . . . In the case at bar the evidence was introduced in support of a plea that defendant was induced to enter into the contract by reason of false representations as to the size of the lot. For such purposes the evidence was admissible.

19. *Burns v. Vesto Co.*, 295 S.W.2d 576 (K.C. Ct. App. 1956).

20. 356 S.W.2d at 549.

Thus it was held that the trial court should have sustained defendant's motion for a directed verdict. Even though the bank had camouflaged a usurious transaction by requiring two notes for one loan, and requiring interest to be paid according to the superfluous note contrary to the oral agreement and the first note executed, the court refused to permit parol evidence to remove the camouflage. The decision, therefore, is inconsistent with the general rule that for the purpose of showing usury or some other illegality in a written contract, parol or extrinsic evidence is admissible, even though it may directly contradict the terms of the writing.<sup>21</sup>

It is submitted that if parol evidence is not allowed to prove such allegations as were involved in the principal case, the usury statutes will be rendered ineffective to curtail the very practices which their creation contemplated. Loan sharks and others who might seek to evade the usury laws, particularly those who loan to persons illiterate as to fine legal implications, by this decision are given a blueprint which they can follow to remain beyond the reach of Missouri's usury laws.

None of the cases cited as supporting the court's conclusion dealt with usury or any type of illegality. The only Missouri case cited by the court on this point was *Fischman-Harris Realty Co. v. Kleine*,<sup>22</sup> a case where the plaintiff sued upon a promissory note and the defendant alleged as a defense that plaintiff's assignor had falsely and fraudulently represented to the defendant that plaintiff would look only to the property involved for the payment of the note; that the defendant herself would not be held personally liable thereon. On appeal the plaintiff contended that such evidence, even if true, constituted no defense, because it was inadmissible as violative of the parol evidence rule. The court said:

It is indeed true, as a basic proposition of law, that one who admits the execution of a note, as defendant does in this case, will not be permitted (over objection) to show the existence of an oral agreement entered into at the time of its execution that he was not to pay it, though parol evidence is, of course, admissible to show want or failure of consideration. This, obviously, for the reason that when a contract has been

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21. See cases cited in note 6 *supra*.

The case also seems inconsistent with the language in *Webster v. Sterling Fin. Co.*, 355 Mo. 131, 195 S.W.2d 509, 514 (1946):

The law will not tolerate any camouflage disguising a usurious transaction to make it seem innocent. 'The law looks at the nature and substance of the transaction, and not to the color or form which the parties in their ingenuity have given it. No imaginable act or contrivance to cover up and conceal the usury will avail the parties. They will not be permitted successfully to evade the provisions of the statute by any conceivable scheme or expedient. The courts will follow them through all their shifts and devices, and ascertain the true character and design of the transaction. And if upon such investigation, it appears that there was in substance a loan at an illegal rate of interest, no matter what form or shape the contract has been made to assume, it will be declared to be usurious, and the proper remedy applied.' *Kreibohm v. Yancey et al.*, 154 Mo. 67, loc. cit. 86, 55 S.W. 260.

22. 82 S.W.2d 605, 610, 611 (St. L. Ct. App. 1935).

reduced to writing, the law will presume that it embodies the entire agreement of the parties; and particularly is this the situation in the case of a promissory note where the negotiable instruments law itself denominates the status and respective obligations of those whose names appear as parties to the instrument. . . .

It might be thought, however, that in no event could there be a question of the application of the parol evidence rule to the facts of this case in view of the very broad and general rule, as it is so frequently expressed, that where fraud in the inducement of a contract is relied upon as a defense, the situation is taken from within the scope of the parol evidence rule, and evidence of the fraud becomes competent, even though the contract was in writing. Here defendant, having charged that plaintiff's assignor, through its agents, represented to her that they would look only to the property for the payment of the note and would not hold her personally liable upon it, has sought to avoid liability upon the note upon the ground that such representations were false and fraudulent, her theory undoubtedly being that evidence of such fraud was competent in avoidance of the note, despite the fact that it was directly contradictory of its terms.

It is to be borne in mind, however, that a proper defense of fraud in avoidance of the obligations of a contract is not a showing that the parties actually had a verbal agreement or understanding which differed from the written contract, but rather *it is a defense that the contract itself constituted a fraud, or else that its execution by the defendant was procured and induced by fraudulent representations regarding the matters to which the contract relates.* In other words, parol evidence, under the guise of showing fraud, is not admissible to contradict the terms of a written contract, or, in effect, to substitute a verbal contract for the written one, but only to prove that the instrument itself was a fraud or that the defendant's signature thereto was procured by fraud, the instrument in either of such events thus purporting to be an agreement which, in point of fact, was not made, and upon which the minds of the parties had never met. Were the rule otherwise, and were a party, knowing and appreciating the effect of the instrument he signs, nevertheless permitted to advance and rely upon a contemporaneous verbal promise that the instrument would not be enforced according to its terms, then, when sued upon the instrument, 'he would only need to say that it did not contain the agreement; and, not containing the agreement, it is fraudulent; and, being fraudulent, it cannot be enforced. Thus a writing would be mere waste material and all stability of contract be at an end. . . .' (Emphasis added.)

The above language is in accord with the generally accepted rule that parol evidence is admissible as evidence of fraud to show that there is no validly formed contract. The integration aspect of the parol evidence rule is inapplicable unless there is a validly formed contract embodied in a writing that is assented to by the parties as the final repository of their entire agreement. Without valid formation, there is no contract to be protected by the exclusion of extrinsic evidence. In fact, the language of the *Fischman* case should substantiate the plaintiff's contention that the parol evidence rule should not apply to preclude his testimony in the instant case. By his testimony the plaintiff was not seeking to alter the terms of the \$24,000 five-year note and thereby gain the benefit of its continued existence under the altered terms; the plaintiff sought merely to prove that the \$24,000 note,



because of the fraudulent representations by the bank president, in fact had no valid existence. Plaintiff's testimony was accepted. Thus, the \$24,000 note could have no existence to justify the bank's requiring the plaintiff to pay more than the rate of interest provided in the \$20,000 note, or more than the statutory limit for lending money for one year.

The case did not present the more difficult question of whether an action for damages for fraud and deceit may be predicated upon unfulfilled promises or statements as to future events which are sought to be proved by parol evidence.<sup>23</sup> However, even in jurisdictions where parol evidence is held insufficient or inadmissible to prove such causes of action, the cases indicate that such a view does not prevent the courts from following the general rule permitting parol evidence, contradictory to the terms of an instrument which appears on its face to be legal, to prove usury.<sup>24</sup>

A converse situation is presented where parol evidence is offered to negative usury apparent on the face of a written instrument. Here there is less agreement among the cases as to the admissibility of the parol testimony. The reasons for admitting the evidence to prove the illegality (usury) of the contract do not obtain where the purpose is to prove that the contract, though usurious on its face, is in fact legal, and it has been held that "where the writing is plain and unambiguous and by its terms illegal, parol testimony is not admissible for the purpose of purging the contract of its illegality."<sup>25</sup> In many jurisdictions, however, the rule permitting parol evidence even to negative usury has been adopted.<sup>26</sup>

The issue was presented to the Kansas City Court of Appeals in *Allen v. Newton*,<sup>27</sup> where the plaintiff had executed several promissory notes totaling \$800,

23. See *Jeck v. O'Meara*, 341 Mo. 419, 107 S.W.2d 782 (1937); *Reed v. Cook*, 331 Mo. 507, 55 S.W.2d 275 (1932), 18 St. Louis U. L. J. 166 (1933); 3 Mo. L. REV. 69 (1938); Comment, 49 CALIF. L. REV. 877 (1961). The last mentioned comment criticizes *Reed v. Cook*, *supra*, and a similar line of cases following *Bank of America Nat'l Trust & Sav. Ass'n. v. Pendergrass*, 4 Cal.2d 258, 48 P.2d 659 (1934).

24. *Crisco v. Murdock Acceptance Corp.*, 222 Ark. 126, 258 S.W.2d 551, (1953), *cert. denied*, 346 U.S. 910 (1953); *Abbot v. Stevens*, 133 Cal. App.2d 242, 284 P.2d 159 (Dist. Ct. App. 1955).

The *Abbot* case is particularly interesting in that it specifically mentions the line of cases following the *Pendergrass* case, *supra* note 23. The court said:

In effect counsel for appellants argue . . . that the parol evidence rule does not apply to the usury issue and hence the *Bank of America, etc. v. Pendergrass* line of cases, *supra*, is inapplicable. It is true that the parol evidence rule cannot impede such an inquiry. (cases cited) And this means that if there was an oral agreement between these litigants that the loan should run but one year and that plaintiffs should, upon liquidating it, also pay the 180 days' unearned interest (over and above the specified 10 per cent), the loan would be usurious, though innocent on its face.

25. *Ulvilden v. Sorken*, 58 S.D. 466, 237 N.W. 565 (1931).

26. *Mutual Protective Corp. v. Palatnick*, 118 Conn. 1, 169 A.H. 917 (1934); *McConnell v. Gregory*, 146 Ga. 475, 91 S.E. 550 (1917); *Aldrich v. Aldrich*, 260 Ill. App. 333 (1931); *Donahue v. Casabianca*, 109 N.J.L. 425, 162 Atl. 763 (Ct. Err. & App. 1932).

27. 219 Mo. App. 74, 80-1, 266 S.W. 327, 330 (K.C. Ct. App. 1924).

each to mature five years after date, with interest coupons attached representing annual interest at seven percent per annum, and one commission note for \$80, all payable to G. W. Newton, defendant's testator, and all secured by a single deed of trust. Plaintiffs contended that the \$80 commission note constituted an exaction of usury, but defendants were permitted to show that the testator, who was in the real estate and loan business, had actually made the loan on behalf of a client, and thus that the \$80 note represented a commission properly payable to Newton as agent to procure the loan for the plaintiffs. The court said:

It is urged the court erred in admitting evidence in explanation of the purport of the \$80 note in question. This objection, doubtless, is bot-tomed upon the assumption that the note itself shows on its face that it is usurious. We cannot accept this assumption as justified. The instrument is a plain note of hand, and we must go elsewhere for any explanation as to its actual import. It has been held in this State that in usury cases the apparent intent of the written instrument may be altered by parol evi-dence.

It would seem that if Missouri courts are to allow parol evidence to negative usury, as indicated by the *Allen* case, this should provide an additional reason for Missouri courts to permit parol evidence to show usury. There is at least as much reason to allow parol evidence to show the illegality of an apparently legal transaction as there is to allow parol evidence to show the legality of a transaction appar-ently illegal. The preferable view, and the one generally followed, permits parol evidence in both situations.<sup>28</sup>

A further aspect of the problem of using parol evidence to show usury relates to the degree of proof which should be required, if the parol testimony is permitted. It is undisputed that the burden of proof is upon the party who asserts that the transaction involved usury. The most recent Missouri case on the required degree of proof in usury cases, a Kansas City Court of Appeals decision, took the position that the defense of usury must be proved by "clear and convincing" evidence.<sup>29</sup> Only five years earlier, however, the same court, in answering the contention that the burden of proof in cases of usury must be beyond a reasonable doubt by a clear preponderance of the evidence, stated: "Missouri follows a more liberal rule and the only cases applying a harsher term than preponderance in civil cases have been overruled."<sup>30</sup> Earlier appellate court cases had held that usury must be "clearly proved," or must be established by at least "clear and convincing proof."<sup>31</sup> Thus, the degree of proof required of the party asserting usury in Missouri, in civil actions, is in an unsettled state at the present time, even if parol evidence

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28. 6 WILLISTON, CONTRACTS § 1699 (Rev. ed. 1938).

29. *Gershon v. Ashkanazie*, 239 Mo. App. 1012, 199 S.W.2d 38 (K.C. Ct. App. 1946).

30. *Auto Money Corp. v. Clark*, 236 Mo. App. 862, 872, 153 S.W.2d 113, 118 (K.C. Ct. App. 1941).

31. *General Motors Acceptance Corp. v. Weinrich*, 218 Mo. App. 68, 262 S.W. 425 (K.C. Ct. App. 1924); *Tobin v. Neuman*, 271 S.W. 842 (St. L. Ct. App. 1925).

is not considered. This in itself may be a partial explanation of the court's reluctance in the instant case to permit parol evidence on the issue of usury.

#### IV. CONCLUSION

There are substantial reasons why Missouri should seek to retain the parol evidence rule in its law, just as there are good reasons for Missouri to protect its citizens against usury. But Missouri should not permit either of these policies to abrogate the other, as would be the result of following the decision in the instant case. The solution would seem to be: (1) permit parol evidence to prove the illegality (usury) with liberality; and (2) place a heavy burden of proof upon the party who seeks by parol evidence to contradict the terms of the writing, in order to protect the other party against false allegations as to such illegality.

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