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Parol Evidence--Admissability of Oral Warranty--Explanation of Words in Writing (Waters, Inc. v. March et al., 269 N.Y. Supp. 420 (1st Dept. 1934))

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PAROL EVIDENCE—ADMISSIBILITY OF ORAL WARRANTY—EXPLANATION OF WORDS IN WRITING.—Plaintiffs, dealers in New York, contracted in writing to buy a quantity of "No. 1 and No. 2 hareskins of winter hair or type A," from the defendants-manufacturers in China. Negotiations were conducted by the defendants' New York agents, who orally warranted the fur yield of these hareskins. In an action for breach of warranty, the plaintiff sought to introduce parol evidence to explain the meaning of "No. 1 and No. 2 hareskins * * * etc." and also parol evidence to establish the warranty. *Held,* admissible as to the former, but inadmissible as to the latter. (*Waters, Inc.* v. *March et al.,* — App. Div. —, 269 N. Y. Supp. 420 (1st Dept. 1934).

It is the established rule that if the language of the writing is such that the court does not understand it, extrinsic evidence may be received to ascertain the real meaning.[1] It should be noted that this evidence does not contradict the terms of the document but merely tends to explain or construe them.[2] This principle applies if the writing is in a foreign language,[3] if technical words are used,[4] if the words have gained a local or trade usage,[5] if the words have gained a limited meaning in some branch of business,[6] or if the words are ambiguous or unintelligible.[7] This rule also applies where the words

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[1] Dana v. Fiedler, 12 N. Y. 40 (1854); Storey v. Salomon, 71 N. Y. 420 (1876); Franklin Sugar Refining Co. v. Tipowiez, 247 N. Y. 465, 160 N. E. 916 (1928); Hulbert v. Carver, 37 Barb. 62 (N. Y. 1862); McKee v. DeWitt, 12 App. Div. 617, 43 N. Y. Supp. 132 (3rd Dept. 1897); Ottman Co. v. Martin, 16 Misc. 490, 38 N. Y. Supp. 966 (1896); Bolton Worsted Mills Co. v. United British Ins. Co., 118 Misc. 530, 193 N. Y. Supp. 688 (1922).

[2] JONES, EVIDENCE (3rd ed. 1924) §455.

[3] *Id.* §456.

[4] Dana v. Fiedler, *supra* note 1; Colwell v. Lawrence & Foulks, 38 N. Y. 71 (1868); Nelson v. Sun Mutual Ins. Co., 71 N. Y. 453 (1877); Mandel v. Nat'l Ass'n Bldg. Corp., 234 N. Y. 564, 138 N. E. 448 (1922); Gumbinsky Bros. Co. v. Smalley, 235 N. Y. 619, 139 N. E. 758 (1923); American Aniline Prod., Inc. v. Mitsui Co., 190 App. Div. 485, 179 N. Y. Supp. 895 (1st Dept. 1920); McCarthy v. Krebs Pigment & Chemical Co., 204 App. Div. 501, 198 N. Y. Supp. 545 (1st Dept. 1923).

[5] Walls v. Bailey, 49 N. Y. 464 (1872); Atkinson v. Tuesdell, 127 N. Y. 230, 27 N. E. 844 (1891); Newhall v. Appleton *et al.,* 174 N. Y. 140, 66 N. E. 665 (1903); Kitching v. Brown, 180 N. Y. 414, 73 N. E. 241 (1905); Gumbinsky Bros. Co. v. Smalley, *supra* note 4; Wells v. Fisher, 237 N. Y. 79, 142 N. E. 358 (1923); Brimbarg v. G. B. Hersig Co., 200 App. Div. 106, 192 N. Y. Supp. 830 (1st Dept. 1922); Moore Stave Co. v. Mossom Co., 126 N. Y. Supp. 79 (1910); Simmons Co. v. Goldfarb, 150 N. Y. Supp. 547 (1914).

[6] Collender v. Dinsmore, 55 N. Y. 200 (1873); Newhall v. Appleton, *supra* note 5; South Co. v. Mosclahlades, 193 App. Div. 126, 183 N. Y. Supp. 500 (1st Dept. 1920); Vietor v. Nat'l City Bank, 200 App. Div. 557, 193 N. Y. Supp. 868 (1st Dept. 1922); Neff v. Klopfer, 16 Misc. 49, 37 N. Y. Supp. 654 (1896); Dominion Trading Co. v. Nathan Krouman & Co., 170 N. Y. Supp. 219 (1918).

[7] Emmett v. Pennoyer, 151 N. Y. 564, 45 N. E. 1041 (1896); Sholl v. Price Line, 109 App. Div. 591, 96 N. Y. Supp. 368 (1st Dept. 1905); S. Strolk & Co. v. Lichtenthal, Inc., 224 App. Div. 19. 229 N. Y. Supp. 371 (1st Dept. 1928); Rodger v. Tioletles Co., 37 Misc. 779, 76 N. Y. Supp. 940 (1902).

are of a doubtful meaning or are obscure.[8] But such principle will not apply unless some difficulty arises as to the construction of the writing from its context, or from the circumstances attending the making of it.[9] Hence, if the writing is plain and unambiguous, the courts will construe it according to its terms rather than receive collateral evidence to show the secret intention of the parties, or that any other than the natural and primary meaning of the language used was intended.[10] This latter rule is not inconsistent with the one first laid down.[11]

When a writing embodies the terms of a sale, and it is apparently complete in all respects, parol evidence to show a warranty or any other additional term not included in the instrument, is inadmissible.[12] It is more natural to suppose that the document would cover such warranty as accompanied the sale, because the warranty is certainly a part of the agreement and not a separate obligation.[13] But, obviously, where only some of the terms of the sale are included in the writing, and thus the instrument is incomplete since there must have been other terms, extrinsic evidence is admissible to com-

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[8] *Supra* note 3.

[9] Dent v. North American S. S. Co., 49 N. Y. 390 (1872); Garvin Machine Co. v. Hammond Typewriter Co., 159 N. Y. 539, 53 N. E. 1125 (1899); Middleworth v. Ordway, 191 N. Y. 404, 84 N. E. 291 (1908); U. S. Printing & Lith. Co. v. Powers, 233 N. Y. 143, 135 N. E. 225 (1922); Levy v. Forster, 224 App. Div. 463, 231 N. Y. Supp. 238 (1st Dept. 1928).

[10] Dent v. North American S. S. Co., *supra* note 9; Tobias v. Lissberger, 105 N. Y. 404, 12 N. E. 13 (1884); Dadly v. O'Rourke, 172 N. Y. 447, 65 N. E. 273 (1902); Williams v. Gridley, 187 N. Y. 526, 79 N. E. 1119 (1907); Mardock v. Gould, 193 N. Y. 369, 86 N. E. 12 (1908); Lossing v. Cushman, 195 N. Y. 386, 88 N. E. 649 (1909); Heiberger v. Johnson, 34 App. Div. 66, 53 N. Y. Supp. 1057 (2d Dept. 1898); Sargent v. Vought, 194 App. Div. 807, 185 N. Y. Supp. 578 (2d Dept. 1920); McCarthy v. Krebs Pigment & Chemical Co., *supra* note 4; Ehle v. Chitenango Bank, 24 N. Y. Supp. 548 (1862).

[11] Nelson v. Sun Mut. Ins. Co., *supra* note 4; Newhall v. Appleton, 114 N. Y. 140, 21 N. E. 105 (1889); Gray v. Sheppard, 147 N. Y. 177, 41 N. E. 500 (1895); Homes Ins. Co. v. Continental Ins. Co., 180 N. Y. 389, 73 N. E. 65 (1905); Finucane Co. v. Bd. of Education, 190 N. Y. 76, 82 N. E. 737 (1907); Gold v. Ross, 234 N. Y. 621, 138 N. E. 471 (1922); Sargent v. Vought, *supra* note 10.

[12] Pollen v. LeRoy, 30 N. Y. 549 (1863); Thomas v. Nelson, 69 N. Y. 118 (1877); Routledge v. Worthington Co., 119 N. Y. 592, 23 N. E. 1111 (1890); Fuller & Co. v. Schrenk, 171 N. Y. 671, 64 N. E. 1126 (1901); Brantingham v. Huff, 174 N. Y. 53, 66 N. E. 620 (1903); Loomis v. N. Y. C. & H. R. R. R. Co., 203 N. Y. 359, 96 N. E. 748 (1911); Standard Milling Co. v. De Pass, 214 N. Y. 638, 108 N. E. 1108 (1915); Seeley v. Osborne, 220 N. Y. 416, 116 N. E. 97 (1917); Interstate Chemical Corp. v. Duke, 226 N. Y. 610, 123 N. E. 871 (1919); Edison El. Ill. Co. v. Thacher, 229 N. Y. 172, 128 N. E. 124 (1920); Independent Trading Co. v. Fonger & Co., 233 N. Y. 592, 135 N. E. 931 (1922); Doobins v. Pratt Check Co., 242 N. Y. 106, 151 N. E. 146 (1924); Vaughn Mach. Co. v. Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 138 (4th Dept. 1901); Colt v. Demarest & Co., 159 App. Div. 394, 144 N. Y. Supp. 557 (1st Dept. 1913); Eastman v. Brittan, 175 App. Div. 476, 162 N. Y. Supp. 587 (1st Dept. 1916); Blumenthal & Co. v. Zimmerman, 189 N. Y. Supp. 209 (1921).

[13] 5 WIGMORE, EVIDENCE (2d ed. 1923) §2434.

plete the writing.[14] It is within this rule that oral warranties will be accepted.[15] However, wherever possible the courts treat the writing as the sole expression of the transaction as to warranties.[16] Yet, in certain circumstances, it has been permitted by parol to show such warranties,[17] but these cases must be held to their peculiar facts.

S. B. S.

PLEADING AND PRACTICE—SUPPRESSION OF DEPOSITION—RULES OF PRACTICE MAY NOT BE INCONSISTENT WITH ANY STATUTE. —Pursuant to §288 of the Civil Practice Act, appellant had taken by deposition, testimony of one Loomis, since it appeared, because of his illness, that he would be unable to attend the trial of the action. Loomis died before the minutes were transcribed. On respondent's motion, the deposition was suppressed solely because it had not been read over and subscribed in accordance with rule 129 of the Rules of Civil Practice. On appeal, *held,* reversed. Said rule is invalid as

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[14] Grierson v. Mason, 60 N. Y. 394 (1875); Jameston Bus. College Ass'n v. Allen, 172 N. Y. 291, 64 N. E. 952 (1902); Cooper v. Payne, 186 N. Y. 334, 78 N. E. 1076 (1906); Niles v. Sire, 186 N. Y. 573, 79 N. E. 112 (1906); Studwell v. Bush Co., 206 N. Y. 416, 100 N. E. 129 (1909); DiMenna v. Cooper & Evand Co., 220 N. Y. 391, 115 N. E. 993 (1917); Perry v. Bates, 115 App. Div. 337, 100 N. Y. Supp. 881 (1st Dept. 1906).

[15] *Supra* note 13.

[16] De Witt v. Berry, 134 U. S. 312, 10 Sup. Ct. 536 (1890); Seitz v. Refrigerator Co., 141 U. S. 510, 12 Sup. Ct. 46 (1891); Van Winkle v. Crowell, 146 U. S. 42, 13 Sup. Ct. 18 (1892); Gardener v. McDonough, 147 Cal. 313, 81 Pac. 964 (1905); Hills v. Farmington, 70 Conn. 450, 39 Atl. 795 (1898); Maxwell v. Willingham, 101 Ga. 55, 28 S. E. 672 (1897); Barrie v. Smith, 105 Ga. 34, 31 S. E. 121 (1898); Bullard v. Brewer, 118 Ga. 918, 45 S. E. 711 (1903); Telluride P. T. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319 (1904); Grubb v. Milan, 249 Ill. 456, 94 N. E. 927 (1911); Conant v. Bank, 121 Ind. 324, 22 N. E. 250 (1889); Michigan Pipe Co. v. Sullivan Water Co., — Ind. —, 127 N. E. 768 (1920); Younie v. Walrod, 104 Ia. 475, 73 N. W. 1021 (1898); Ehrsam v. Brown, 64 Kan. 466, 67 Pac. 867 (1902); Neale v. American E. V. Co., 186 Mass. 303, 71 N. E. 566 (1904); Scholl v. Killorian, 190 Mass. 493, 77 N. E. 382 (1906); Leavitt v. Fiberloid Co., 196 Mass. 440, 82 N. E. 682 (1907); Glackin v. Bennett, 226 Mass. 316, 115 N. E. 490 (1917); Bennett v. Thomson, 235 Mass. 463, 126 N. E. 795 (1920); McCray R. & C. S. Co. v. Woods, 99 Mich. 269, 58 N. W. 320 (1894); Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281, 62 N. W. 339 (1895); Thompson v. Libby, 34 Minn. 374, 26 N. W. 1 (1885); Miller v. Electric Co., 133 Mo. 205, 34 S. W. 585 (1896); Gerhardt v. Tucker, 167 Mo. 46, 85 S. W. 552 (1905); Quinn v. Moss, 45 Neb. 614, 63 N. W. 931 (1895); Naumberg v. Young, 44 N. J. L. 331 (1882); Wilcox v. Cate, 65 Vt. 478, 26 Atl. 1105 (1893); Milwaukee B. Co. v. Duncan, 87 Wis. 120, 58 N. W. 232 (1894); Case Plow Works v. N. & S. Co., 90 Wis. 590, 63 N. W. 1013 (1895); Caldwell v. Perkins, 93 Wis. 89, 67 N. W. 29 (1896).

[17] Chapin v. Dobson, 78 N. Y. 74 (1879); Eighmie v. Taylor, 98 N. Y. 288 (1885); Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961 (1891).