

## The Generative Force of Custom and Usage in Law

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if not with actual knowledge, at least with presumptive notice of the dangerous condition and the risk involved?

The problem is a social one. The increasing number of individuals affected demands a remedy. Undoubtedly the vendee's liability will be extended until assumption of title will "ipso facto" charge him with presumptive notice of the condition of the premises. While it has been suggested that the liability of the vendor should continue until discovery and repair by the vendee<sup>16</sup> it is submitted that the former rule would be more easily applied, since the uncertain element of "reasonable time to repair" would not be included. The line would be sharply drawn if determined by the "time of transfer," and responsibility would be definitely fixed.

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#### THE GENERATIVE FORCE OF CUSTOM AND USAGE IN LAW.

There is an ancient rule of evidence of wide application that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.<sup>1</sup> It is but a corollary of the rule, that where there is no imperfection or ambiguity in the language of a contract, it will be deemed to express the entire and exact meaning of the parties.<sup>2</sup> *Ergo*, on the same principle, all conversations and parol agreements prior to or contemporaneous with the written agreement are so merged therein, that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.<sup>3</sup>

The rigidity of the rule above adverted to has been relaxed to allow for numerous exceptions,<sup>4</sup> the analysis and treatment of which

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<sup>16</sup> Kilmer v. White, *supra* note 2.

<sup>1</sup> A written contract cannot be altered to show that an indorsement on a note in blank was agreed to be without recourse, *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647 (1881); that the acceptor of a draft should not be called on to pay, *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146 (1874); that the date of payment be changed, *Wells v. Baldwin*, 18 Johns. 45 (N. Y. 1820); *Wright v. Taylor*, 9 Wend. 538 (N. Y., 1832); that goods might be delivered in parcels where the agreement was to deliver a gross amount, *Baker v. Higgins*, 21 N. Y. 397 (1860); that a certificate of deposit should bear interest, *Reed v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250 (1891).

<sup>2</sup> *Miles v. Schreve*, 179 Mich. 671, 146 N. W. 374 (1914); *Reed v. Van Ostrand*, 1 Wend. 424 (N. Y. 1828); *Washington Trust Co. v. Keyes*, 79 Wash. 61, 139 Pac. 638 (1914).

<sup>3</sup> *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536 (1890); *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773 (1892); *Ennis v. Wright*, 217 Mass. 40, 104 N. E. 430 (1914); *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961 (1891); *Traders National Bank v. Laskin*, 207 App. Div. 18, 201 N. Y. Supp. 728 (4th Dept. 1923); see editorial, *N. Y. L. J.*, May 4, 1928.

<sup>4</sup> *Richardson*, *Evidence* (1928), Sec. 425.

are outside the scope of this paper. Our discussion will be limited to the relation of custom and usage to the rule.

The creative energy of custom has been a vital force in the fashioning of legal norms.<sup>5</sup> Blackstone and his retinue apotheosized custom.<sup>6</sup> Its was the omnipotent power to which all law was answerable; its the generative force which yielded legal principles. Today, the judicial process while cognizant of its presence has tempered its efficacy.<sup>7</sup> In the words of Judge Cardozo, "In these days \* \* \* we look to custom, not so much for creation of new rules but for the tests and standards that are to determine how established rules shall be applied."<sup>8</sup>

Frequently a situation arises wherein the parties have not stated the contract in all its details, but have left to implication those incidents which a uniform usage would annex. In these instances, the law is clear that parol evidence of local or general usages of trade and commerce should be admitted to clarify the true meaning of written contracts.<sup>9</sup> This rule has been applied to principal and agent relationships,<sup>10</sup> where it was held competent to show that by a custom of trade a broker, who purchased without disclosing the name of his principal, was liable as principal. Again, the rule has found expression in shipping contracts.<sup>11</sup> In such an instance the Court admitted the evidence to prove that the words "quantity guaranteed," used in a bill of lading meant that the carrier should pay for any shortage.<sup>12</sup> But here too caution must be exercised. Evidence of usage will be excluded if the law has attached a fixed and certain meaning to the words used.<sup>13</sup>

The rule under discussion has been frequently applied in contracts for furnishing materials, or erecting buildings, and in other similar contracts;<sup>14</sup> and to contract dealings between landlord and tenant.<sup>15</sup> The latter decisions rest on the doctrine that, as to those

<sup>5</sup> Cardozo, *The Nature of the Judicial Process* (1921), p. 59 et seq.

<sup>6</sup> Blackstone, *Comm.* (1889), pp. 67, 68.

<sup>7</sup> *Supra* note 5.

<sup>8</sup> *Ibid.* at p. 60.

<sup>9</sup> *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. 1 (1890); *Moore v. United States*, 196 U. S. 157, 25 Sup. Ct. 202 (1905); *Petrie v. Phenix Ins. Co.*, 132 N. Y. 137, 30 N. E. 380 (1892); *Bolles v. Scheer*, 225 N. Y. 118, 121 N. E. 771 (1919).

<sup>10</sup> Usage not admissible to prove that a broker has the right to disregard the positive written instructions of the principal, *Hutchings v. Ladd*, 16 Mich. 493 (1868); *Leland v. Douglas*, 1 Wend. 490 (N. Y. 1828); *Cattin v. Smith*, 24 Vt. 895 (1851).

<sup>11</sup> *Louisville v. Wilson*, 119 Ind. 352, 21 N. E. 341 (1869).

<sup>12</sup> *Bissell v. Campbell*, 54 N. Y. 353 (1873).

<sup>13</sup> Parol evidence should not be admitted to explain the meaning of "Guarantee." *Phelps v. Gamevell Fire Alarm Tel. Co.*, 72 Hun 26, 25 N. Y. Supp. 654 (1893); or the word "Incompatible" used in a written contract of employment, *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. 500 (1895).

<sup>14</sup> *Eastern Granite Co. v. Heim*, 89 Iowa 698, 57 N. W. 437 (1894); *Florence Machine Co. v. Daggett*, 135 Mass. 532 (1883).

<sup>15</sup> *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96 (1906).

matters concerning which the lease is silent, proof of general usage is competent, for the persons are deemed to contract with reference thereto.

Obviously, wide latitude has been given for the explanation of written contracts by parol proof of usage. Yet the admission of proof of usage has been circumscribed. Certain essentials must be shown to exist before any proof of usage can be given to affect any contract. Thus the usage, to have the force of law, must be reasonable.<sup>16</sup> Courts have frequently claimed the right to reject those usages which they have deemed prejudicial to public interests.<sup>17</sup>

Similarly, the usage must not only be well established,<sup>18</sup> but also must be well known in the community.<sup>19</sup> In the latter instance, however, a distinction is made between notorious and uniform usages of trade, and the customs of an individual in his private business. As to the former, people are deemed to contract according to that usage, while in a private enterprise, actual knowledge of the custom is necessary.<sup>20</sup> But here the distinctions are tenuous. In *Walls v. Bailey*,<sup>21</sup> the proof showed that there was a uniform usage among the plasterers of Buffalo as to the mode of measuring work. The party against whom the evidence of the usage was given was a builder who had resided in the City for ten years. Nevertheless, the Court held that the defendant might testify that he had no knowledge of the usage.

Further, it is requisite that the usage be lawful<sup>22</sup> and moral.<sup>23</sup> As Lawson states it, "If it (the usage), conflicts with an established rule of public policy, which it is not to the general interest to disturb, if its effect is injurious to the parties themselves, in their relation to each other, if, in short, it is an unjust, oppressive or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz.: reasonableness."<sup>24</sup>

Still, even though all of the above essentials appear it is fundamental that proof of usage will never be admitted when it tends to

<sup>16</sup> *Newhall v. Appleton*, 114 N. Y. 140, 21 N. E. 105 (1889); See *Atkinson v. Truesdell*, 127 N. Y. 230, 27 N. E. 844 (1891).

<sup>17</sup> *Hoppen v. Sage*, 112 N. Y. 530, 20 N. E. 350 (1889); *Groat v. Gile*, 51 N. Y. 431 (1873).

<sup>18</sup> *Smith v. Wright*, 1 Caines 45 (N. Y. 1804).

<sup>19</sup> *Robertson v. National S. S. Co.*, 139 N. Y. 416, 34 N. E. 1053 (1893).

<sup>20</sup> *Trotter v. Grant*, 2 Wend. 413 (N. Y., 1829); this is true of a particular merchant to charge his customers interest, *Wood v. Hickock*, 2 Wend. 501 (N. Y. 1829).

<sup>21</sup> 49 N. Y. 472 (1872).

<sup>22</sup> Lawson, *Usages* (1881), p. 465 et seq.

<sup>23</sup> See *Seagar v. Sliengerland*, 2 Caines 219 (N. Y. 1804), wherein the Court excluded testimony of a custom which condoned illicit relations of lovers.

<sup>24</sup> *Supra* note 22 at 465.

vary or contradict the express terms of a written instrument.<sup>25</sup> *Green v. Wachs*,<sup>26</sup> a recent New York decision, is illustrative of this prohibition.

Green, a jeweler, delivered a diamond to Vollman, a dealer customer, under the following written memorandum:

"New York, Sept. 3, 1925

To Felix B. Vollman,  
City.

These goods are sent for your inspection and remain the property of Henry Green and are to be returned on demand. Sale takes effect only from date of approval of your selection and a bill of sale rendered.

1 Em. cut Dia. in ring 13.40                      \$12,500.—Stone  
Net.

(Signed) Felix B. Vollman"

Vollman delivered the stone to another dealer, and he to a third dealer, who sold the stone to Wachs, without accounting for the purchase price. An action was brought to recover the stone or its value. The defendant, in an attempt to defeat recovery, sought to introduce testimony of a custom in the jewelry trade to show that the transaction as between the plaintiff and Vollman gave to the latter authority to sell the stone. The Court refused to receive the testimony, predicating the exclusion on the principle that evidence of a custom can never be introduced to vary the plain and unambiguous meaning of a writing.<sup>27</sup>

If we premise that the memorandum is clear on its face, the ruling of the Court must stand unquestioned.<sup>28</sup> Difficulty, however, arises when we seek to reconcile the instant case with a former decision of the Court in *Smith v. Clews*.<sup>29</sup> There, the facts were analogous. Diamonds were the subject of the sale on memorandum,<sup>30</sup> which stated that they were given to the broker or middleman "on approval" to show his customers. They were to be returned on demand. At the second trial effort was made to show that the words "on approval" had a well recognized meaning in the trade

<sup>25</sup> *Bigelow v. Legg*, 102 N. Y. 652, 6 N. E. 107 (1886); *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350 (1889); *Hayward v. Wemple*, 152 App. Div. 195, 136 N. Y. Supp. 625 (2nd Dept. 1912), *aff'd* 206 N. Y. 692, 99 N. E. 1108 (1912); *Hart v. Cort*, 165 App. Div. 583, 151 N. Y. Supp. 1 (1st Dept. 1914).

<sup>26</sup> 254 N. Y. 437, 173 N. E. 575 (1930).

<sup>27</sup> *Supra* note 25.

<sup>28</sup> *Ibid.*

<sup>29</sup> 105 N. Y. 283, 11 N. E. 632 (1887); 114 *id.* 190, 21 N. E. 160 (1889).

<sup>30</sup> The memorandum read:

"New York, April 12, 1879.

Received from Alfred H. Smith & Co., by their representative, B. W. Plumb, a pair of single stone diamond ear-knobs 10 ½ carats, of the value of fourteen hundred dollars, 'on approval' to show to my customers. Said knobs to be returned to said A. H. Smith & Co. on demand.

(Signed) E. MEERS."

and were understood to confer no power of sale, but merely authority to show diamonds to a customer and report to the owner. There the Court thought that the words "on approval" necessitated explanation. Without the words, the duty to return would have been absolute. With them, the memorandum was ambiguous and oral testimony was necessary to clarify the import of the instrument.<sup>31</sup>

While the line of demarcation between the cases is obscure, the law evolved remains constant. The interpretation of the instrument is of paramount importance. If it be clear and intelligible on its face, the evidence of the custom and usage will be excluded. But if the instrument is ambiguous, the ruling of *Smith v. Clews*<sup>32</sup> will apply, and the evidence will be admitted.

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RECENT LIMITATION OF DOCTRINE OF LIABILITY FOR NEGLIGENCE  
TO THIRD PARTIES.

"General principles do not decide concrete cases."<sup>1</sup> In this modern day of complex commercial relations it is equally evident that not a small part of the judicial process deciding a specific case is devoted to avoiding the effect of general principles in order to leave the way open to decide the particular case in accordance with the economic and commercial requirements of the particular situation.

The case of *Ultramares Corporation v. Touche*,<sup>2</sup> recently decided by the Court of Appeals, is significant as a limitation upon the growing tendency to impose liability for negligence in favor of parties not in a contractual relationship or other relation of privity with the negligent party—a limitation prompted by expediency.

The public accounting firm of Touche, Niven and Company was employed by the Stern Company to audit its books and prepare a certified balance sheet for the year ending December 31, 1923, as it had at the end of each of the preceding three years. The certified balance sheet ascribed to the Stern Company a net worth of over \$1,000,000., whereas, in fact, the company was insolvent. On the strength of one of the 32 counterpart originals issued by the defendant, audit company, the plaintiff to whom it was exhibited made a series of loans to Stern Company. In the month preceding the total collapse of the business in 1924, the plaintiff had advanced

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<sup>31</sup> See *Smith v. Clews*, second appeal, 114 N. Y. 190, 21 N. E. 160 (1889).

<sup>32</sup> *Supra* note 29.

<sup>1</sup> *Lochner v. N. Y.*, 198 U. S. 45 at 76, 25 Sup. Ct. 539 at 554 (1905), per Holmes, J.

<sup>2</sup> 255 N. Y. 170, 184 N. E. 441 (1931).