LECTURE II.

A DEED may be defined as a formal writing of a non-testamentary character which purports or operates to create, declare, confirm, assign, limit or extinguish some right, title or interest.

There is no need to make use of any particular form in the delivery of a deed. In practice it often happens that a man delivers the deed in the presence of his own solicitor only, and possibly retains it in his own possession. The question whether this is intended to operate as an absolute delivery, or as a delivery to take effect on the performance of a condition is entirely a matter of fact to be ascertained from all the surrounding circumstances. It is well settled, however, that the mere retention of a deed after its execution by the maker of the deed does not of itself impair the validity of the deed or prevent its operating at once (1). A policy "signed, sealed and delivered" is complete and binding as against the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it; nor is it necessary that the assured should formally accept or take away a policy in order to make the delivery complete (2). The registration of a deed of sale constitutes sufficient delivery

(1) *Doe d Garnons* v. *Knight* (1826), 5 B. & C., 671.

(2) *Xenos* v. *Wickham* (1866), L. R., 2 H. L., 296. See *In re Marine Insurance Certificate* (1894), 19 Bom., 130.

of the deed in order to pass an interest in the property comprised in the deed (1).

When parties have deliberately put their mutual engagements into writing, in language which imports a legal obligation, or, in other words, a complete contract it is only reasonable to presume that they have introduced into the written instrument every material term and circumstance. Consequently, all parol testimony of conversations held between the parties, or of declarations made by either of them, whether before, or after, or at the time of the contract, will be rejected; because such evidence, while deserving far less credit than the writing itself, would inevitably tend, in many instances, to substitute a new and different contract for the one really agreed upon, and would thus, without any corresponding benefit, work infinite mischief and wrong (2).

Rule 1. Oral evidence cannot be received to contradict, vary, add to or subtract from the terms of a deed as between parties to the deed or their representatives in interest.(3)

It must be remembered that this rule is not, properly speaking, a rule of interpretation; it is a rule of law limiting the subject-matter to be interpreted to that contained in the deed itself (4); and may be traced back to a remote antiquity. It is founded on the inconvenience that might result, if matters in writing, made by advice, and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke calls "the uncertain testimony of slippery memory" (5). If parties have made an executory contract which

(1) *Ponnayya* v. *Mutlu* (1893), 17 Mad., 146.
(2) Taylor, 10th Ed., § 1132.
(3) Ev. Act, s. 92.
(4) Elphinstone, pp. 1, 2; Norton, 124.
(5) Taylor, § 1132.

is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging, or diminishing, or modifying the contract which is to be found in the deed itself (1). Thus, evidence to show that a deed of sale was intended only to operate as a security for the payment of a certain sum of money to the vendee was held to be inadmissible under this rule (2). Where the contract was for the delivery of 750 maunds of copper conditional on arrival within four months; in a suit for damages for non-delivery, evidence to show that delivery was to be conditional upon one-fourth of the successive arrivals in certain godowns, amounting in the aggregate to 750 maunds was held inadmissible (3). Nor was the defendant in a suit upon a promissory note payable on demand allowed to give evidence to the effect that there was an oral agreement between the parties that the plaintiff should not bring any suit to enforce payment of the promissory note until the defendant's share in the compensation-money awarded in a certain land-acquisition case should have been received by him(4).

But it must be remembered that this rule can only be applied (*a*) when the document contains the whole of the agreement between the parties, (*b*) to parties to the

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(1) *Per* James, L. J., *Ligott* v. *Barrett* (1880), 15 Ch. D., 309; and *per* Brett, L. J., *ib.*, 311.

(2) *Banapa* v. *Sunder Das* (1876), 1 Bom., 333. See *Cohen* v. *Bank of Bengal* (1880), 2 All., 598.

(3) *Jadu Rai* v. *Bhobataran Nundy* (1889), 17 Cal., 173.

(4) *Ramjeebun Serowgy* v. *Oghore Nath Chatterjee* (1897), 25 Cal., 401; 2 C. W. N., 188. See *Ebrahim* v. *Cursetji* (1887), 11 Bom., 644; *Cowasji* v. *Burjorji* (1888), 12 Bom., 335. See *Kasim Mundle* v. *Sreemutty Noor Beebee* (1864), 1 W. R., 76.

deed and their representatives in interest, and (*c*) to cases in which some civil right or civil liability is dependent upon the terms of the document in question. Thus, extrinsic evidence may be given to show that the document does not contain the real agreement arrived at between the parties(1), or that it does not contain the whole of the agreement arrived at between them(2).

Secondly, any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove (3). So where the question was whether A, a pauper, was settled in a particular parish and a conveyance to which A was a party was produced purporting to convey land to A, for a valuable consideration, the parish appealing against the order was allowed to call A as a witness to prove that no consideration passed(4). Moreover, the words "between the parties to the deed" mean the persons who on the one side and the other come together to make the contract and do not apply to questions raised between parties on the one side only of a deed. Thus, in a suit for ejectment, where the property in suit had been conveyed to the plaintiff and the defendant jointly, the plaintiff was allowed to adduce oral evidence that he alone was the real purchaser, although in the deed of sale the defendant was described as one of the two purchasers(5).

Thirdly, any party to a deed, or any representative in interest of any such party, may prove any fact contradicting, varying, adding to or subtracting from the

(1) *Guddalu* v. *Kunnatter* (1872), 7 M. H. C. R., 189; *Pym* v. *Campbell* (1856), 6 E. & B., 370; *Harris* v. *Rickett* (1859), 28 L. J. Ex., 197.

(2) *Allen* v. *Pink* (1838), 4 M. & W., 140; *Behari Lall Dey* v. *Kamini Sundari* (1870), 14 W. R., 319; *Bholanath* v. *Kalipersad* (1871), 8 B. L. R., 89, 92; *Cutts* v. *Brown* (1880), 6 Cal., 328.

(3) Stephen, Art. 92.

(4) *R.* v. *Cheadle* (1832), 3 B. & A., 833.

(5) *Mulchand* v. *Madho Ram* (1888), 10 All., 421.

terms of the deed for any purpose other than that of varying or altering any civil right or liability depending upon the terms of the document(1). So where the question was, whether A obtained money from B under false pretences, and it was shown that the money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence, B was allowed to give evidence of the false pretence, although he executed the deed mis-stating the consideration for the premium(2).

Fourthly, when a deed bears no date or an impossible or incorrect date, evidence is admissible to prove the date of delivery. A deed takes effect from the time of its delivery, not of its date. The date indeed is to be taken *primâ facie* as the time date of execution, but as soon as the contrary appears, the apparent date is to be utterly disregarded(3). Where a deed bears no date, or an impossible date, and in the deed reference is made to the "*date*," that word must be construed "*delivery*;" but if the deed bears a sensible date, the word "*date*" occurring in the deed means the day of the date and not that of the delivery(4).

Rule 2. Extrinsic evidence may be given, which would invalidate any document, or which would entitle any person to a decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law(5).

In the cases contemplated by this rule the admission of extrinsic evidence does not violate Rule 1

(1) Stephen, Art. 92.
(2) *R.* v. *Adamson* (1843), 2 Moody, 286.
(3) *Per* Patteson, J., *Browne* v. *Burton* (1847), 5 Dow & Lownd, 292; 17 L. J. N. S. Q. B., 50.
(4) *Styles* v. *Wardle* (1825), 4 B & C., 908; Elphinstone, 123, Norton 175.
(5) Ev. Act, s. 92, proviso 1.

inasmuch as it is adduced, not for the purpose of contradicting or varying the deed, but of proving that the deed ought not to be interpreted at all(1).

Agreements by way of wager are void(2), and extrinsic evidence may be given to show that an agreement in a deed is such an agreement(3). Instances where a party to a deed would be entitled to a decree or order relating thereto are given in illustrations (*d*) and (*e*) of s. 92 of the Evidence Act. Fraud, of course, vitiates all deeds, and when the execution of a deed has been obtained from a person by fraud, he will always be allowed to adduce extrinsic evidence to show that this was so(4). As to whether such fraud must be contemporaneous with the transaction or whether fraud subsequent to the execution of a deed can be pleaded for the purpose of invalidating it there is a conflict of opinion. Westropp, C. J., held that if the first proviso to s. 92 of the Evidence Act contemplated subsequent fraud, it would render the section nugatory(5), and Garth, C. J., also decided that the fraud contemplated by this proviso was fraud in the inception of the deed(6), basing his decision on certain paragraphs in Taylor's Book on Evidence(7). Melvill, J., on the other hand, held that it was not clear that these words were not large enough to let in evidence of such subsequent conduct as in the view of a Court of Equity would amount to fraud(8).

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(1) Elphinstone, 5, Norton 138.

(2) Cont. Act, s. 30.

(3) *Anupchand* v. *Champsi* (1888), 12 Bom., 585; *Eshoor* v. *Venkatasubba* (1894), 17 Mad., 480.

(4) *Monohur Das* v. *Bhagabati Dasi* (1867), 1 B. L. R., O. C., 28; *Kashinath Chuckerbutty* v. *Brindabun Chuckerbutty* (1884), 10 Calc., 649; *Baboo Lall* v. *Joy Lall* (1897), 24 Calc., 533.

(5) *Banapa* v. *Sunder Dass* (1876), 1 Bom., 333. See *Preonath Shaha* v. *Madhu Sudan* (1898), 25 Calc., 606.

(6) *Cutts* v. *Brown* (1880), 6 Calc., 338.

(7) *See* Taylor, §§ 1132-6, Kerr on Fraud, 423.

(8) *Baksu* v. *Govinda* (1880), 4 Bom., 608. *See Rakken* v. *Alagappudyan* (1892), 16 Mad., 83.

Parol evidence may also (under a proper pleading) be given to show that the contract not disclosing these was really made for objects forbidden, either by Statute, or by common law; that such writing was obtained by improper means, such as duress; that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiotcy, insanity, or intoxication; or that the instrument came into the hands of the plaintiff without any absolute and final delivery by the obligor or party charged(1).

A deed made without consideration is void unless it is made on account of natural love and affection in writing and registered or is a promise to pay a debt barred by the Law of Limitation(2). Consequently parol evidence may be given to show want or failure of consideration or that the actual consideration that passed was other than that stated in the deed(3).

Parol evidence will sometimes be admitted on equitable grounds, to contradict or vary a writing, which, by some *mistake in fact*, speaks a different language from what the parties intended, and it would consequently be unjust to enforce it according to its expressed terms(4). In all such cases, however, the party seeking relief undertakes a task of great difficulty, since the Court must be clearly convinced by the most satisfactory evidence, first, that the mistake complained of really

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(1) Taylor, § 1137.

(2) Cont. Act, s. 25.

(3) *Hukum Chand* v. *Hira Lall* (1876), 3 Bom., 159; *Vasudeva* v. *Narasamima* (1882), 5 Mad., 6; *Pogose* v. *Bank of Bengal* (1877), 3 Calc., 174; *Lalla Himmut* v. *Llewhellen* (1885), 11 Calc., 486; *Kumara* v. *Srinivasa* (1887), 11 Mad., 213; *Indayet* v. *Lal Chand* (1895), 18 All., 168; *Sah Lal Chand* v. *Indrajit* (1900), 22 All., 370; 4 C. W. N., 485; 27 I. A., 93; *Kailash Chunder Neogi* v. *Harrish Chunder Biswas* (1900), 5 C. W. N., 158.

(4) *Taylor*, § 1139; *Baboo Dhunput Sing* v. *Shaikh Jowahur Ali* (1867), 8 W. R., 152; *Mahendra Nath Mukerjee* v. *Jogendra Nath* (1897), 2 C. W. N., 260.

exists, and next that it is such a mistake as ought to be corrected(1).

Rule 3. The existence of any separate oral agreement as to any matter on which a deed is silent and which is not inconsistent with the terms of the deed may be proved(2).

No evidence is admissible under this rule if the oral agreement sought to be proved is inconsistent with the terms of the written instrument(3). Where a promissory note is silent as to payment of interest, a subsequent agreement to pay interest may be proved(4).

In considering, however, whether or not evidence ought to be admitted under this rule, the Court has regard to the character and formality of the document (5), evidence being more readily admitted where the document is of an informal character (6).

Rule 4. The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under a deed may be proved (7).

This rule does not clash with Rule 1, for it does not admit evidence to contradict, alter or vary the terms of a deed. Where there exists a condition precedent to the document becoming a valid and operative document, the document cannot be construed until such condition is performed. The subject-matter of the condition precedent is *dehors* the contents of the deed; and until the condition is performed, there is in fact no written agreement at all (8). But this rule does not apply

(1) Taylor, § 1139.

(2) Ev. Act, s. 92, Proviso 2.

(3) *Ebrahim* v. *Curperji* (1887), 11 Bom., 644; *Cowasji* v. *Burjorji* (1888), 12 Bom., 335.

(4) *Umesh Chunder* v. *Mohini Mohun* (1881), 9 C. L. R., 301; *Sowdamonee Debya* v. *A. Spalding* (1882), 12 C.L. R., 163.

(5) Ev. Act, s. 92 Ills. (g) and (h), *Mayen* v. *Malden* (1892), 16 Mad., 254.

(6) *Umesh Chunder* v. *Mohini Mohun* supra.

(7) Ev. Act, s. 92, Prov. 3.

(8) *Bell* v. *Ingestre* (1848), 12 Q. B. 317; *Davis* v. *Jones* (1856), 17 C. B., 625; *Pym* v. *Campbell* (1856), 6 E. & B., 370; *Anna Gurubala* v. *Kristnaswami*

to a case where the written agreement has not only become binding, but has actually been performed as to a large portion of its obligation; and the words "any obligation" mean any obligation whatever under the contract and not some particular obligation the contract may contain (1).

Rule 5. Any usage or custom by which incidents not expressly mentioned in the deed are usually annexed to contracts of the description of the one contained in the deed may be proved: Provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the deed(2).

Provided they are not inconsistent with the contract, it is allowed to *supply terms* of *known usage* in control of the contract, and which is known by the expression of "*annexing incidents.*" This is upon the principle that the contract was itself framed *with reference to the usage;* and so as to incorporate the usage in, and as part of itself. Indeed, it is in part also upon this principle, that even as respects *the actual terms of the contract, it is by the usage they are expounded*(3). These incidents are sometimes the creatures of mere usage. But usage may come at length, by judicial recognition, to be regarded as part of the *law merchant,* and this would be obligatory without special evidence. Consequently, the law merchant annexing to a Marine Insurance the condition of *sea-worthiness* at the commencement of the voyage, it would *ipso facto* become annexed to any ordinary contract of such insurance (4). But

(1863), 1 M. H. C., 457; *Dada Honaji* v. *Babaji* (1865), 2 B. H. C., 38; *Guddalu* v. *Kunnatter* (1872), 7 M. H. C., 189; *Jugtanand* v. *Nerghan* (1880), 6 Calc., 435; *Tiruvengada* v. *Rangasami* (1883), 7 Mad., 19.

(1) *Jugtanand* v. *Nerghan,* supra.

(2) Ev. Act, s. 92, Proviso 5.

(3) Goodeve, Ev., Ed. 1871, p. 375.

(4) *Ib.*, 376; *Humfrey* v. *Dale,* 1856-7 W.R.(Eng.), 467; *Koonj Behari* v. *Shiva Baluk* (1867), Agra R. F. B., 123; *Hari Mohan Bysack* v. *Krishna Mohun Bysak* (1872), 9 B. L. R., App. 1.

custom cannot affect the express terms of a written contract(1), nor can a custom at variance with, or *repugnant to, the express terms of a deed be proved* in evidence (2). In order that a practice on a particular estate may be imported as a term of the contract into a contract in respect of land in that estate, it must be shown that the practice was known to the person whom it is sought to bind by it, and that he assented to its being a term of the contract: and when the person sought to be bound by the practice is an assignee for value of rights under that contract, it must also be shown that he and all prior assignees (if any) for value knew that the practice was a term of the original contract (3).

These five rules may be shortly summarized as follows. Extrinsic evidence is not admissible to alter, add to, contradict or vary the express terms of a deed where the deed contains the whole of the agreement between the parties, but it is admissible to show that the deed is invalid, that it does not contain the real agreement arrived at between the parties, that there is a collateral agreement not inconsistent with the deed, that there is a condition precedent to be performed before the deed can come into operation, and that incidents about which the deed is silent are by a well recognized usage or custom annexed to the terms set forth in the deed.

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(1) *Indur Chunder* v. *Luchmi Bibi* (1871), 7 B.L.R., 682; *Morris* v. *Panchanada* (1870), 5 M. H. C., 135.

(2) *MacFarlane* v. *Carr* (1872), 8 B. L. R., 459; *J. G. Smith* v. *Ludha* (1892), 17 Bom., 143.

(3) *Mana* v. *Rama* (1897), 20 Mad., 275.