if they could have foreseen *Teubner* v. *Humble*, which was only recently decided by the High Court of Australia.[27] There Windeyer J. stated that decisions on the facts of one case do not really aid the determination of another case. His Honour said:

> Reports should not be ransacked and sentences apt to the facts of one case extracted from their context and treated as propositions of universal application that a pedestrian is always entitled or that a motorist is always obliged, to act in some particular way. That would lead to the substitution of a number of rigid and particular criteria for the essentially flexible and general concept of negligence.

This dictum should, perhaps, be kept in mind in future rescue cases which arise as the result of a road accident, and *Chapman* v. *Hearse* should be referred to simply for the propositions of law which it contains.

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27. (1963) 36 A.L.J.R. 362.

CONTRACT

Parol Evidence

The business convenience[1] supporting a general rule prohibiting the introduction of parol evidence to vary the terms of a written contract has been extensively deferred over the years to the no less compelling requirements of justice in the particular case. Most of the rules now accepted as qualifying the parol evidence rule have long been recognised.[2] There are others whose operation, though no less effective, is less frequently acknowledged. The *High Trees* principle, which is not restricted to cases where the representation relied upon as modifying the promisee's rights is contained in a written document, is a notable example.[3]

There are other exceptions to the parol evidence rule which, because they derive from the substantive law of contract, are not usually found in standard texts on the law of evidence. In each of these cases a verbal representation may govern the parties' rights despite the presence of a written document purportedly dealing with those same rights. In the first place, the prior verbal representation may be understood as a promise the consideration for which is the representee accepting the written contract.[4] Here there are independent contracts, the intention being that the verbal contract will control that which is written. Secondly, the verbal representation,

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1. *Pollock*, 13th ed. 199. There does not appear to be unanimity as to the true basis of the rule: *Phipson*, 9th ed. 599.
2. *Phipson*, 601-613; *Cross*, 476-495; see also 472.
3. This follows from the formulation of the doctrine by Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215 at 220, that "words or conduct" are sufficient. This formulation is adopted in 15 *Halsbury's Law of England*, 3rd ed., p. 175, para. 344.
4. Per Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, 47; *City and Westminster Properties Ltd.* v. *Mudd* [1901] 2 K.B. 215.

although not amounting to an independent contract, might stipulate a condition precedent to the validity of the written contract.[5] Thus the parties can tender parol evidence to show that the written contract is not valid although it may appear to be so. Thirdly, it might be that the "total contract" is not restricted to the written terms, but is part written and part verbal.[6] Fourthly, although the written document might embody a complete contract, a subsequent verbal novation may have altered it.[7] Finally, the contract might be wholly verbal although it includes by implication from the circumstances the contents of certain printed terms. This latter forms the basis of the decisions in *Couchman* v. *Hill*[8] and *Harling* v. *Eddy*,[9] both auction cases, where the auctioneer made verbal representations, giving the purchaser more security than the standard printed terms, in order to induce bids. These contracts were concluded not on the printed terms but on the verbal contract offered by the auctioneer.

In the recent South Australian case of *Stuart* v. *Dundan and Another*,[10] the not uncommon situation arose where the purchaser, having negotiated verbally, subsequently alleged that the vendor did not accurately document the terms of the bargain. In the course of the litigation, three of the above methods of circumventing the parol evidence rule, together with a fourth and somewhat novel approach, were raised and considered.

The facts as found by the Special Magistrate of the Local Court of Naracoorte were as follows: The plaintiffs had by verbal agreement purchased several cows at a price of £59 per head. This verbal agreement, but not the subsequent written document, contained the stipulation that the cows were to be in calf, such calves were to be the progeny of a short horn bull, and to be born in April or May, so as to be ready for the Christmas market. A written contract, purporting to contain the agreement, was presented to one of the plaintiffs who without bothering to read it signed at the bottom as purchaser. It subsequently became evident that, whilst some cows were not in calf at all, others had been served by a Hereford bull, and several more were born too late for the market.

The plaintiff's claim was for damages of £280, representing the reduction in value of the cows supplied, at £14 per head, due to their lack of compliance with the verbal contract. The magistrate gave judgment for the plaintiffs on the basis of the verbal agreement, finding expressly that "the real purpose for which they bought the cattle in question was completely defeated."

On appeal to the Supreme Court (Travers J.)[11] the defendant relied on an inclusion clause in the written contract, stating that:

> The parties hereto acknowledge that this contract contains the whole of the agreement between the parties and each of them agrees with the other that no writing whether in the form of a letter memorandum or otherwise sent, given or

5. *Pym* v. *Campbell* (1856), 6 E. & B. 370.
6. S.S. *Ardennes* (*Cargo Owners*) v. S.S. *Ardennes* (*Owners*) [1951] 1 K.B. 55.
7. *Goss* v. *Lord Nugent*, 5 B. & Ad. 58.
8. [1947] 1 A.E.R. 103.
9. [1951] 2 A.E.R. 212.
10. Unreported at date of printing; judgment was delivered on 13th May, 1963.
11. 1962 Law Society Judgment Scheme Reports 390.

> shown to him by the other party or his agent prior to the signing of this contract has induced him to sign the said contract.

The appellant contended that this clause had the effect of restricting the terms of the contract to those defined by the written agreement. His Honour refused to accept this contention and dismissed the appeal. He concluded that the real contract between the parties was not confined to the written document, but also included the prior oral agreement. The reasons for this finding were, first, the defendants' complete passivity to the plaintiff's introduction of the parol evidence before the magistrate, secondly, the clumsy drafting of the written contract which (1) described the same person as both vendor and purchaser, (2) neglected to particularize the cows although they had been selected, (3) failed to indicate whether the one plaintiff who signed it was signing it on behalf of himself only, on behalf of both plaintiffs, or on behalf of Dalgety & Co. Ltd. which was elsewhere described as the purchaser. As an alternative ground, His Honour invoked the notion of a collateral parol contract contemporaneous with the written contract.[12] The Full Supreme Court, allowing the appeal, held that there was no evidence that the verbal representation which induced the contract also constituted a term, either as part of that contract or as part of an independent collateral contract.

With reference to the "total contract" exception, the Full Court rejected the proposition enunciated by Travers J. that the failure of the written document to identify accurately both parties and subject matter was relevant to the question whether it was intended to constitute the whole contract. Although there are special authorities which allow parol evidence to identify both parties and subject-matter,[13] the fact that such parol evidence was necessary in the present case was considered by His Honour as tending to establish that the written document was only part of the whole contract. This having been established, oral evidence as to terms other than those concerning parties and subject-matter would be admissible. The Full Court held this "wedge" argument invalid however, quoting from the judgment, in *Bateman* v. *Phillips*,[14] that "evidence of this kind does not go to extend the terms of the agreement in writing."

With reference to the collateral contract exception, the Full Court stated as the requirements of such a contract: (1) that it should not contradict the written agreement; (2) that it should be strictly proved; and (3) that it should be entirely collateral. These criteria, though traditional, are not particularly helpful. First it is difficult to envisage a collateral contract which can affect the rights of the parties as defined in the document without contradicting it in some way. Secondly, the distinction between proof and strict proof is not obvious. Thirdly, whether an alleged verbal contract is entirely collateral must first be determined. For this latter purpose it is not

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12. Both grounds were somewhat more apposite than that of the Special Magistrate. The latter relied on the auction cases (nn. 8, 9, supra), where the verbal representation was subsequent to the printed terms.

13. Such extrinsic evidence is allowed in aid of interpretation: Cross, *Evidence*, 481.

14. (1812) 15 East 272, 274.

enough that there appears to be one contract only which is subsequently documented, for the validity of that contract may have been intended to be governed by the representation which induced it. In this context it is submitted that the principle enunciated by Lord Moulton in *Heilbut Symons* v. *Buckleton*[15] and referred to by the Full Court is not helpful. Lord Moulton says:

> It is my Lords of the greatest importance . . . that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation no matter in what way or under what form the attack is made.

This principle stops short where the innocent misrepresentation happens also to be a term, for the law of contract makes no distinction between honest and dishonest breaches. It follows that the principle cannot be invoked to determine whether a representation amounts to a contractual term; this is one "form of attack" that is unimpeachable.

In the judgment of Travers J., the suggestion was made that the court will allow parol evidence of a condition to be added to a written contract if that condition would have the status of a fundamental condition were it expressly incorporated in the contract.[16] The Full Court, without expressly saying so, rejected this method of introducing a parol undertaking, by holding that the question whether the term is fundamental must always be subsequent to the question whether it actually is a term.[17] On principle alone this view seems clearly correct. The "weight and gravity" test[18] of a fundamental condition was regarded by Travers J. as satisfied on the Magistrate's finding that, but for the oral stipulations, the plaintiffs would not have entered the contract at all. The same may well be said of a stipulation amounting only to a condition, for the choice of rescinding the contract which the law gives for the breach of a condition is explicable only on the assumption that the plaintiff's contracting was dependent on the defendant's compliance with the condition. Moreover, since any representation might induce a contract without subsequently forming a part of it, the test suggested by His Honour for identifying a fundamental condition would be of doubtful value.

Neither Travers J. nor the Full Court found it necessary to elaborate on the "integration clause" which expressly defined the contents of the document as containing the whole of the contract between the parties. It is respectfully submitted that in cases of this type the written instrument should not be allowed to subvert the true intention of the parties merely by defining itself as the total contract, for this would not allow for cases where the written document is subject to a condition precedent, is collateral to another,

15. [1913] A.C. 30, 51.
16. 1962 Law Society Judgment Scheme Reports, 395.
17. "Whatever the principle may be, it stands to reason that a breach cannot be 'fundamental' or 'go to the root of the contract' unless it is a breach of the contract." (p. 7, Transcript of Judgment.)
18. A test suggested by Holroyd Pearce L.J. in *Yeoman Credit Ltd.* v. *Apps* [1961] 2 A.E.R. 281 at 289.

verbal contract, or has been modified by subsequent verbal negotiations. Since proof that the legal relationship is broader than the written documents indicate is not prevented merely because the only evidence that this is the case is parol, it would seem both illogical and unjust that such an integration clause should be treated as anything more than presumptive evidence to the contrary. The parol evidence rule so far as the exceptions outlined above are concerned, cannot be a strict rule of law, but a rule, the effect of which is merely to raise a rebuttable presumption as to the intention of the parties. This intention is to be concluded from a consideration of all the circumstances.[19]

19. See per Lord Russell in *Gillespie Bros.* v. *Cheney, Eggar & Co.* [1896] 2 Q.B. 59 at p. 62.

POLICE OFFENCES ACT

Unlawful Possession

The recent decision of the South Australian Supreme Court in *Beard* v. *Brebner*[1] demonstrates once again a recurrent difficulty that has perplexed the minds of many of our jurists: attempting to define the concept of possession in the common law.

The problem arose in *Beard* v. *Brebner* in the context of s. 41 of the Police Offences Act, 1953-60 which creates the offence of unlawful possession of personal property.[2] This offence contains several inherent difficulties: first, it is constituted not by the commission of an act or pursuit of a course of conduct but by the existence of a certain state of affairs. That criminal liability should arise in such circumstances is of course far from exceptional. For example, s. 172 of the Criminal Law Consolidation Act 1935-57, enacts the crime of being found by night in certain circumstances. Legislation relating to aliens is a further illustration.[3]

Secondly, the prosecution is by the phrasing of the section absolved from the onus of establishing *mens rea* on the part of the defendant.[4] This departure from principle is again far from novel and in this case might be considered as a statutory formulation of the doctrine

1. 1962 Law Society Judgment Scheme reports 516.
2. s. 41: (1) Any person who has in his possession any personal property which either at the time of such possession, or at any subsequent time before the making of a complaint under this section in respect of such possession, is reasonably suspected of having been stolen or unlawfully obtained shall be guilty of an offence. Penalty: One hundred pounds or imprisonment for two years.
(2) It shall be a defence to a charge of an offence against this section to prove that the defendant obtained possession of the property honestly.
(3) If any personal property is proved to have been in the possession of a person, whether in a building or otherwise, and whether the possession had been parted with before the hearing or not, it shall for the purpose of this section be deemed to have been in the possession of that person.
3. See e.g., *R.* v. *Larsonneur* (1933) 97 J.P. 206 which demonstrates the injustice of which this type of offence is capable.
4. *Wallace* v. *Hansberry* [1959] S.A.S.R. 20; unless the mere knowledge of possession (*animus possidendi*) is to be construed as constituting this element: *Palumbo* v. *O'Sullivan* [1955] S.A.S.R. 315.