Parol Evidence to Vary or Contradict Consideration Clauses in Missouri

INTRODUCTION

One aspect of Missouri law which has escaped consideration by legal writers in recent years is the effect and ramifications of the well-known but seldom understood parol evidence rule. Perhaps one reason for the failure to analyze this rule is the staggering amount of litigation construing it and the myriad exceptions and counter-exceptions employed in its application. This note will not attempt to cover the entire scope of the parol evidence rule but will be confined to the effect of parol evidence offered to vary or contradict the consideration clause in written instruments.

> As a general proposition the parol evidence rule is said to apply: When two parties have made a contract and have expressed it in a writing to which they both have assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understanding and negotiations will not be admitted for the purpose of varying or contradicting the writing.[1]

It is apparent that the parol evidence rule, as defined, requires as conditions precedent, first, that the parties must have made a *contract* in writing,[2] and second, that they must have *assented* to the writing as the complete and accurate integration of that contract. Since the problem of the admissibility of parol evidence to vary or contradict written consideration stems historically from its application to deeds, these conditions precedent have been generally ignored, and this has resulted in the application of the rule to writings which are not true contracts.

I. JUDICIAL CONSTRUCTION PRIOR TO 1893

A. Deeds

The first reported Missouri case which dealt with the admissibility of parol evidence to vary or contradict a written consideration clause was *Henderson v. Henderson*[3] which arose in 1850. There the grantee of a deed brought an action of covenant against the grantor's execu-

1. 3 CORBIN, CONTRACTS § 573 (1960). This statement of the rule summarizes and follows Missouri court definitions of the rule. *E.g.*, Commerce Trust Co. v. Watts, 360 Mo. 971, 231 S.W.2d 817 (1950); Davison v. Rodes, 299 S.W.2d 591 (Mo. Ct. App. 1956); Sol Abrahams & Son Constr. Co. v. Osterholm, 136 S.W.2d 86 (Mo. Ct. App. 1940).

2. Corbin, *Parol Evidence Rule*, 53 YALE L.J. 603, 645 (1944).

3. 13 Mo. 151 (1850).

tors. In the consideration clause decedent-grantor acknowledged receipt of $766 as consideration for the land, but at the trial the grantor's executors were permitted to show by parol that no consideration had in fact been paid and that both parties intended the subsequent reconveyance of the land to the grantor. The Supreme Court reversed a trial court judgement for defendant and held such testimony inadmissible inasmuch as such an admission would destroy the operation of the deed as a conveyance.[4] The court went on to indicate that parol evidence is never admissible if it would destroy the *operative effect* of the deed, but evidence of the amount of purchase money actually paid is admissible if the amount is material. Thus, recited consideration is not necessarily conclusive.

The *Henderson* decision reflects a liberalization of the earlier common law rule whereby neither the grantor nor the grantee were allowed to vary *any* statement of consideration in the deed by parol.[5] However, this strict rule became relaxed, first in equity and then at law.[6] Specifically, parol evidence became admissible to show consideration which was not repugnant to the consideration recited in the deed.[7] Thus, the decision in *Henderson* was in substantial conformity with the general trend away from the strict common law rule.

However, in the forty-three year period following the *Henderson* decision, the case was not strictly adhered to by the Missouri courts. For instance, parol evidence *was* admitted to vary or contradict recited consideration in deeds in a grantee's action for breach of covenant against a prior grantor because such evidence was relevant in determining grantee's damages.[8] Further, the *Henderson* rule that parol evidence must be relevant to an issue of damages before being admissible was often ignored. For example, in *Aull Savings Bank v. Aull's Adm'r*,[9] the grantee of certain realty sought to recover from grantor's estate the reasonable rental value for grantor's continued use of the premises following the sale. The executors sought to show by parol that rent-free occupation by grantor was a part of the consideration for the transfer in addition to that expressed in the deed. The introduction of this evidence over plaintiff-grantee's objection was sustained on appeal, primarily on two grounds: first, that the evidence did not affect the operative effect of the deed, and second, that the consideration may be explained by parol since it occupies no higher

4. *Id.* at 153.

5. 1 WILLISTON, CONTRACTS § 115A (3d ed. 1957).

6. *Ibid.*

7. *Ibid.*

8. Lambert v. Estes, 99 Mo. 604, 13 S.W. 284 (1890); Allen v. Kennedy, 91 Mo. 324, 2 S.W. 142 (1886); Miller v. McCoy, 50 Mo. 214 (1872); Guinotte v. Chouteau, 34 Mo. 154 (1863).

9. 80 Mo. 199 (1883).

position than an ordinary receipt for money.[10] No mention was made of the *Henderson* requirement that the evidence be relevant to an issue of damages.

But despite such instances of deviation from the *Henderson* doctrine, the prohibition there laid down against the destruction of a deed by the introduction of parol was uniformly followed,[11] and extended to include parol which defeated the operative effect of a *covenant* contained in a deed. For example, *MacLeod v. Skiles*[12] involved a deed containing a covenant in which the grantor warranted to defend grantee's title except as to certain taxes. Grantee paid these taxes but then sued for their recovery, arguing that the grantor had agreed in a separate writing to pay all taxes *including* the ones expressly excepted in the deed. The exclusion of this evidence by the trial court was affirmed on appeal. The court held that a grantee could not accept a deed with a covenant and escape the force and effect of the covenant by parol evidence.[13]

Thus Missouri was following the trend away from the old common law rule strictly prohibiting parol evidence to vary or contradict express consideration in deeds. But deeds are not the only written instruments which contain consideration clauses. An examination must therefore be made of parol evidence offered to vary or contradict consideration clauses in other written instruments.

B. Instruments Other Than Deeds

Outside of deed cases, prior to 1893 few cases arose where the determinative issue was the admissibility of parol evidence to vary or contradict the consideration clause. Where the question arose, confusion prevailed and decisions seemed to be based on rules noted previously as arising from deeds.

An indication of the attitude of the court toward this type problem at this time is illustrated in the case of *Price v. Reed.*[14] A contract for the sale of land between a third party and defendant contained a statement of the purchase price. Plaintiff, a creditor of the third

10. *Id.* at 201. See McConnell v. Brayner, 63 Mo. 461 (1876); Laudman v. Ingram, 49 Mo. 212 (1872).

11. Bobb v. Bobb, 89 Mo. 411, 4 S.W. 511 (1886); Wood v. Broadley, 76 Mo. 23 (1882); Hannibal & St. Joseph R.R. v. Green, 68 Mo. 169 (1878); Fontaine v. Boatmen's Sav. Institution, 57 Mo. 552 (1874).

12. 81 Mo. 595 (1884).

13. *Id.* at 604. The court there made an interesting statement of another theory which would bar such evidence. The court said that after the delivery of the deed, "the rights and liabilities of the parties are measured and determined by the contracts and covenants in the deed so delivered and accepted." *Ibid.* This is the first indication given that any part of a deed may be viewed as a contract.

14. 38 Mo. App. 489 (1889).

party, sued defendant on a note drawn by the third party, on the theory that defendant had assumed payment of the note as part of the consideration to the third party as grantor of the land. Defendant sought to exclude parol evidence of his obligation on the note, since no mention of it appeared in the consideration clause of the sale contract. The evidence was admitted over plaintiff's objection and a judgement for defendant was affirmed on appeal, the court stating:

> In reference to all instruments . . . it is now well settled that it is competent by parol to show that no consideration was, in fact, paid or received, or that the consideration was greater or less than, or different from, the one expressed. This may be done for every purpose except to impeach or destroy the instrument. The amount or kind of consideration is not regarded an essential part of the contract, and is open to contradiction or explanation like a common receipt.[15]

Prior to 1893, no clear rationale had been established for deciding questions of parol evidence to vary or contradict consideration clauses in instruments *other* than deeds, and the rule controlling deeds was often applied to other types of instruments, often with curious results.

II. The Jackson Case—A New Approach

In 1893 a significant new approach to the problem of the admissibility of parol evidence to vary or contradict stated consideration was established. The case of *Jackson v. Chicago, St. P. & K.C. Ry.*[16] presented to the Kansas City Court of Appeals an unusual deed consideration clause. Plaintiff landowner sued defendant railroad company for damages resulting from water overflowing plaintiff's land, basing the suit on defendant's failure to dig a ditch across a right of way plaintiff had previously conveyed to defendant. Plaintiff contended that defendant had orally promised to dig the ditch as a part of the consideration of the right of way, although it was not mentioned in the deed. The deed stated the consideration as $750 and further provided that:

> the said railway company is to provide and maintain for the said grantors, one grade farm crossing, and also one underground cattle pass, and to haul and dump thereat all the stone desired by the said George W. Jackson to pave the approaches to said cattle pass, not exceeding four car loads. The grantors are to do the paving, railway company to haul said stone within six months after its railway is regularly running.[17]

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15. *Id.* at 499. In Nedvidek v. Meyer, 46 Mo. 600 (1870), the court analogized between a bill of sale and a deed. *Cf.* Liebke v. Knapp, 79 Mo. 22 (1883); Baile v. St. Joseph Fire & Marine Ins. Co., 73 Mo. 371 (1881).

16. 54 Mo. App. 636 (1893).

17. *Id.* at 641.

It was conceded that the defendant had fully performed all of the obligations stated in the deed.

The trial court permitted plaintiff to show the oral promise by parol over defendant's objection that the consideration expressed in the deed was a matter of contract and could not be altered or added to in the absence of fraud, accident or mistake. Defendant appealed from a judgment for plaintiff, and the appellate court reversed, holding that parol evidence of the oral promise should not have been admitted. The court indicated that consideration in a deed could be stated in one of two ways: First, the consideration might be stated as a *recital* which was defined as "the statement of the amount of consideration . . . and the acknowledgement of its payment . . . ."[18] From this definition it can be assumed that a consideration clause reading: "In consideration of the sum of $250 paid to me this twelfth day of March, 1962" would be a recital of consideration. The second method of stating consideration is *contractually.* The court did not expressly define this method, but in the discussion was the implication that any clause which indicates that the consideration is to pass or be performed in the *future* and has not already passed between the parties will be considered *contractual* consideration. The court gave the following as an example of contractual consideration: "In consideration of the sum of one thousand dollars to be paid to me in beef cattle weighing not less than one thousand two hundred pounds each, at five cents per pound."[19]

Based on this distinction, the court held that the consideration clause in the Jackson deed was stated contractually. The court then reasoned that since the consideration clause was stated contractually the parties intended to be bound by the specific terms of the consideration clause when they entered into the agreement. Since this was the intent of the parties, the court reasoned that it would be improper to subsequently permit a variance or modification of the clause by parol evidence.

The court also discussed the problem of parol evidence to vary or contradict those consideration clauses which were stated as *recitals.* A recited consideration clause would have a two-fold effect: First, in any action in which the amount of consideration was an issue, the amount recited in the clause would be prima facie evidence of the amount paid. Second, the recited consideration would estop the grantor from showing a lack of consideration by parol. But parol which varied the consideration clause was admissible for any other purpose.

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18. *Id.* at 643.

19. *Id.* at 644.

One important question was not considered by the court. The decision did not state whether the distinction between recited and contractual consideration was to be applied only in cases involving deeds, or whether it was also to apply to cases involving other written instruments.

III. Liberalization of the Rule

The decisions which followed the *Jackson* case expanded the holding that *contractual* consideration clauses may not be varied by parol, by including mortgages,[20] bills of sales,[21] releases,[22] and contracts in general.[23] However, the basis for distinguishing between *recited* and *contractual* consideration has often been obscured, if not ignored.

A. Recited Consideration

On occasion the admissibility of parol has been determined by the court from an examination of the consideration clause. If the language used states the amount of consideration and acknowledges its receipt, the clause is normally held to be a mere recital and not intended as binding by the parties.[24] Therefore, parol evidence offered to vary or contradict the clause is admissible. For example, in the case of *McDaniel v. United Rys. Co. of St. Louis*,[25] plaintiff, in a personal injury action, sought to avoid a release signed by him which contained a consideration clause reading: "for and in consideration of the sum of one hundred and seventy-five dollars ($175), Dr. Brokaw's bill and St. John's Hospital bill, to me in hand paid by the United Railways Company of St. Louis, the receipt of which is hereby acknowledged . . . ."[26] Plaintiff sought to show by parol that defendant had orally promised that plaintiff would be treated only by a certain specialist, one Dr. Brokaw, but that in fact, defendant secured a different and less competent physician to treat him. The evidence was

20. Stringer v. Geiser Mfg. Co., 177 Mo. App. 234, 162 S.W. 645 (1914).

21. George O. Richardson Mach. Co. v. Dix, 245 S.W. 215 (Mo. Ct. App. 1922).

22. See, *e.g.*, Gunter v. Standard Oil Co., 60 F.2d 389 (8th Cir. 1932); Tate v. Wabash Ry., 131 Mo. App. 107, 110 S.W. 622 (1908); Williams v. Kansas City Suburban Belt Ry., 85 Mo. App. 103 (1900).

23. See, *e.g.*, Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173 (8th Cir. 1955); Pile v. Bright, 156 Mo. App. 301, 137 S.W. 1017 (1911); Davis v. Gann, 63 Mo. App. 425 (1895).

24. Allaben v. Shelbourne, 357 Mo. 1205, 212 S.W.2d 719 (1948); Deal v. Ford, 204 S.W. 181 (Mo. 1928); Craig v. Koss Constr. Co., 69 S.W.2d 964 (Mo. Ct. App. 1934). The court in all these cases failed, however, to specifically use the definition of recited consideration given in the *Jackson* case. The *Craig* case consideration clause seems to be promissory even though held otherwise.

25. 165 Mo. App. 678, 148 S.W. 464 (1912).

26. *Id.* at 687-88, 148 S.W. at 465.

admitted over defendant's objection and upon appeal by defendant on this issue the trial court ruling was affirmed. The court stated:

> We see nothing contractual in the consideration clause of this release. . . . It is true the contract of release follows thereafter, but so much of the document as pertains to the consideration merely recites the receipt of $175, Dr. Brokaw's bill and St. John's Hospital bill as if in hand paid to plaintiff and acknowledges a receipt to that effect. Obviously, there is no contract contained in such clause . . . and, unless the consideration clause reveals itself to be contractual and reflects the intention of the parties to that effect, it is competent to either contradict or explain it by showing other and additional considerations as well.[27]

This language indicates the purest application of the *Jackson* rationale.

Conversely, however, a substantial number of cases fail to examine the language of the consideration clause with such particularity. Instead, the *type* of instrument involved is determinative as to whether the consideration is a recital or not.[28] A typical illustration of the application of this rule is found in *Lenox v. Earls*[29] in which grantor conveyed lands to defendant-grantee by a deed expressing a consideration of $2,500. The sisters of the grantor brought suit to impress a lien on the land, basing the suit on an agreement between the grantor and defendant, made at the time the deed was transferred, in which grantee promised to pay grantor's sisters the sum of $1,500 in lieu of the $2,500 stated in the deed. This evidence was admitted over grantee's objection that the deed could not be varied by the written agreement because of its effect on the consideration clause of the deed. On appeal by the defendant from an adverse judgment the court stated: "The law is well established, however, that the consideration of a conveyance is generally open to explanation . . . ."[30] and affirmed the admission of the agreement even though it contradicted the consideration of the deed.

The court here simply reverted to the earlier common law rule which regarded all consideration clauses in deeds as recitals.[31] No

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27. *Id.* at 693, 148 S.W. at 467.

28. Finley v. Williams, 325 Mo. 688, 29 S.W.2d 103 (1930); Poplin v. Brown, 200 Mo. App. 255, 205 S.W. 411 (1918); Barry v. Bernays, 162 Mo. App. 27, 141 S.W. 933 (1911); Staed v. Rossier, 157 Mo. App. 300, 137 S.W. 901 (1911); See v. Mallonee, 107 Mo. App. 721, 82 S.W. 557 (1904); Holt v. Holt, 57 Mo. App. 272 (1894). See Cave v. Wells, 319 Mo. 930, 5 S.W.2d 636 (1928); Goodman v. Griffith, 238 Mo. 706, 142 S.W. 259 (1911); Edwards v. Latimer, 183 Mo. 610, 82 S.W. 109 (1904); Talbert v. Grist, 198 Mo. App. 492, 201 S.W. 906 (1918); Frase v. Lee, 152 Mo. App. 562, 134 S.W. 10, *aff'd*, 160 Mo. App. 607, 140 S.W. 1194 (1911).

29. 185 S.W. 232 (Mo. Ct. App. 1916).

30. *Id.* at 234.

31. See text accompanying notes 5-7 *supra*.

inquiry into the language of the consideration clause was even attempted. This rationale that consideration clauses in conveyances are recitals has been extended to include mortgages.[32]

Once a consideration clause is held to be a recital by either line of reasoning, parol evidence which varies or contradicts the consideration clause is admissible to show the actual consideration,[33] the terms of payment,[34] or that additional oral promises were part of the consideration.[35] This is in accord with the *Jackson* holding that parol is not admissible for *all* purposes simply because the consideration clause has been held a recital. As was indicated previously,[36] the common law, after breaking away from the strict deed rule barring parol for any purpose, began to admit parol to show consideration not repugnant to the consideration recited in the deed and to show the damages of a grantee in a breach of covenant action. However, parol evidence which would impeach the validity of the deed was still barred.[37] Also the bar was extended to parol evidence which would defeat the operative effect of a convenant in a deed.[38] The *Jackson* case recognized the limitation as to parol which sought to prevent the operation of the deed as a conveyance of the property and based the limitation on an estoppel theory. One who has signed the statement acknowledging the receipt of a sum is estopped to later deny that any sum was received in order to impeach the validity of the conveyance.[39] The tendency still persists today to extend the application of the estoppel theory to bar parol which abrogates the effect of covenants contained in the deed.[40]

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32. C. D. Johnson Farming Co. v. Goodwyn, 208 S.W. 110 (Mo. Ct. App. 1919); Shantz v. Shriner, 167 Mo. App. 635, 150 S.W. 727 (1912).

33. Cave v. Wells, 319 Mo. 930, 5 S.W.2d 636 (1928); Goodman v. Griffith, 238 Mo. 706, 142 S.W. 259 (1911); Talbert v. Grist, 198 Mo. App. 492, 201 S.W. 906 (1918); Poplin v. Brown, 200 Mo. App. 255, 205 S.W. 411 (1918); Barry v. Bernays, 162 Mo. App. 27, 141 S.W. 933 (1911); See v. Mallonee, 107 Mo. App. 721, 82 S.W. 557 (1904); Shantz v. Shriner, 167 Mo. App. 635, 150 S.W. 727 (1912); Staed v. Rossier, 157 Mo. App. 300, 137 S.W. 901 (1911).

34. C. D. Johnson Farming Co. v. Goodwyn, 208 S.W. 110 (Mo. Ct. App. 1919).

35. Lennox v. Earls, 185 S.W. 232 (Mo. Ct. App. 1916); Holt v. Holt, 57 Mo. App. 272 (1894).

36. Notes 7 and 8 *supra.*

37. Note 11 *supra.*

38. Note 12 *supra.*

39. Ott v. Pickard, 361 Mo. 823, 237 S.W. 2d 109 (1951); Schneider v. Johnson, 357 Mo. 245, 207 S.W.2d 461 (1948); Crenshaw v. Crenshaw, 276 Mo. 471, 208 S.W. 249 (1918); Chambers v. Chambers, 227 Mo. 262, 127 S.W. 86, (1910); Weissenfels v. Cable, 208 Mo. 515, 106 S.W. 1028 (1907); Strong v. Whybark, 204 Mo. 341, 102 S.W. 968 (1907); Wishart v. Gerhart, 105 Mo. App. 112, 78 S.W. 1094 (1904); Hickman v. Hickman, 55 Mo. App. 303 (1893).

40. In the following case, defendant grantor was barred from showing by parol that no consideration had been paid so as to defeat action by grantee for

In summary, consideration clauses will be held as recitals on one of two theories: either because the language used in the clause shows an intent by the parties to recite consideration; or, by virtue of the type of instrument in which the consideration clause is found, it will be conclusively presumed a recital and therefore variable by parol. Once the clause is held to be a recital, parol evidence is generally admissible for the purposes other than impeaching a deed as a conveyance or destroying the operative effect of covenants in a deed.

B. Contractual Consideration

Decisions subsequent to the *Jackson* case, in which the consideration clause has been held contractual, have shown a strong tendency to follow the reasoning in *Jackson*.[41] The determination of whether the consideration clause is contractual is made by looking to the language used to express it and in viewing as contractual that which is more than a mere statement of amount or acknowledgement of its receipt.

This approach is illustrated in *Pile v. Bright*[42] where the instrument involved was a contract for the sale of land. The consideration clause read that the:

> party of the first part agrees to pay to parties of the second part the sum of one hundred dollars as commission in full on said sale. Parties of the second part agree to take their commission as follows: The second monthly payment made by the purchaser . . . amounting to twenty dollars . . . shall be paid to parties of the second part until the full sum of one hundred dollars shall have been paid.[43]

Plaintiff, as party of the second part, sued to recover amounts still owing on the commission. Defendant sought to show by parol that plaintiff had promised orally that the purchaser of the land would

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breach of covenants: Johnston v. Bank of Poplar Bluff, 221 Mo. App. 127, 294 S.W. 111 (1927). In Laclede Laundry Co. v. Freudenstein, 179 Mo. App. 175, 161 S.W. 593 (1913) and Brown v. Morgan, 56 Mo. App. 382 (1894), the grantor was barred from showing by parol that grantee waived the covenants in the deed as part of the consideration. *Cf.* Holloway v. Vincent, 143 Mo. App. 434, 128 S.W. 1009 (1910).

41. See, *e.g.*, Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173 (8th Cir. 1955) (contract); Stringer v. Geiser Mfg. Co., 177 Mo. App. 234, 162 S.W. 645 (1914) (chattel mortgage); Pile v. Bright, 156 Mo. App. 301, 137 S.W. 1017 (1911) (sale of land contract); Tate v. Wabash R.R., 131 Mo. App. 107, 110 S.W. 622 (1908); Williams v. Kansas City Suburban Belt Ry., 85 Mo. App. 103 (1900) (releases). *But see* Bellows v. Porter, 201 F.2d 429 (8th Cir. 1953); State *ex rel.* Alport v. Boyle-Pryor Constr. Co., 352 Mo. 1061, 180 S.W.2d 727 (1944); Union Elec. Co. v. Fashion Square Bldg. Co., 165 S.W.2d 284 (Mo. Ct. App. 1942).

42. 156 Mo. App. 301, 137 S.W. 1017 (1911).

43. *Id.* at 306, 137 S.W. at 1018.

pay $500 of the purchase price to the defendants by a certain time and also would take up a second mortgage on the property upon defendants' request. The trial court held this evidence inadmissible. Judgment for plaintiff was affirmed on appeal, the court stating:

> This contract expressly states that defendant agrees to pay plaintiffs $100 for services performed by them in selling her property and shows beyond the possibility of cavil that the provision for the payment of commission for the particular services already rendered was of the substance of the contract itself and not a mere recital that could be contradicted, or explained away, or added to, by parol testimony.[44]

Occasionally, examples can be found of a misapplication of the *Jackson* reasoning resulting in a consideration clause which is clearly a recital held to be contractual. For example, consideration clauses reading "I hereby agree to accept, and do accept . . . the sum of five thousand eight hundred dollars. . . . Received Jan. 5, 1905 . . . ."[45] and "Received of The Standard Oil Company . . . the sum of Two Hundred & no/100 Dollars ($200.00) in full settlement and satisfaction. . . ."[46] were both held to be contractual, even though both state an amount of money and acknowledge the receipt of that amount.

In summary, consideration clauses will be held contractual because of the language and method of expression used. If the clause is stated promissorily, and not just a statement of an amount of money followed by the acknowledgement of its receipt, the clause is properly held contractual and not variable by parol.

IV. Parol to Clarify Ambiguous Statements of Consideration

Consideration clauses may be expressed in a way so as to be indefinite as to their intended meaning. Clauses stating that in consideration of an insignificant amount of money and "of love and affection"[47] or "and other good and valuable consideration"[48] certainly cannot indicate clearly what the intended consideration was. Parol evidence offered to clarify the meaning of such phrases is always admissible.[49] Similarly, instruments in which the consideration is

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44. *Id.* at 308-09, 137 S.W. at 1019.

45. Tate v. Wabash R.R., 131 Mo. App. 107, 110-11, 110 S.W. 622, 623 (1908).

46. Gunter v. Standard Oil Co., 60 F.2d 389, 390 (8th Cir. 1932).

47. Edwards v. Latimer, 183 Mo. 610, 614, 82 S.W. 109 (1904).

48. Finley v. Williams, 325 Mo. 688, 697, 29 S.W.2d 103, 106 (1930).

49. Ragan v. Schreffler, 306 S.W.2d 494 (Mo. 1957); Finley v. Williams, 325 Mo. 688, 29 S.W.2d 103 (1930); Edwards v. Latimer, 183 Mo. 610, 82 S.W. 109 (1904); *cf.* Hebbard v. American Zinc, Lead & Smelting Co., 66 F. Supp. 113 (W.D. Mo. 1946).

not stated at all,[50] or is not clear as to meaning,[51] may be explained by parol evidence offered by either party to the agreement. Such admissibility is not premised on contractual or recited statement of consideration, but rather on the theory which permits ambiguities in a written contract to be explained by parol.[52]

V. Fallacy in Present Rules

The problem of determining when parol evidence is admissible to vary or contradict written consideraton is in need of a consistent and uniform approach to all types of written instruments.

The doctrine first indicated in the *Henderson* case,[53] which permits parol evidence to be introduced to vary or contradict written consideration in deeds if the operative effect of the deed is not defeated thereby, is not entirely satisfactory. This doctrine ignores the language of the consideration clause completely and gives no opportunity for the intent of the parties to play a role in deciding whether parol is admissible or not. The application of this rule effectively establishes an irrebuttable presumption that consideration clauses in certain instruments are recitals, the intent of the parties notwithstanding.

Nor does the *Jackson* rationale completely solve the problem. The reasoning of the *Jackson* case permits determination of the intent of the parties when determining the admissibility of parol, but only indirectly by looking to the language used in the consideration clause. If the clause is a statement of amount and the acknowledgement of its receipt, the clause is only a statement of a past event. The law cannot bind the parties to that which has taken place prior to the integration of the agreement and therefore the conclusion is that the parties intended the clause as a recital and not subsequently binding. Conversely, if the language of the clause is not a statement of amount and the acknowledgement of its receipt, it is held that the parties have intended the consideration clause to be contractual and subsequently binding. However, the determination of intent solely by analysis of the language of the consideration clause does not necessarily guarantee that the true intent of the parties will be in accord

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50. Heagy v. Cox, 191 Mo. App. 377, 177 S.W .684 (1915); *cf.* Hackney v. Hargrove, 216 Mo. App. 202, 259 S.W. 495 (1924), which involved the consideration for the sale of a partnership. The court permitted the defendant to show the consideration by parol evidence, but relied in part on the fact that plaintiff had sought to show a different consideration by parol and therefore could not object to defendant showing consideration by parol.

51. Field v. Brown, 207 Mo. App. 55, 229 S.W. 445 (1921); *cf.* Walker v. Modern Woodmen, Camp 5111, 190 Mo. App. 355, 177 S.W. 331 (1915).

52. See generally 3 Corbin, Contracts § 579 (1960).

53. See text accompanying note 3 *supra.*

with the interpretation of the court. For example, contracting parties with no concept of the distinction between reciting consideration as a fact and stating the consideration promissorily may innocently use language in the consideration clause which is entirely inconsistent with their actual intent. The *Jackson* reasoning would bar any parol evidence to show what the parties intended, if the court considers only the language used. This possibility has led to criticism of the *Jackson* rationale:

> These cases [holding parol inadmissible to show the intent of the parties at the time the instrument was integrated] should be disapproved, for the reason that if the testimony is true there was no written integration of an actual agreement. In these cases, the court seems to think that the writing proves its own character and validity, or else that the plaintiff's testimony that it was assented to as a complete integration of contract cannot be rebutted by contradictory testimony by the defendant.[54]

Thus the fallacy in the theory of *Jackson* is that it permits the writing to prove its own character and conclusively presumes that contrary testimony is not true.

CONCLUSION

If the intent of the parties is the determinative factor in deciding the admissibility of parol to vary or contradict the consideration clause, "this intent must be sought where always intent must be sought, namely in the conduct and language of the parties and the surrounding circumstances."[55] The *Jackson* decision is a step in the right direction, but is still short of reaching the ultimate goal. If the issue of parol admissibility arises, evidence of what the parties intended should be admissible. If the evidence of intent shows the parties intended to be bound by the consideration clause, then the clause was intended to be contractual, and parol which varies or contradicts it should be inadmissible. If the evidence shows that the parties merely intended the consideration clause as a statement of an executed event, the clause should be viewed as a recital and parol evidence should then be admissible. Only by this approach can the court effectively and certainly decide the question of parol admissibility in accord with the actual intent of the parties to any instrument.

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54. 3 CORBIN, CONTRACTS § 577 (1960).
55. *Id.* at § 582.