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THE INTERPRETATION OF WORDS AND THE PAROL EVIDENCE RULE*

Arthur L. Corbin†

GROWTH OF THE LAW, IN SPITE OF LONG REPETITION OF FORMALISTIC RULES

At an earlier date, this author warned that "in advising clients and in predicting court decisions, it must always be borne in mind that the assumption of uniformity and certainty in the meaning of language, however erroneous, has been made so often and so long that it will be repeated many times in the future."¹ This prediction has been fully borne out in the court opinions that have been published in the fourteen years since it was made. It is still being said, sometimes as the ratio decidendi but more often as a dictum representing established law, that extrinsic evidence is not admissible to aid the court in the interpretation of a written contract (an integration) if the written words are themselves plain and clear and unambiguous. This is said even by a court that declares the rule to be a rule of substantive law and not a rule of evidence.

Is not this continuous repetition in itself sufficient to make the statement a well settled rule of substantive law, even though it results at times in the court's making a contract for the parties in disregard of their actual intention? Hard cases, they say, must not be allowed to make bad law. Contracting parties must be made to know that it is their written words that constitute their contract, not their intentions that they try to express in the words. They, not the court, have chosen the words; and they, not the court, have made the contract. Its legal operation must be in accordance with the meaning that the words convey to the court, not the meaning that they intend to convey. Is not an author, or even a dissenting judge, guilty of the utmost temerity (and even of folly) to deny the accuracy, the justice, and the necessity of the repeated rule?

There are times when an author is incompetent, and even intellectually and morally dishonest, if he fails to attack an often repeated statement of law. This is such a case; one that has had many precedents throughout our legal history. There are many court decisions, made by highly respected courts, that are inconsistent with the repeated rule. If extrinsic

* This article is substantially adapted, with the consent of the author and the West Publishing Co., from new sections 543AA, 543B, 543C, and 543D, recently published in the 1964 pocket supplement to 3 Corbin, Contracts (2d ed. 1960).

† Professor of Law Emeritus, Yale Law School.

¹ 3 Corbin, Contracts § 542, at 112 (2d ed. 1960).

evidence is admitted without objection, the trial court is never reversed for considering it in the process of interpretation. There are many cases, practically never subjected to criticism, in which the court has considered extrinsic evidence as a basis for finding that the written words are ambiguous; instead of ambiguity admitting the evidence, the evidence establishes the ambiguity. Learned judges have often differed as to whether the written words are ambiguous, each one sometimes asserting that *his* meaning is plain and clear. All that any court has to do in order to admit relevant extrinsic evidence is to assert that the written words are ambiguous; this has been done in many cases in which the ordinary reader can perceive no ambiguity until he sees the extrinsic evidence.

There are general rules that are universally accepted that are inconsistent with the stated rule here criticized. The cardinal rule with which all interpretation begins is that its purpose is to ascertain the intention of the parties. The criticized rule, if actually applied, excludes proof of their actual intention. It is universally agreed that it is the first duty of the court to put itself in the position of the parties at the time the contract was made; it is wholly impossible to do this without being informed by extrinsic evidence of the circumstances surrounding the making of the contract. These include the character of the subject matter, the nature of the business, the antecedent offers and counter offers and the communications of the parties with each other in the process of negotiation, the purposes of the parties which they expect to realize in the performance of the contract.² The court must put itself "in the shoes" of the parties; is

² In *Local 787, Int'l Union Elec. Workers v. Collins Radio Co.*, 317 F.2d 214 (5th Cir. 1963), the court had to interpret an arbitration provision in a collective contract. The court admitted (and recounted) the evidence of the background and negotiations of the bargaining. In justification, the court, John R. Brown, J., said:

[This evidence] revealed the exact setting in which the collective bargaining contract including the exclusionary clauses in the grievance machinery was consummated. This was not to use parol evidence to alter or vary. It was, as we have many times said, the essential act of the Court of putting itself in the position of the parties at the time the contract was made.

Id. at 220. The court then cited four of its previous decisions supporting this statement: "A court called upon to determine the meaning of written contracts . . . looks primarily to the language of the contracts after first placing itself as nearly as possible in the position of the parties to them at the time of their execution." *Id.* at 220 n.12. If this is not sound law and justice, then contracts are made by the courts and not by the parties.

In *Continental Bus Sys. v. NLRB*, 325 F.2d 267, 273 (10th Cir. 1963) the court said:

If the language of the contract is susceptible of more than one interpretation, the court should construe the contract in the light of the situation and relation of the parties at the time it was made, and, if possible, accord it a reasonable and sensible meaning, consonant with its dominant purpose.

This statement is applicable, and in almost all cases is actually applied, to the interpretation and construction of all written contracts. Unless the court wishes to make the contract for the parties in the sole light of its own linguistic education and experience, it must always know the situation and relation of the parties and its dominant purpose. Without thus putting itself in the position of the parties, a court cannot know whether the language of the contract is susceptible of more than one interpretation, cannot determine the dominant purpose of the parties, and cannot arrive at the reasonable and sensible meaning.

it justified in drawing on the "shoes" of one party and not of the other, or only one "shoe" of each, or no "shoe" at all? Shall an author, or a court, disregard the cardinal general rules and accept without criticism a commonly asserted subsidiary rule that is inconsistent with them? If we wish to profit by the mistakes as well as by the wisdom of the past, it is necessary to look back over our legal history. Such a look informs us that law never begins with a system of rules and doctrines and principles, each (presumably) eternal, unchangeable, perfect (and perfectly worded with one true meaning). Such a look informs us that law is in a constant process of development and change; that laws are put into words by men—men who are not all-wise and capable of foresight into the distant future—and that these words are repeated by other men for shorter or longer periods of time, packing new meanings into the words as the exigencies of life require, finally (after a century of confusion) abandoning them altogether. A few examples of such a historical development may be profitable.

Consider the law of third party beneficiaries. No informed lawyer or judge doubts that by the common, judge-made law such beneficiaries have enforceable legal rights. And yet it is only a short lifetime since teachers ceased teaching and writers ceased writing and judges ceased holding that privity of contract is necessary, that two parties cannot by contract create a legal right in a third, and that a stranger to the consideration cannot enforce a promise. For at least two centuries, the "law" on this subject had been in confusion, a fact that did not prevent thousands of dogmatic statements of the law.

How long has it been since leading jurists have ceased saying that at law a chose in action (a contract right) is not assignable, that an assignment creates merely a power of attorney authorizing the assignee to sue in the name of the assignor? The right was a personal relation, indissolubly attached to the assignor. Probably a million such statements, dogmatically asserted, can be found in the treatises and law reports throughout two centuries.

What a struggle it has taken, and is still taking to get rid of the doctrine that a release of one of two or more joint obligors discharges them all.

In *Pocius v. Halvorsen*, 30 Ill. 2d 73, 76, 195 N.E.2d 137, 140 (1964), the court emphasized:

The intention of the parties, it is true, must govern; but the experience of human affairs teaches courts that this intention is not to be sought merely in the apparent meaning of the language used, but this language may be enlarged or limited by reference to the circumstances surrounding the parties and the object they evidently had in view.

Here, the parties were in the relation of attorney and client. The court considered the interpretation that had been placed upon the contract by the parties, although the payments made by the client prior to termination of the litigation did not tend wholly in her favor.

Must the consideration for a promise still be a detriment to the promisee? Is it still true that action in reliance on a promise cannot impart validity to what before was void?

For centuries a bilateral contract was unknown to the courts (although ignorant individuals probably performed them). And after they were recognized as enforceable, it took two centuries more to get rid of the doctrine that such exchanged promises were mutually independent, so that each one could be enforced even though the other had been repudiated. To many courts, this was just and right. Should not a man who has made a binding promise keep to his word and be compelled to do so? He had exactly the same remedy against the other party, who was likewise bound. Perfect equality, was it not?

I shall continue to do my best to clarify the process and the law of interpretation, of both words and acts as symbols of expression; to demonstrate that no man can determine the meaning of written words by merely glueing his eyes within the four corners of a square paper; to convince that it is men who give meanings to words and that words in themselves have no meaning; and to demonstrate that when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience.

At no place and at no time have I asserted that there is no difference between language that is plain and clear and language that is ambiguous, or that a judge should give no weight to the extrinsic evidence of his own education and experience. In view of the common efforts of attorneys at law to base interpretation on irrelevant and incredible extrinsic evidence and upon mere forensic assertion in place of any evidence, the extrinsic evidence of the judge's own education and experience (of which he necessarily takes judicial notice) may well be decisive. But in every case he should realize that this evidence, known only to himself, may not be the best evidence; that he must hold it at every point subject to correction; and that the purpose of all the evidence is the ascertainment of the intention of the parties (*their* meaning), and not the meaning that the written words convey to himself or to any third persons, few or many, reasonably intelligent or otherwise.

PROCESS OF INTERPRETATION—OBJECTIVE MEANINGS

The case of *Frigaliment Importing Co. v. B.N.S. Intl Sales Corp.*,³ is well suited for use in illustrating the process of interpretation. A contract

³ 190 F. Supp. 116 (S.D.N.Y. 1960).

for the sale of goods by the defendant, a New York corporation, to the plaintiff, a Swiss corporation, was confirmed in the following form:

US Fresh Frozen Chicken, Grade A, Government Inspected, Eviscerated
2½-3 lbs. and 1½-2 lbs, each, all chickens individually wrapped in cryovac
packed in secured fiber cartons or wooden boxes, suitable for export

75,000 lbs. 2½-3 lbs.	at \$33.00
25,000 lbs. 1½-2 lbs.	at \$36.50

per 100 lbs. FAS New York.

Scheduled May 10, 1957, pursuant to instructions from Penson & Co.,
New York.⁴

When the initial shipment arrived in Switzerland, on May 28, the plaintiff found that the 2½-3 lbs. birds were not young chicken suitable for broiling or frying, but stewing chicken, or fowl. The plaintiff sued for damages, asserting that the delivery of stewing chicken or fowl was a breach. New York law was applicable.⁵ Was this an ambiguous contract, or a valid contract at all? How is the court to determine?

The court said, "The issue is, what is chicken?" Also, "Since the word 'chicken' standing alone is ambiguous, I turn first to see whether the contract itself offers any aid to its interpretation."⁶ The word chicken did not stand alone; and whatever meanings (if any) it might have standing alone, do not determine the issue. The word as used by the parties is in a context of other words, a context of negotiations by cable and by word of mouth in New York, a context of variable usages by other people (in their own variable contexts).⁷

⁴ *Id.* at 117.

⁵ No problem in the conflict of laws was actually involved in this case. The usages of the word chicken, in various contexts, that were introduced in evidence were chiefly those of people doing business in New York (the place where the contract was made); but usage in the Department of Agriculture was also considered. Usage elsewhere, even in Switzerland, would be admissible against the defendant if it is shown that it knew of the usage and knew or had reason to know that the plaintiff understood the words of the contract in accordance with that usage. The fact that the plaintiff purchased the chicken for shipment abroad and that this was known by the defendant was a relevant factor in the case; but the plaintiff failed to establish the existence of a foreign usage that the defendant had reason to know, or that the plaintiff in fact relied on. See Ehrenzweig, *Conflict of Laws* § 186, at 494 nn.8 & 9 (1959).

⁶ *Frigalim Importing Co. v. B.N.S. Int'l Sales Corp.*, *supra* note 3, at 118.

⁷ In *Ratkovich v. Randell Homes, Inc.*, 403 Pa. 63, 169 A.2d 65 (1961), a covenant in a deed provided that "not more than one house exclusive of a private garage shall be erected on each lot." The court held that this did not prohibit the erection of a "duplex and/or four-unit multi-family house." Restrictions on the use of land are narrowly construed. The court said that "the meaning and scope attributable to the word 'house' often depends upon the context in which it is used." The court distinguished *Bennett v. Lane Homes, Inc.*, 369 Pa. 509, 87 A.2d 273 (1957) where the covenant provided that "not more than one house, same to be detached or semi-detached, and private garage to be used in connection therewith, shall be erected on each lot"; and the court held that the provision meant "a single private dwelling," excluding a "3-story, 34-unit apartment house." *Id.* at 510, 87 A.2d at 275. Meaning of a word always depends on context. For an instructive case on the interpretation of words see *Astwood v. Rodman*, 355 S.W.2d 206 (Tex. Civ. App. 1962). Cf. *Stewart Oil Co. v. Sohio Petroleum Co.*, 202 F. Supp. 952 (D.C. Ill. 1962), *aff'd*, 315 F.2d 759 (6th Cir. 1963) cert. denied, 375 U.S. 828 (1964). See *Sturtevant v. Hart*, 327 F.2d 695 (6th Cir. 1964); *East Side Mercury Sales, Inc. v. Charlie Stuart*,

The court said:

Assuming that both parties were acting in good faith, the case nicely illustrates Holmes' remark that the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having *meant* the same thing but on their having *said* the same thing. [The Path of the Law, in Collected Legal Papers p. 178.] I have concluded that plaintiff has not sustained its burden of persuasion that the contract used "chicken" in the narrower sense.⁸

Observe, first, that in this case, regarding the writing as an integration, there were not two sets of external signs. The plaintiff made no objection to the defendant's written confirmation; and the court does not suggest that the contract comprised any different set of words. It is this one set of words that constitutes the contract that the court is interpreting. The court must, indeed, interpret this set of words in the light of surrounding circumstances, the oral and cabled communications; the usages of other persons; but these collateral factors do not constitute any part of the contract that is being interpreted.

Secondly, since the contract, the subject matter of interpretation, consisted of only one set of written words, they were the words of both parties alike. These parties *said* the same thing. Holmes' statement, if it is interpreted in accordance with his own theory (i.e., interpreting it objectively, by what he *said* and not by what he *meant*), lends no support to the court's decision. It should not be sacrilege to suggest that there is an ambiguity in Holmes' use of the word *said*; in using it, Holmes may have put into it the meaning *the thought that the words convey to others*, but not *the words themselves* and not *the thought that the user intended to convey*. In this case, the parties expressed their thoughts by the same identical set of words; but the thoughts that they intended to convey were not identical. Nor were the thoughts (the meanings) that this set of words would convey to various third persons identical.

Thirdly, it was not the contract that used the word *chicken*, in any sense, narrower or broader. It is only men who use words as a means of conveying thoughts. The two parties adopted the words that they put into the present written instrument (the "integration"), including the word *chicken*. Each of them used these words to convey a meaning—*his* meaning. Assuming good faith (as the court does), the meanings that they gave to these words were not identical; there was no meeting of the

Inc., 134 Ind. App. 538, 179 N.E.2d 204 (1962); Mack Oil Co. v. Laurence, 389 P.2d 955 (Okla. 1964).

⁸ Frigalment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y. 1960).

minds. The words that they said (in writing) were identical; but these words did not say (Holmes' word) the same thoughts to each other. (Note the double usage of the verb say.)

Fourthly, if the identical words did not convey the same thoughts, were the parties legally bound by a valid contract? We have all been made aware, largely by the work of Holmes himself, that a party may be bound by a valid contract in accordance with an interpretation that was not his own. This is true of transactions conducted orally, in which the parties do not use identical words, or by a series of letters not identically worded. It is true also of cases like the present one, in which the parties have adopted a single set of words, now commonly described as an integration. If the parties, in good faith, understood the words of this integration differently, under what circumstances and for what reasons will the court penalize the defendant for not performing in accordance with the plaintiff's different interpretation? It is only when the facts are such that the court believes that the defendant is in some way at fault in not giving the words the same interpretation as the plaintiff did. This is expressed in various ways: the defendant was negligent, he had reason to know, he should have known. Then there is always the possibility that *he did know* and that his present assertions are not in good faith. Instead of expressing the reason in terms of fault, it may be explained on the ground that the general welfare requires the security of expectations reasonably induced by the defendant's assent to the words used; but this merely states the matter in another form. It passes the buck to a determination of what is reasonable. It must be borne in mind that both parties may have been negligent or that neither may have been, that both may have been equally reasonable or unreasonable; that the plaintiff may have had as much "reason to know" as the defendant had. In making the determination, the court is judging the parties and their use of words by the understandings and usages of other men, at the same time making some indeterminate allowance for the special mentality, experience, and education of the contracting parties themselves.

In determining whether the defendant was legally bound to deliver only young and tender birds, sometimes described as broilers and fryers, and not more mature and relatively tough hens and roosters that have to be stewed, the court was not interpreting the word chicken, standing alone; but rather in a context of other words in the integration, in the broader context of relevant communications, and the still broader context of the linguistic usages of other men. Dictionary usage could not be decisive, for "Dictionaries give both meanings, as well as some others not relevant here." Moreover, no dictionary interprets the word chicken in its present

context. The court very properly said: "I turn first to see whether the contract itself [the "integration" as a whole] offers any aid to its interpretation."⁹

The fifty or more words of the integration itself did not make the interpretation plain and unambiguous to the judge. It might have seemed otherwise to the present writer if he had been the judge. In his own linguistic experience and education, he had heard of broilers and fryers, and also of fowl; but to him the word chickens included them all. For ten years on a Kansas farm it had been a regular job to feed the chickens, with no suggestion that the old hens and roosters were to be excluded. In the campaign of 1928, the country was informed that one of the issues was "a chicken in every pot," obviously a bird for stewing. But in spite of his limited knowledge of other people's usages, he would have admitted extrinsic evidence, as the court did in this case. The integration itself contained certain descriptive elements: The birds sold must be US, Grade A, not over 3 lbs. each, and Government Inspected; but no one asserted that these terms segregated the young from the old or the tender from the tough. Evidence was admitted to show that the Department of Agriculture inspected chickens, including thereunder six classes beginning with broiler and ending with cock or old rooster, expressly including hen or stewing chicken or fowl. But the integration made no distinct reference to the Department's classification. Other extrinsic evidence included trade usages in New York, which the plaintiff testified used chicken to include only broilers and fryers. But the defendant testified that it had only that year entered the poultry trade; and the court says it is quite plain that defendant's belief [as to trade usage] was to the contrary. A New York buyer for the Swiss trade testified that on chicken I would definitely understand a broiler, but also that he was careful to say broiler when he intended to exclude fowl. A dealer who had supplied the defendant with some of the birds sold to the plaintiff testified that chicken in the poultry industry meant "the male species . . . that could be a broiler, a fryer or a roaster" but not a "stewing chicken," and that he had induced the defendant to use the term "stewing chicken" in its confirmation with him. The price paid to this dealer by the defendant was 30¢ per lb. Cablegrams, both antecedent and subsequent to the closing of the deal, were admitted. These were mostly in German; but they used the English word chicken. Plaintiff testified that the word was used because it understood it to mean broilers; also, that in German (well understood by defendant) chicken would be translated as "Brathuhn"

⁹ Id. at 118.

and not by the more general term "Huhn." There was other extrinsic testimony.

Other terms used in the opinion, besides the word "chicken," might well be regarded as "ambiguous." What is the "poultry trade" and what witnesses were competent to speak for the usages of the persons engaged therein? The word "broiler" has its uncertain aspects. Was the manager of an "eviscerating" company, who testified that to him "chicken" meant "anything except a goose, a turkey, or a duck," engaged in the "poultry trade"? Does the term include both domestic and foreign transactions, both wholesale and retail? The plaintiff could have got much support from housewives and cooks, American as well as Swiss, who expect and actually receive a "broiler" when they order a "chicken" at a "supermarket." Would their testimony be admissible? And yet if they ordered a "5 lb. chicken," they would expect and receive a "fowl." What line in weight or age distinguishes a "broiler" from a "fowl"?

Finally the court said:

When all the evidence is reviewed it is clear that defendant believed it could comply with the contract by delivering stewing chicken in the 2½-3 lbs. size. Defendant's subjective intent would not be significant if this did not coincide with *an objective* meaning of "chicken." Here it did coincide with *one of the dictionary meanings*, with the definition in the Department of Agriculture Regulations to which the contract made at least *oblique* reference, with at least *some usage* in the trade, with the *realities* of the market, and with what plaintiff's spokesman had *said*. Plaintiff asserts it to be equally plain that plaintiff's own subjective intent was to obtain broilers and fryers; the only evidence against this is the material as to market prices and this may not have been sufficiently brought home. In any event it is unnecessary to determine that issue. For plaintiff has the burden of showing that "chicken" was used in the narrower rather than the broader sense, and this it has not sustained.¹⁰

From this it appears that chicken has *more than one* objective meaning; that all the meanings in any dictionary are objective meanings; that the meaning of the "Department" of Agriculture (if it has one) is an objective meaning; that meanings given by various persons in the poultry trade are objective meanings; that the subjective meaning of the defendant is significant if it coincides with an objective meaning; and that the plaintiff's subjective meaning does not have to be determined (even though it too did coincide with an objective meaning) only because it had the burden of proving that the word was used to mean broilers only. The court does not say by *whom* the word was used; but the words of the integration were the words of both parties. The issue before the court was as to how it was used *by these two parties*, in this particular

¹⁰ Id. at 121. [Emphasis added.]

context, in this specific case. No exception is here taken to the court's decision; but if the parties had been reversed and the seller had been suing for damages or for the purchase price, the burden of proof that the word was used in the broader sense would have been on the seller. The plaintiff (purchaser) lost this case, not because the word has *one objective meaning* by which the parties were bound, but because it failed to show that the defendant either "knew" or had reason to know that the plaintiff intended to buy broilers only and assented to the words of the integration with the understanding that chicken excluded birds that would have to be stewed.

The opinion of the court and a careful analysis of the facts and the evidence both lead to the conclusion that chicken has no single objective meaning, and that any meaning is an objective meaning if it is given to the word in any context by any person other than the two contracting parties.¹¹

INTERPRETATION; CONTRADICTION; SUBSTITUTION;
NULLIFICATION; REFORMATION

The interpretation of a written contract is the process of determining the thoughts that the users of the words therein intended to convey to

¹¹ *Dadourian Export Corp. v. United States*, 291 F.2d 178 (2d Cir. 1961); *Molero v. California Co.*, 145 So. 2d 602 (La. App. 1962). *Hondo Oil & Gas Co. v. Pan American Petroleum Corp.*, 73 N.M. 241, 387 P.2d 342 (1963) involved an exploration and operating contract providing for the drilling of a test well and a series of other wells by the operator, and under stated circumstances for the retention by the operator of a specified acreage adjacent to each well. Both parties asserted that the words were unambiguous; but the operator contended that it had a right to the specified acreage around every completed well, whether a dry hole or a producing well, and the other party contended that the operator's right to such acreage applied only to producing wells. The court interpreted the words of the contract, very reasonably, in harmony with the operator's contention. After making the statement that if "a contract is clear and unambiguous the intent of the parties must be ascertained from the language and terms of the agreement," and also that "we are confined to the language used by the parties," the court proceeded at great length to interpret the written language and terms, as is necessary in all cases. In this process, it intelligently considered the use of the term "well" in all the other parts of the long and complex document; but it did not confine itself to a scrutiny of that document within its own four corners. It studied the meanings printed in Webster's New International Dictionary and in many other court opinions that interpreted the word well as used by other parties in similar but far from identical contexts. It did not confine itself to the clear and unambiguous meaning that the word might convey to the court on the basis of its own linguistic experience and education. It had before it the correspondence of the parties over a period of years, as to which it said: "We are fortified in our conclusion, if indeed bolstering were needed, by the fact that the parties themselves so construed the contract for more than four years, and until the value of the property was much increased because of new discoveries in the neighborhood." *Id.* at 243, 387 P.2d at 349. The word well is a common and ordinary word but like chicken it is used with various meanings, and it has not one true and objective meaning. The court, in searching for the just and reasonable meaning, was not making a contract for the parties; it was considering extrinsic (as well as intrinsic) relevant evidence in the interpretation of the language and terms used by the parties. Apparently, there was no evidence offered as to antecedent negotiations; but the court discussed the nature of the transaction and of the contractual relations of the parties.

See also *Deloro Smelting & Ref. Co. v. United States*, 317 F.2d 382 (Ct. Cl. 1963); *Needles v. Kansas City*, 371 S.W.2d 300 (Mo. 1963).

each other. [A court is never justified in altering or perverting the language in order to produce a result that it regards as more just and equitable.] Extrinsic evidence is admissible to aid in the process of interpretation as above defined, to determine the meaning of language that the parties actually gave to it, to expound and enforce the contract that the parties actually intended to make. Such evidence is never relevant or admissible when offered for the purpose of establishing another meaning or intention and to expound and enforce a different contract. Contradiction, deletion, substitution: these are not interpretation.

[All rules of interpretation, whether stated by a court or by a writer, are mere aids to the court, the lawyer, and the layman, in ascertaining and enforcing the intention of the parties. No supposed rule should be given any respect when it fails of that purpose. No rule, however carefully drawn, is absolute; and many a stated rule has been so bad that it defeats its own purpose. The courts are always correct when they say that they must not by interpretation alter or pervert the meaning and intention of the parties, thus making a new and different contract.]

The first sentence of section 573 of my treatise provides as follows: "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing."¹²

Whether the parties have, or have not, assented to such a writing is a question of fact; and the meaning and intention that the parties used the written words to convey to each other is also a question of fact, although often it is one that is to be resolved by the court and not by a jury.

When such an integration has in fact been assented to (a matter that in multitudes of cases is not in dispute), it is the language of that integration that is the subject of Interpretation; words are not to be deleted and other words are not to be added. It is the meaning that the parties intended to convey by these specific words that is to be determined. Since all words have been used in all kinds of contexts to convey varying and inconsistent meanings, they must in any case be examined and weighed in the light of the persons and objects and circumstances and purposes and usages of the time and place. This is the process of interpretation.

It is sometimes said, in a case in which the written words seem plain and clear and unambiguous, that the words are not subject to interpretation or construction. One who makes this statement has of necessity

¹² 3 Corbin, *supra* note 1, § 573, at 357.

already given the words an interpretation—the one that is to him plain and clear; and in making the statement he is asserting that any different interpretation is “perverted” and untrue. In most such cases, his interpretation may well be in full harmony with the intention of the parties. It is always just and correct to say that the words are not subject to perverted or strained interpretation or construction. This is equally true whether the words are ambiguous or unambiguous.

In many cases, the process may not be at all difficult. Viewed as a whole and in the particular and undisputed context, the language may at first sight convey only one meaning and intention, either to the judge, the jury, or to any other reader. When such is the case, the words will be described as plain and clear and unambiguous. We must, indeed, be wary of this first impression, since language conceals many a pitfall. But an interpretation is not to be scorned merely because it seems obvious; words are, indeed, not to be condemned because they seem plain and clear and unambiguous. Clarity of expression is a merit—a somewhat unusual one. There are cases in which the words of the writing are ambiguous to nobody; the contracting parties may themselves not even assert different interpretations. Their dispute may be wholly restricted to the legal effects and operation of the words. In other cases, they may violently assert different interpretations; and their attorneys may argue with eloquent and wearisome repetition for an interpretation favorable to their clients, without producing any relevant or credible evidence in support, intrinsic or extrinsic, either within the four corners of the writing or in the word usages of the time and place.

Consider the following statement:

Without a doubt, in supporting the interests of their clients, counsel often urge upon the court interpretations of the language of a contract that are far removed from common and ordinary usage, without producing any substantial evidence that the other party to the transaction gave the unusual meaning to the language or had any reason to suppose that the first party did so. In such cases the harassed judge is justified in saying that the words are too plain and clear to justify such an interpretation.¹³

In cases like these, the words of the contract stand as written and will be enforced as interpreted, unless it is proved that they were included by mistake or accident or were assented to by reason of fraud or duress. But the harassed judge is not justified in saying that when the written words are (or seem) unambiguous relevant extrinsic evidence of the background, surrounding circumstances, and negotiations is inadmissible.

Extrinsic evidence (parol or otherwise) may be offered by a litigant for three quite distinct purposes:

¹³ 3 Corbin, *supra* note 1, § 542, at 112.

(1) To convince the court that the written words were adopted and assented to with a specific meaning that is favorable to himself. This is a process of *interpretation of the written words*.

(2) To convince the court that the written words were not assented to as the complete and exclusive integration of the terms actually agreed on. This is not a process of interpretation of the written words.

(3) To convince the court that the parties had mutually agreed upon specific terms, had tried to express them in the written words and had failed. Here the issue is not one as to interpretation of the written words. It may not even be argued that they are ambiguous. This is the case that is commonly described as one involving fraud, accident, or mistake.

The issues before the court in these three classes are not identical; but they are related and they are likely to be mixed together in the minds of the lawyers and in the briefs and opinions. Relevant extrinsic evidence is admissible in all three classes; but it must be relevant to the specific issue.

In cases of the third class, the court is very likely to say that the written words are unambiguous, and that extrinsic evidence is not admissible in aid of their interpretation. The statement is unsafe and is likely to be misleading, for the reason that it may be erroneously supposed to be applicable in cases within the first two classes. If the facts asserted are such that the case is within the third class, it is extremely important for the lawyers to assert, in express terms, the existence of fraud, accident, or mistake. The issue to which the evidence they are offering is directed and is relevant is neither one of interpretation nor of integration. But the evidence should not be excluded, and proper relief denied, merely because the issue has not been clearly defined. If the offered evidence is relevant and credible on the issue of fraud or mistake, modern rules of procedure require that relief shall not be denied merely because those terms are not used. At the very least, an opportunity to amend and to clarify the issue by adopting those terms should be allowed. If the offered evidence is relevant and credible on the issue of either interpretation or integration, it should never be excluded, for the reason that, whatever are the written words, those issues are always debatable.

In several recent cases, now to be analyzed, the words of the written contract were not asserted to be ambiguous; and yet extrinsic evidence was offered to induce the court to give a desired legal operation to the contract by disregarding the written words—in effect deleting them. In refusing judgment, the court said that the offered evidence was inadmissible because the words were unambiguous. The statement was true; but, in

reality, the evidence was not offered to establish an interpretation (a meaning) of the words different from the obvious one, but to produce a legal effect as if they were not there and other words were in their place. The character of the issue was confused; and the weight of the offered evidence was very doubtful on any issue.

In *Imbach v. Schultz*,¹⁴ the plaintiff broker found a purchaser for the defendant's property; and a written contract on a printed form called a "Deposit Receipt" was executed by the parties. This instrument had all the aspects of a complete integration. On its reverse side, in print, were words of contract between the defendant and the broker. So far as appears, the broker supplied the printed form. These words were "I agree to sell the property described on the reverse side hereof on the terms and conditions therein stated and agree to pay the agent named therein as commission *on closing* the sum of \$18,500, or one-half the deposit in case same is forfeited by purchaser."¹⁵ All of this was in print, except that the \$18,500" was filled in by pen and ink and the two words "on closing" were interlined in ink by the defendant's attorney. The purchaser made a deposit of \$15,000, to be applied on the price, or, in case of failure to complete the purchase, to be "retained by defendants at their option as consideration for the execution of the agreement." The purchaser failed to complete the purchase; and the defendant retained the \$15,000. The broker brought this suit for one-half the deposit. In defense the defendant vendor testified that, before signing, his own attorney told him (in the plaintiff's presence) that the agreement could not be signed in the printed form and had to be corrected because no commission was to be paid unless the deal was closed; and that thereupon the words on closing were interlined, as stated above. The broker denied hearing such a statement; but the trial court rendered judgment against the broker. The appellate division reversed this, two judges to one. Their reversal was vacated (under California practice); and the supreme court unanimously reversed the trial court, holding that the defendant's oral testimony was inadmissible. The court says that the defendant did not ask for reformation, did not plead mistake, and did not rely on the existence of any special usage (habitual or customary practice) of any group, or even of the parties themselves, with respect to the words used. On these facts, the attorney's statement to the defendant does not purport to be an interpretation of the printed words; and the defendant did not testify that his attorney's statement caused him to give any interpretation to the printed words. In this case the parol evidence rule did not exclude

¹⁴ 58 Cal. 2d 858, 377 P.2d 272, 27 Cal. Rptr. 160 (1962).

¹⁵ *Id.* at 859, 377 P.2d at 274, 27 Cal. Rptr. at 162.

evidence to aid in the interpretation of words, because no evidence of anybody's interpretation of the words of the contract was introduced. If the attorney's statement to the defendant was not heard by the plaintiff, it was wholly immaterial. If it was heard, it would be relevant in an action for reformation or as part of a defense in this action without reformation, although standing alone it would not be sufficient to take the case to a jury. The attorney's statement may have been intended by him and understood by the defendant as referring solely to the stated commission of \$18,500; and the interlineation of the words on closing was so made as to apply to nothing else. Two separate amounts were promised, payable on separate and inconsistent conditions: \$18,500 on closing; \$7,500 on failure to close. The defendant's contention was not made as an interpretation of the \$7,500 provision; instead, it totally deletes that provision. If the defendant's attorney had understood that nothing was to be paid on failure to close, he should have drawn a line through that provision. If the broker knew that such was the defendant's understanding, he had no right to the \$7,500. If the defendant had asserted that he had never assented to the \$7,500 provision and did not know that it existed, that the instrument was the broker's printed form, and that the contract was almost one of adhesion, his defense might have had a ghost of a chance; but it would have nothing to do with "interpretation" of the printed words on the reverse side. Those words were not "ambiguous" to anybody; the broker and the defendant gave them exactly the same meaning. The only question was: Were they in fact a part of the terms agreed on? On that issue, extrinsic evidence was admissible and necessary.¹⁶

In *Cotiga Dev. Co. v. United Fuel Gas Co.*,¹⁷ a lease of oil and gas property with producing wells, made in 1929, provided that the lessee should pay for one-eighth of the gas produced "at the rate received by lessee for such gas," but not less than 12¢ per mcf. The defendant succeeded the original lessee by assignment. The lessor brought this suit, more than twenty-five years later, for damages caused by the lessee's failure to produce and market the gas with due diligence. The trial court found that the lessee had failed to produce and market a stated number of cubic feet, and that all the gas was still in place and not lost. In measuring the damages, the question arose as to the contract price at

¹⁶ This case should be considered along with the Steven case stated in text accompanying note 20 infra, decided just five days later. In the present case, the court does not suggest that the purchaser had a right to the restitution of any part of the \$15,000 deposit; but it says to "compare *Caplan v. Schroeder*, 56 Cal. 2d 515, 518-19, 364 P.2d 321, 15 Cal. Rptr. 145 (1961)."

¹⁷ 128 S.E.2d 626 (W. Va. 1962).

which the unproduced gas should have been paid for. The defendant argued that this price was the market price at the wellhead, as evidenced by the fact that for twenty-five years the lessor had accepted that price without protest, and that it was concluded by its own practical interpretation. The lessor insisted, and the court held, that the price was conclusively established by the express words "at the rate received by the lessee for such gas," and that the evidence of practical construction for twenty-five years was not admissible. The decision is sound since the action of the parties in paying and receiving the market price at the wellhead was not offered for the purpose of determining their interpretation of the phrase "at the rate received by the lessee." The lessee received nothing at the wellhead except the gas, as the lessor knew. There was not even an assertion in argument that, when the contract was made, the parties understood and intended the quoted phrase to mean the market price at the wellhead. That would, indeed, have been the contract price, if the lessee had sold the gas at that point. The extrinsic evidence as to the actual payment and receipt would be relevant on the issue of a substituted contract or an accord and satisfaction; but the lessor raised no such issue. Observe that the lessee had not sold the unproduced gas at any price; there is no "rate received for such gas," either at the wellhead or at any of the many points of distribution by the Fuel Company. The lessor also offered evidence that at the time the contract was made "the universal custom of the natural gas industry in the Appalachian region was to base payments on all open end royalty clauses in gas leases on the wellhead price of gas."¹⁸ This evidence of universal custom was evidence of a custom of *payment*; it was not offered as evidence that anybody used "rate received" to mean "wellhead price," or that either the lessor or the lessee understood and intended the quoted phrase to mean "market price at the wellhead." The custom would be evidential as to the contracts that other parties then made; it would not be evidential that other parties put into their contracts the phrase "at the rate received" meaning "wellhead price." It would have a little evidential weight that the quoted phrase was put into this contract by mistake or fraud; but the lessor raised no such issue. Therefore, the offered evidence was not inadmissible because the words of the contract were unambiguous; it was inadmissible because it was not relevant on the issue of interpretation. Had the usage and custom been a usage of the phrase "at the rate received," it would have been relevant and admissible, but would probably have been too weak for belief. The fact that it was the universal custom of other lessees

¹⁸ *Id.* at 634.

to pay no more than market price at the wellhead would be relevant but not decisive on the issue of whether the original lessee ever actually assented to the written words, but not relevant on the issue of their interpretation. The probability is that the lessor in 1929 obtained a somewhat more favorable price for its one-eighth royalty gas than did the other landowners. That the fuel company knew that it was more favorable is indicated by the very fact that it took less gas from the lessor's wells than from other wells.¹⁹

Steven v. Fid. & Cas. Co.,²⁰ illustrates how a contract may be made for the parties, both by supplying non-existent terms and by a strained interpretation of express words to discover the intention of a party who never saw them. The decision was handed down just five days after *Imbach*, above. The plaintiff's husband, just before boarding a plane, purchased an accident insurance policy from a vending machine at the airport. He filled a few blanks, signed on a dotted line, paid the premium, and mailed the policy to the beneficiary as directed. He did not read the policy of 2,000 words and had no reasonable chance to do so. He gave no interpretation to the written words. He was killed when riding on a local and unscheduled plane between Terre Haute and Chicago, obtained at his request by the carrier (not the insurer) when his regularly scheduled plane was delayed. The defendant asserts that this risk was plainly not within the coverage stated in the policy. The court said:

In this type of standardized contract, sold by a vending machine, the insured may reasonably expect coverage for the whole trip which he inserted in the policy, including reasonable substituted transportation necessitated by emergency. If the insurer did not propose such coverage, it should have plainly and clearly brought to the attention of the purchaser such limitation of liability.²¹

If this is true, it is immaterial whether the limitations of liability contained in the 2,000 printed words are ambiguous or unambiguous. On grounds of public policy, the terms of the contract (the extent of the "coverage") are determined by the purchaser's reasonable expectations, the normal expectation—not by his reasonable or normal interpretation of the printed terms; he did not see them or interpret them, and the insurer did not expect him to do so.

Here, the court was making a contract for the parties with a vengeance. How the court discovered the terms of coverage that would accord with reasonable expectations does not appear. Were they discovered by

¹⁹ For a more complete statement see 3 Corbin, *supra* note 1, § 558, at 249, 261 & n.7.

²⁰ 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

²¹ *Id.* at 868-69, 377 P.2d at 288, 27 Cal. Rptr. at 176.

judicial notice? There was no extrinsic evidence of the expectations of Mr. Steven (the insured). How were the normal expectations of other passengers who deal with vending machines discovered? The court suggests expectations in the case of an emergency; the only emergency in this case was the delay of the scheduled plane and the missing of a business appointment. In case of emergency or delay, a passenger no doubt normally expects the carrier to get him to his destination, as it was paid to do. Does he also normally expect his insurance company to cover the unexpected risk? The court says that "The risk of injury on the substitute conveyance *in many cases* will be *no greater* than the risk on the scheduled flight."²² Would insurance actuaries and the Civil Aeronautics Board agree with this? There was some outcry at the Government's use of "Non-Skeds" when a plane loaded with soldiers crashed. The insurer has no recourse, whether its risk was increased only a little or a lot. Was the extent of the increase in this case evidenced to some extent by the fact that Turner, the owner of the crashed taxi-plane, agreed to transport the four delayed passengers to Chicago for \$36 each (\$144), but if they would find him two more passengers he would take the six for \$21 each (\$126)? They found two more; and the six died.

Thus far, the court was not making a contract for the beneficiary by a process of interpretation of the written policy, based on evidence, extrinsic or otherwise. The policy, obtained from a vending machine, was a contract of adhesion par excellence; and the terms of coverage were supplied by the court. For some reason, however, the court felt it necessary to examine the 2,000 words of the unread policy, and to bolster its decision by a process of interpretation of its words. The insurer had taken great pains to limit its risk to that involved in transportation by a "Scheduled Air Carrier" duly licensed, with one specific addition: the risk of injury while riding in a land conveyance provided by the carrier. The court finds the insurer's effort ambiguous, thus making applicable the rule of interpretation against the insurer, and making extrinsic evidence admissible to prove the intent of the parties. The words of coverage are thought ambiguous because they expressly included the risk of *land* transport, but did not expressly exclude the risk of unscheduled air transport. The insurer may not invoke the maxim *expressio unius est exclusio alterius*, because to invoke it proves ambiguity, whereupon the rule of interpretation *contra proferentem* overpowers the maxim. Moreover, this maxim is a legalistic concept that would not occur to the mind of Mr. Steven when he boarded the Turner plane at Terre

²² Id. at 870, 377 P.2d at 289, 27 Cal. Rptr. at 177.

Haute. "The policy did not clearly notify Mr. Steven that *in spite of his expectation and in view of the intention of the parties in entering into the contract*, the coverage did not extend to a substitute flight in the event of emergency."²³ The author joins the three dissenting judges, being unconvinced as to either expectation or intention. The court was justified in holding that the insured's rights were not limited by printed provisions that he had no opportunity to read; but the extension of his coverage went too far. Further, the insurer might, by express words in the policy, include a coverage far beyond what the insured expected or had any reason to expect; but in this case it did not do so, the attempted interpretation being strained and unconvincing.²⁴

In *Birchcrest Bldg. Co. v. Plaskove*,²⁵ the parties were interested in the development of a tract of land, the plaintiff being a builder. After a series of transactions (in which each party had put in sums of money, and in which both parties were in default and development at a stalemate), the defendant then being the sole title holder of the land, the parties executed a written contract whereby the defendant placed in escrow a deed to the plaintiff with instructions to deliver it to the plaintiff on payment of \$22,500 within thirty days. The contract expressly provided that in consideration of the deed so placed in escrow the plaintiff "agrees to pay" the \$22,500 within thirty days. It further provided as follows: "This agreement shall supersede and rescind all former written or oral contracts and land contracts entered into between the parties hereto. Each of the parties hereto do hereby release and discharge each other from any and all claims . . . under all contracts whatsoever. . . ." ²⁶ The plaintiff failed to pay as agreed and to close the escrow for some six months, whereupon the defendant sold the land to other parties for \$58,000. The plaintiff at once claimed a share of this money by virtue of agreements and understandings prior to the written contract, and brought this suit for reformation and an accounting. Observe: (1) This was not a suit to enforce the written contract, it is a suit to set it aside by the process called reformation. (2) The parties do not assert adverse interpretations of the written words, and such evidence as the plaintiff may have introduced was not offered for the interpretation of the written words. (3) The plaintiff does not assert that it did not assent to and execute the written contract. (4) The plaintiff asserts that the contract was an option contract, and that, by virtue of antecedent understandings, its prior rights were not

²³ Id. at 872, 377 P.2d at 290, 27 Cal. Rptr. at 178. [Emphasis added.]

²⁴ See the similar case of *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

²⁵ 369 Mich. 631, 120 N.W.2d 819 (1963).

²⁶ Id. at 634, 120 N.W.2d at 821.

to be superseded and discharged if it chose not to exercise its option. (5) In fact, the contract was a bilateral contract by the defendant to sell his interest in the property and by the plaintiff to buy it and to pay \$22,500 for it. The court reviews in detail the antecedent agreements and negotiations of the parties, informs us that the written contract was drafted by the defendant's lawyer, and states that the parties were both experienced in business transactions like the present one. The plaintiff regarded the writing as an option contract, evidently overlooking its own words "agrees to pay"; this may have been due to the fact that the defendant's deed was put in escrow for delivery on condition. The court itself describes the contract as an option contract. This is immaterial if the parties effectively agreed that it should supersede and discharge all previous claims. But it tends to support a contention that the parties intended to execute a contract by which antecedent claims would be superseded and discharged by the exercise of the option and consummation of the sale, instead of by the mere making of the option contract. That this was their actual intention finds further support in a bit of relevant evidence reported thus: "Plaintiff contends it demanded elimination of the forfeiture clause contained in the original draft of exhibit 4 [the written contract] prepared by defendant's attorney, and that said forfeiture clause was accordingly eliminated."²⁷ How much weight was given to this bit of evidence by the trial court does not appear; but it certainly is not irrelevant or inadmissible in a suit for reformation. It was not offered as an interpretation of the written words, but to show that the written words did not express the agreement that the parties intended to make. Unless evidence of this kind for this purpose is admitted and believed, the remedy called reformation should never be granted. And, under modern procedure, the admissibility of the evidence does not depend on an express demand for reformation or for any other specific remedy. The court affirmed the trial court's refusal of reformation on the ground that the plaintiff's contention was inconsistent with the written contract. The court said: "This Court has repeatedly held that we will make no attempt to ascertain the actual mental processes of the parties in construing a particular contract. We have held that *the law presumes that the parties understand the import of the contract and had the intention manifested by its terms.*"²⁸ Courts have, indeed, said similar things many times. In 1478, Chief Justice Brian said: "the devil himself does not know the thought of man."²⁹ And yet, in almost every

²⁷ *Id.* at 635, 120 N.W.2d at 822.

²⁸ *Id.* at 637, 120 N.W.2d at 823. [Emphasis in original.]

²⁹ Y.B. Pasch. 17 Edw. 4, 2 (1478).

case, the court makes an effort to ascertain the intention of the parties; and intention is a mental process. Like others, the Michigan courts have done this, in cases in which the parties assert different meanings for specific written words (the problem then being one of true interpretation); in cases where a party asserts that the written words are not a complete and accurate integration; and in cases like the present one where a party asserts that the written words however clear and unambiguous, do not manifest correctly the actual understanding and agreement of the parties. In the latter two classes, the problem is not one of "interpretation" of the written words. Of course, the plaintiff's contention in the present case was inconsistent with the written words; but this is the very case in which the courts hold that the party is not bound by the written words and is entitled to reformation or rescission. If this is not true, the court's compact review of the antecedent understandings and agreements and loans and conveyances and circumstances was wholly immaterial. In the present case, the words of the written contract present a perfect example of the operation of the true rule of substantive contract law; they supersede and discharge all prior inconsistent agreements as long as it is not shown that they do not manifest the actual intention of the parties. Whether the trial court admitted and properly weighed the plaintiff's evidence on this issue was the question before the Supreme Court. But if the plaintiff in fact understood the contract to be an option contract which provided that prior claims would be superseded and discharged only in case the option was exercised, and if the defendant's lawyer who drafted it (and explained it to the plaintiff) knew that the plaintiff so understood it (or had reason to know it), the plaintiff's action should have been sustained. A court may, indeed, presume an understanding (a mental process); but the presumption is always rebuttable. The import of words is not an absolute; it is the meaning that one party using them intended them to manifest, or the meaning that they actually conveyed to the mind of the other party. Did the court itself understand the import of the words of this bilateral contract?

Often, when a court declares extrinsic evidence inadmissible because the written words are unambiguous, it says that the party has not alleged (or pleaded) mistake, accident, fraud, or duress. In some of these, as in *Imbach*, *Cotiga*, and *Birchcrest*, above, the evidence offered, or the argument made, may not have been applicable in the process of interpretation of the written words. The purpose of the party and his counsel may have been to induce the court to disregard the written words, not to interpret them, and to produce a result more consonant with justice

and with the client's interest. When such is the case, the evidence and argument are not to be declared inadmissible and thrown out if they are relevant and credible to establish the mistake, accident, fraud, or duress that would entitle the client to relief. This is true, even though they are presented in the false guise of "interpretation." The integrated written contract may be void or voidable, even though as correctly interpreted it would, if valid, displace and discharge every prior inconsistent understanding or agreement, oral or written. The parol evidence rule, however worded, does not exclude relevant evidence to show the non-existence of a valid contract, or the voidability or inapplicability of the written instrument. In any case, counsel should have an opportunity of amendment.

The first danger to be avoided is that of refusing to consider relevant and credible evidence offered to establish the proper interpretation of the written words. Next to be considered is whether the offered evidence is relevant and credible to establish invalidity, voidability, or inapplicability. It is not to be thrown out merely because it is extrinsic; seldom, if ever, can it be anything else. Of course, it should be disregarded if it is as irrelevant or incredible on the second issue as it is on the prior issue of interpretation.

The following are illustrations of extrinsic evidence that is not offered as an aid in the interpretation of written words, but would be relevant as a defense in an action to enforce the written words: the instrument was executed as a joke; it was executed as a sham to deceive others; it was a mere preliminary draft; it was never assented to as a complete integration; it was purchased from a vending machine that concealed its contents; its words were inserted by the error of a scrivener; a printed term was overlooked and not stricken out; the written words are very different from those commonly used and are unconscionable; the consideration was purposely misstated; its execution was induced by a lie as to its contents, as to its legal effect, or as to other material facts; the parties have by subsequent words or conduct substituted one or more new provisions. Of course, this list could be extended.

Lewis v. Dils Motor Co.,³⁰ is another case in which the litigated issue on appeal is whether the words of a garage owner's liability policy are or are not "clear and unambiguous." The majority of the court, having interpreted the words of the policy in the light of their own linguistic experience, and by this process having found that the language was "clear and unambiguous" and therefore "not subject to construction or interpretation," held (reversing the trial court) that the insurance company was under liability to the plaintiff. Two judges, however, find them-

³⁰ 135 S.E.2d 597 (W. Va. 1964).

selves "in respectful but emphatic disagreement."³¹ They assert that the interpretation which the majority holds to be the only one possible causes one important clause of the policy to be redundant and superfluous. Thus, an identical set of words can be plain and clear to some judges and ambiguous to other judges (who are equally reasonable). The two dissenters would not reverse the trial court, which interpreted the policy so that there was no liability. It does not appear whether the trial court had any extrinsic evidence to aid in the interpretative process. The majority would disregard it, however convincing, because they know the meaning of words. They correctly say, quoting *Cotiga*, that "It is not the right or province of the court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."³² The two dissenters think that the majority occupied that very province and did that deed. There is, in the opinion of this writer, little doubt that the duty of every judge is to discover the intention of the parties by weighing all the relevant and credible evidence, in all cases alike.³³

In *Founder's Ins. Co. v. Lanco Dev. Corp.*,³⁴ Founders executed a

³¹ *Id.* at 601.

³² *Ibid.*

³³ See *Golden Gate Corp. v. Barrington College*, 199 A.2d 586, 590 (R.I. 1964), where the court, after reviewing its own previous cases, said: "These examples of inapplicability clearly demonstrate that the issue of admissibility of parol is not susceptible to the simple test of the presence or absence of fraud or mistake or ambiguity." The trial court's refusal to admit extrinsic evidence to prove a prior oral agreement as to heating and toilet facilities, as an addition to the terms of an unambiguous and apparently complete written lease, was erroneous. Prior negotiations and surrounding circumstances are provable on the issue of whether the writing was intended to be a complete integration.

In *Republic Eng'r & Mfg. Co. v. Moskovitz*, 376 S.W.2d 649,655-56 (Mo. App. 1964), the court repeated the dictum that "when, as here, the language of a contract is clear and unambiguous there can be no construction of it because there is nothing to construe." It proceeds, however, to fill twelve columns of print in the process of interpreting a number of provisions of the complicated written contract.

In *Callison v. Continental Cas. Co.*, 221 Cal. App. 2d 363, 34 Cal. Rptr. 444 (1963), the extrinsic evidence offered was a statement by an agent without authority that the insurance policy included coverage that it did not in fact include. It was not offered to interpret the words of the policy or to prove the meaning that had been conveyed to the plaintiff by those written words. *Spencer v. Travelers Ins. Co.*, 133 S.E.2d 735 (W. Va. 1963), is to the same effect and is correctly determined for the same reason.

In *Western Cas. & Sur. Co. v. Harris Petroleum Co.*, 220 F. Supp. 952 (S.D. Cal. 1963), the insurance company issued a liability policy covering all of the insured's "owned automobiles." At that time, in the mistaken belief that a specific station wagon had been transferred to another party, it was stated in a collateral letter that it was not included within the coverage. The court held that the insurer was liable for an accident involving the station wagon, saying that the letter was excluded by the parol evidence rule. But the court received other extrinsic testimony showing that both parties intended to cover all owned automobiles, thus making the mistaken statement in the letter immaterial. The parties did not intend to limit the coverage that was stated in the policy; and even if they had so intended, an applicable state statute invalidated such an amendment. It was not the parol evidence rule, whatever its wording, that made the mistaken statement in the letter inoperative and immaterial. It was not offered to aid the "interpretation" of the words of the policy or to prove an intentional modification.

³⁴ 221 Cal. App. 2d 503, 34 Cal. Rptr. 522 (1963).

performance bond expressly assuring performance of a construction contract by Lanco with North American Aviation, Inc.; and Sayan executed a contract to indemnify the builders against loss by reason of that bond. Lanco defaulted in performance and the builders paid construction bills. In this action on the indemnity contract against Sayan, it appeared that Lanco had no contract with Aviation, that corporation having no interest in the transaction. Lanco's contract was with North American Aid, a different corporation. The court held that Sayan was not bound to indemnify the builders, since the indemnity contract was limited to a loss suffered by breach of Lanco's contract with Aviation, and there was no such contract. The court said that it could not be interpreted as covering a loss on a contract with Aid because its words were not ambiguous. Of course, "Aviation" could not be interpreted to mean "Aid," although the stock in Aid was owned by Aviation and some of its employees. The court said: "[T]here was no evidence that respondents [Sayan] intended to indemnify appellant [Builders] against its obligation on any undertaking other than that described in the instrument or that they knew appellant had made a mistake or that Lanco had contracted with anyone other than [Aviation]."³⁵ Also "Respondents did not see the construction contract or the bond until after the commencement of this action."³⁶ Had there been such convincing parol evidence, Builders would have had a right to reformation; but in no case was the problem one of interpretation.

Since publication of the criticism of the decision in *Steven v. Fid. & Cas. Co.*³⁷ in my treatise, it has occurred to the author that an even stronger case can be made for holding that the insured and the beneficiary should have no rights other than those expressly contemplated in the written policy. It is true that Steven had no opportunity to read the words of the policy; but he knew that fact very well and yet voluntarily chose to buy it and to pay \$2.50 for it. He was buying a "pig in a poke" and was aware of that fact. There were no circumstances of necessity or compulsion. The great majority of passengers pass through the airport daily without yielding to the attractions of the vending machine. They choose to carry the risk themselves or to be satisfied with the insurance policies that they already hold. The risk of fatality is so small on Scheduled Liners as to be much less than 1 in 25,000, as is shown by the fact that the defendant was willing to promise to pay an amount 25,000 times the premium paid. When a passenger hastily buys a paper

³⁵ Id. at 505, 34 Cal. Rptr. at 524.

³⁶ Id. at 504, 34 Cal. Rptr. at 523.

³⁷ 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

back book or a monthly magazine at the station news stand, he pays the price without knowledge of its contents. The situation is not so different in the purchase of a policy from the vending machine as to justify the court in making a different contract for him, either by appealing to supposed normal expectations or by straining for a nonexistent ambiguity. In fact, the opinion rendered shows that the court did not know whether Steven saw the notice in large type that the risk was limited to "Schedule Air Carriers" or did not see it. His total investment was \$2.50; and he got his money's worth.³⁸

In *Davis v. Hardman*,³⁹ Lura Ables became owner of a tract of land by virtue of a series of conveyances dating back earlier than 1916 in each of which the grantor conveyed subject to the following reservation: "[his share] . . . of the rest and residue of the oil and gas royalty, when produced, in and under said land, but [the grantee] . . . to have the right to lease said land for oil and gas purposes and to receive the bonuses and carrying rentals."⁴⁰ The plaintiff is the successor in interest to such property as is covered in the reservation. Two separate leases of the land for development and production have been executed, one by the plaintiff, asserting that, by a series of decisions in West Virginia, a reservation (or conveyance) of "the oil and gas royalty" is a reservation of ownership of the "oil and gas in place"; the second lease was by Lura Ables to the defendant. The question for decision was which lessor owned the oil and gas in place, with power to grant a lease for development and production. This had to be determined by interpretation of the words of the reservation quoted above. The various antecedent owners who had executed the series of deeds that contained the reservation were all dead. The court's interpretation of those words, in favor of Lura Ables is quite convincing. It distinguishes the previous decisions that had held that a conveyance of the royalty was a conveyance of the mineral "in place," because they had all indicated that the decision would be otherwise if the grantor expressed a contrary intention. The court holds that the original grantor and the succeeding grantors expressed a contrary intention by the quoted words of the reservation. The rule stated in the earlier cases "is but a rule of construction and the function of the Court . . . is to ascertain the true intent of the parties as expressed by them in the deed . . ."⁴¹ *Cotiga* is then quoted that "a valid written instrument which expresses the intent of the parties in plain and un-

³⁸ See *Rice v. Trunkline Gas Co.*, 323 F.2d 394 (7th Cir. 1963), with respect to the admissibility of extrinsic evidence of mistake to overcome the defense of a written release, without asking a reformation thereof.

³⁹ 133 S.E.2d 77 (W. Va. 1963).

⁴⁰ *Id.* at 78.

⁴¹ *Id.* at 81.

ambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent."⁴² The court then proceeds to construe and interpret the words of this reservation. It says: "All rules of construction must yield to the expressed intention of the parties if that can be ascertained. . . . In order to understand the language of the reservations in this case it is helpful to bear in mind the meaning of certain terms as they are used and understood in the oil and gas industry."⁴³ The court then stated the usage of such terms as "carrying rentals," "delay rentals," "bonus," and "royalty." This process was for the purpose of ascertaining "the intention" of the grantors who had executed the series of deeds through a period of over fifty years. Evidence of this usage is extrinsic evidence. Had this usage been uniform through half a century? Is the intent of the grantor determined in accordance with the usages of today? With the help of this extrinsic evidence, the court construed and interpreted the words of fifty years ago and determined the validity of the leases accordingly. In the absence of other extrinsic evidence, there is no reason to doubt the correctness of the decision. The extrinsic evidence was used here by the court to aid interpretation of the words of the deeds, not (as the defendant tried in *Cotiga*) to displace them.

SEMANTIC STONE WALLS—WHAT ARE THEY MADE OF?

A Warehouseman's Licensing Act provided that any person applying for such a license must file a bond for the security of depositors of goods, and also that any person making such a deposit should have a right of action on the bond in case of the warehouseman's default. This statute contained a preliminary "glossary" of definitions of terms, including this: "'Person' shall mean an individual, corporation, partnership . . . but shall not mean the United States or Iowa State Government or any subdivision or agency of either."⁴⁴ Later, the defendant and a surety company executed such a bond; and the United States deposited grain in his warehouse. The United States brought suit on his bond for his failure to return the grain so deposited. The court held that the United States could not maintain the suit for the reason that it was expressly excluded as a beneficiary. The court said that "when the plaintiff comes along the statutory path to the second statutory provision [authorizing suit] it is met with a semantic stone wall."⁴⁵

In view of the experience of the United States in purchasing agricul-

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Iowa Code Ann. § 543.1(7) (1946).

⁴⁵ United States v. West View Grain Co., 189 F. Supp. 482, 487 (N.D. Iowa 1960).

tural crops at high prices and the extent to which it has deposited grain in storage warehouses, the author of this article had a distinct shock on reading the court's opinion, resulting in some thought as to the nature and the resistant quality of the wall that barred its way in an attempt to get damages for the loss of its stolen grain. It is certain that, although figures of speech have a literary charm, they may have unfortunate results in law suits if taken literally. He observed, first, that in this case the wall was not in fact a wall of stone, against which it is futile to "butt one's head." The stone of which this wall was composed was "semantic stone." The stones of which this wall was composed were mere words. And a long experience in the use of words, by himself as well as by other men, had demonstrated that the thoughts that they express or convey are variables, depending on verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). This is true whether the words are in a statute, a contract, a novel by Henry James, or a poem by Robert Browning. A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning. Consider the variable meanings that have been given to such words as chicken, democracy, income, value, dollar, or, and meaning itself.

In seeing the "semantic stone wall" blocking the remedy of the United States, the court was merely applying the doctrine so often repeated in judicial opinions, that when the words of a statute or of a contract are plain and clear and unambiguous, no interpretation is required and no extrinsic evidence is admissible—evidence of antecedent history and surrounding circumstances and purposes and usages of the parties.⁴⁶ The judge looks at the words of the written document alone and *knows* their true meaning by virtue of judicial notice.

Were the words of the Warehouseman's Act ambiguous? Looking at the words of the statute alone, this author sees no ambiguity. All persons seeking a license must give bond; and all persons injured by default may sue on the bond. But the word persons as used in this statute means all individuals and corporations except the United States and the State of Iowa. What is ambiguous about that? To discover ambiguity, we must resort to extrinsic evidence of history and purposes and surrounding circumstances; and when all this extrinsic evidence is before us, we dis-

⁴⁶ William Graham Sumner once said, "if you want war, nourish a doctrine." In law, if you wish to destroy the judicial system, nourish and apply the doctrines—the formalistic rules—of the past. There are, indeed, those who love and nourish them and who become angry at those who attack them. Certainty is an illusion; but we love our illusions. Repose is not the destiny of man; but we yearn for repose.

cover not ambiguity but mistake, error in the definition, bad lexicography.

Fortunately we have had to wait only three years for the judicial correction of the mistake. In less than one year, the legislature corrected the mistake of its lexicographer; but its correction had no retroactive operation as to antecedent bonds. The United States not only forced a settlement in *West View*; it brought two other suits against the sureties of two other defaulting warehousemen, brought on identical bonds affected by the same Warehouseman's Act (unamended). In these two suits, a new district judge, sitting in the same State of Iowa, heard a new and better argument, and respectfully disapproved the *West View* decision.⁴⁷ He saw the same "semantic stone wall"; but he saw too that it was made of words and not of stone. He could not reform the statute or correct the lexicographic mistake; but he could and did correct the error of his judicial brother. He heard the extrinsic evidence of history and purpose and circumstances; and he found that the intention of the legislature was not in accord with the glossary definition. Its intention was to exclude the United States and the State of Iowa from the requirement of giving bond if they chose to operate a warehouse, and not to exclude them from rights as grain depositors in a private warehouse. He also held that the glossary definition in the statute was applicable to the statute alone, whether corrected or uncorrected, and not to bonds (or other documents) executed by surety companies. The process of interpretation of the bond is to determine the meaning and intention of the parties to the bond. There was no "semantic stone wall" included in the words of the bond.

EXTRINSIC EVIDENCE A NECESSARY AID IN THE INTERPRETATION OF WRITTEN WORDS

The preceding paragraphs were written as supplements to chapters 25 and 26 of the author's treatise on the Law of Contracts. Chapter 25 develops in detail the author's theory and practice in the interpretation of written language. Chapter 26 deals with the so-called Parol Evidence Rule. The present article, therefore, must be understood as bringing support, on the basis of the most recent judicial decisions and opinions, to the theories and reasoning presented in those chapters. In the remainder of the present article, the author will merely present, in abbreviated form, some of the important conclusions more fully stated and supported there.

First and foremost, extrinsic evidence is always necessary in the inter-

⁴⁷ *United States v. Tyler*, 220 F. Supp. 386 (N.D. Iowa, 1963); *United States v. Merchants Mut. Bonding Co.*, 220 F. Supp. 163 (N.D. Iowa 1963).

pretation of a written instrument: in determining the meaning and intention of the parties who executed or relied upon it, in applying it to the objects and persons involved in the litigated or otherwise disputed issues, in determining the specific legal operation that justice requires to be given to the written instrument. In this process of interpretation, no relevant credible evidence is inadmissible merely because it is extrinsic; all such evidence is necessarily extrinsic. When a court makes the often repeated statement that the written words are so plain and clear and unambiguous that they need no interpretation and that evidence is not admissible, it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education, of which it merely takes judicial notice.

The so-called parol evidence rule is not a rule of evidence and has no application in the process of interpretation of a written instrument. It is now most commonly described as a rule of substantive law, even by a court that erroneously applies it to exclude relevant credible evidence. The supposed rule is so variable in its formulation, and its application as an exclusionary rule is so generally avoided in so many ways, that it is erroneous and unjust to apply it for the purpose of excluding evidence that is offered in aid of interpretation.⁴⁸ When it is established by relevant credible evidence that the parties have mutually assented to a specific written instrument as a complete and accurate statement of the terms of their contract (an integration) and the words of that instrument have been properly interpreted with the aid of all relevant extrinsic evidence, that instrument operates as a discharge of all antecedent agreements and negotiations (oral or written) that are inconsistent therewith. This is a rule of substantive contract law, not a rule of evidence. Such antecedent agreements (oral or written) are not rendered inadmissible in evidence; they are merely rendered inoperative by having been discharged by a subsequent agreement that has been duly proved and interpreted.

Whenever a person has made to another person a written promise for which that other has given a consideration or in reliance on which he has reasonably changed his position, the court in its interpretation of the words of that promise must take into account the intention and understanding of each of the two parties—the “meaning” attributed to the words by each of them. If they have inconsistent intentions and

⁴⁸ In *Atlantic Northern Airlines v. Schwimmer*, 12 N.J.2d 293, 302, 96 A.2d 652, 656 (1953), the court said: “Parol evidence cannot be said ‘to vary or contradict a writing until by process of interpretation it is determined what the contract means. . . . Such testimony does not vary or contradict the written words; it determines that which cannot be varied or contradicted.’ Corbin on Contracts, section 579.”

understandings, having given materially different interpretations to the words, no valid contract has been made unless the conduct of the promisor has been such that he is equitably estopped from asserting his own interpretation as against that given to his words by the promisee. A promisor may be legally bound in accordance with the promisee's intention and understanding if he actually knew or had reason to know such intention and understanding. The promisor is thus bound, not because the promisee's interpretation is the one and only true or objective interpretation of the written words, but because he knew or had reason to know the understanding of the promisee and permitted him to act in reliance thereon. In determining whether a promisor is bound by reason of his having had reason to know (without actual knowledge), his conduct must be considered in relation to all the circumstances of the case, including the customs and usages of other men in similar circumstances. Among these usages are the usages of words, as reported in respectable dictionaries and testified to by competent witnesses. Not one of the usages, however, constitutes the one true and objective meaning by which the promisor or anybody else is bound.⁴⁹

⁴⁹ This is considered and developed in 3 Corbin, *supra* note 1, §§ 561-572. Two recent cases have given blanket approval to §§ 561-596 of the author's treatise. *Whitney v. Halibut, Inc.*, 235 Md. 517, 202 A.2d 629 (1964); *Garden State Plaza Corp. v. S.S. Kresge Co.*, 78 N.J. Super. 485, 189 A.2d 448 (1963), citing eight previous New Jersey cases.