"Meaning" in the Law of Contracts

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Introduction

Although contract disputes often turn on the interpretation of contract language,¹ this subject has received relatively little attention, especially when compared to that lavished on the interpretation of statutory language. This article will examine some of the conflicting assumptions American courts make in interpreting contract language, and will offer some suggestions for change.

A number of writers have taken pains to distinguish the process of interpretation from that of construction, a distinction that goes back to Lieber. He defined interpretation as "the art of finding out . . . the sense which their author intended [words] to convey." Construction, on the other hand, "is the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text—conclusions which are in the spirit, though not within the letter of the text."² To Lieber, then, the boundary between interpretation and construction was the boundary between "letter," or "direct expression," and "spirit."

Corbin has stated the modern version of the distinction. He limited the process of interpretation to the language of the contract and argued that interpretation is "the process whereby one person gives a meaning to the symbols of expression used by the other person." In contrast, construction of the contract is the determination of the contract's "legal operation—its effect upon the action of courts and administrative officials."³ On this view, while the "meaning" given by the parties to "the

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1. See Shepherd, Contracts in a Prosperity Year, 6 Stan. L. Rev. 208, 223, 226 (1954), where a total of 25.8 per cent out of 500 contracts cases from the National Reporter System in 1951 were classified under either "principles of interpretation and construction" or "parol evidence." L. Friedman, Contract Law in America 220 (1965) tabulates a total of 52 out of 648 contracts cases in the Wisconsin Supreme Court in selected years between 1896 and 1958, under "construction" and "parol evidence" and notes that "all contracts cases contain some elements of construction and fact analysis."

2. F. Lieber, Legal and Political Hermeneutics 11, 44 (3d ed. 1880).

symbols of expression” may be clear, the process of construction could lead a court to depart from that “meaning.” Williston drew a slightly different distinction. He defined interpretation as the task of determining the “meaning” of expressions used in an agreement, but this task is accomplished by the application of something he called “the legal standard” to these expressions. This idea of using a legal standard will turn out to have important consequences on Williston’s view of the parol evidence rule—a view that differs significantly from Corbin’s. As for construction, Williston defined it as the determination of “the legal meaning of the entire contract.”

“Interpretation” will be used here in this modern sense to refer to the process by which courts determine the “meaning” of the language. We are not concerned with overriding legal rules which may render contract language ineffective after it has been interpreted. Nor are we concerned with “gap filling” by which the absence of contract language is remedied. Our concern is exclusively with contract language and its “meaning.”

The Search for “Meaning”

In Semantics

Writers on semantics have characterized “meaning” as “the arch-ambiguity,” as “a harlot among words . . . a temptress who can seduce the writer and the speaker from the path of intellectual chastity.” They tend to shun the term. However, the semanticists Ogden and Richards, who produced a representative list of sixteen main definitions of the word “meaning” as used by philosophers, could have found more grist for their mill in writings on contract law. Some philosophers, following the distinction suggested by John Stuart Mill, have defined “meaning” as the connotation or intension of a word

4. 4 S. WILLISTON, CONTRACTS § 602 (5th ed. 1961) [hereinafter cited as WILLISTON]. Elsewhere Williston defined interpretation as “the process of determining from the expressions of the parties what external acts must happen or be performed in order to conform to what the law considers their will.” 4 WILLISTON § 600A, at 286.
5. C. OGDEN & I. RICHARDs, THE MEANING OF MEANING 104 (8th ed. 1947) [hereinafter cited as OGDEN & RICHARDS].
7. OGDEN & RICHARDS 186-87. There is not even agreement as to whether it is the “meaning” of the word or the “meaning” of the user of the word that is sought. Williston and the Restatement chose the former: 4 WILLISTON §§ 600, 613; RESTATEMENT OF CONTRACTS § 226 (1932) [hereinafter cited as RESTATEMENT]. Corbin has vacillated between the two. Compare 1 CORBIN § 106, at 474 (“It is individual men who have ‘meanings’”), with 3 CORBIN § 535, at 27-28 (“the meaning of such terms”), and 3 CORBIN § 539, at 78 (“the meaning of the words”).
(the characteristics which determine the objects to which it can correctly be applied and which mark them out from other objects) as opposed to its denotation or extension (the objects to which the word correctly applies). Thus according to the contemporary philosopher Quine, the terms "creature with a heart" and "creature with a kidney" are perhaps alike in denotation, as denoting the same objects, but are unlike in connotation, and therefore unlike in "meaning."\(^9\)

Ogden and Richards rejected this definition of "meaning" as "highly artificial" and as relying on a concept of "correct usage."\(^1\) To demonstrate the fallacy of such definitions, they described the use of language in two stages: first, the word or other symbol symbolizes a thought or reference; and second, the thought or reference refers to an object or other referent. "Between the symbol and the referent there is no relevant relation other than the indirect one, which consists in its being used by someone to stand for a reference."\(^1\) This description has the advantage of avoiding the concept of "correct usage," which will be dealt with later in connection with the search for "plain meaning."

Ogden and Richards went on, however, to postulate that "[a] symbol refers to what it is actually used to refer to," and not necessarily to what either the user or the interpreter intends.\(^1\) In the era when the doctrine of caveat emptor prevailed, there was some basis for this postulate in law, for the seller who innocently described the worthless peachum wood that he sold as valuable "brazilletto," was held only to peachum, the wood to which he had actually referred.\(^1\) Today he would be held to brazilletto, to which both he and the buyer believed that they referred, in order to fulfill the justifiable expectation of the buyer.\(^1\) For the purpose of contract interpretation generally, it is not that to which the parties actually refer, but that to which they believe themselves to refer that is controlling, and "refer" will be used here in this sense.

This difference is illustrative of a significant limitation on the contributions of semantics to the search for the "meaning" of contract language. Modern philosophers and semanticists have concentrated on language as it is used in science to describe experience. For example, one

12. Id. at 11.
13. Id. at 103. Glanville Williams claimed not to understand this. Williams, Language and the law IV, 61 L.Q. REV. 384, 399 n. 19 (1945). See the discussion in M. BLAKE, LANGUAGE AND PHILOSOPHY 193-95 (1949).
15. See, e.g. UNIFORM COMMERCIAL CODE § 2-313(1)(a)-(b) requiring that goods conform to "affirmation of fact" or "description."
group of them, the Vienna Circle of logical positivists, attempted to cleanse the language of philosophy of unscientific elements, of propositions not in principle verifiable by sense experience; and most of them have stressed the distinction between the scientific use of language, to describe experience, and the emotive use of language, to evoke emotion. But for the purpose of contract interpretation, most of these discussions are wide of the mark, for the language that goes to make up a contract is not primarily concerned with either describing experience or evoking emotion. Its objective is instead to control human behavior, the behavior of the contracting parties; and as Hayakawa has pointed out, semanticists have thus far shown surprisingly little interest in language as used for this purpose.

The temptation to look to semantics for help in coping with contract language is aggravated by the fact that in form it is deceptively similar to the language of science, with which semantics has been mainly concerned. The terms of a contract ("Seller will deliver the goods to Buyer at Seller's warehouse") may be similar in form to the laws of science ("Ice will melt at 32° F"), but they are totally different in significance. Since the language of scientific discourse is used descriptively, our concern is mainly with its truth. Since contract language is used to control behavior, our concern is mainly with the expectations that it incites in the contracting parties. This is not to say that contract law has no concern for truth, for if the seller sells wood as "brazilletto," a court may be called upon to decide whether it is in fact braziletto or peachum. But such questions of fact, which concern truth, arise only after questions of law, which concern the expectations of the parties, have been answered: Was the seller bound to deliver braziletto rather than peachum? The answers to these questions turn not on truth but on the expectations of the parties, and it is there that we must look in our search for the "meaning" of contract language.

In Contract Interpretation

One of the doctrines that is said to have retarded the development of contract law is the "subjective theory," under which it was supposed that the creation of a contractual obligation required a coincidence of

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17. See, e.g., Ogden & Richards 149, 239.


19. Id. at 179.
the actual mental process of both parties, “a meeting of the minds.” Generations of crusaders have so succeeded in extirpating this view that Judge Learned Hand could record, in his oft-quoted dictum, that

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. . . . If . . . it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake or something else of the sort.20

Note that Hand, with typical crusader’s zeal, denied not only the necessity of a “meeting of the minds,” but even its relevance.

The doctrine that a contract requires a “meeting of the minds” had a curious origin. It is often erroneously supposed that it was an invention of the late eighteenth century; Williston, for example, believed this.21 He traced the notion only as far back as Cooke v. Oxley,22 decided in 1790, and thence to Adams v. Lindsell,23 decided in 1818. In truth it had been born more than two centuries earlier.

In 1551 there came before the Exchequer Chamber a dispute between Robert Reniger, Comptroller of the Custom and Subsidy in Southampton, and Anthony Fogossa, a Portuguese merchant.24 Fogossa had shipped 4500 quintals of green woad from Portugal to England, but the master of the ship had jettisoned part of the shipment during a tempest off the Isle of Wight, and when the ship reached Southampton, Fogossa was uncertain of the mount that remained. He therefore paid the duty on 2000 quintals and with a surety made an agreement with Thomas Wells, a collector of customs at Southampton. He agreed that if he were permitted to land all of the woad, he would pay any additional duty when it was weighed on the King’s beam. When the woad was landed, Reniger seized the 1693 quintals by which the weight exceeded 2000, and sought the forfeiture of one-half of it under a statute that allowed forfeiture when goods were landed without the duty being paid or the collector “agreed with.” The King’s Counsel argued that the statute should be narrowly construed to exclude an agreement with a

condition, such as weighing the woad. In reply, Sergeant Pollard argued:

[As to the definition of the word (agreement) it seems to me that aggreamentum is a word compounded of two words, viz. (b) of aggregatio and mentium, so that aggreamentum est aggregatio mentium in re aliqua facta vel faciendā. And so by the contraction of the two words, and by the short pronunciation of them they are made one word, viz. aggreamentum, which is no other than a union, collection, copulation, and conjunction of two or more minds in any thing done or to be done.]

The dispute was never resolved on the law, and judgment for Fogossa was given instead upon order of the King.

In the centuries that followed, Sergeant Pollard's faulty etymology acquired sufficient respectability to be cited and summarized in 1636 in Rastell's Les Termes de la Ley and in 1762 in Comyn's Digest. And by the opening of the nineteenth century a New York court could say: "This cannot amount to a contract. There is no agreement, no aggregatio mentium between the parties, as to the thing, or subject matter of the contract." This appealing metaphor of an aggregatio mentium, a meeting of the minds, has since enjoyed popularity on both sides of the Atlantic.

At the end of the eighteenth century, the confusing case of Cooke v. Oxley was decided in the Court of King's Bench. It apparently stood for the proposition that a person, after having offered to sell goods, could by a mere change of mind (as by a sale to another, uncommunicated to the offeree) prevent acceptance by the offeree. With this case the metaphor was given practical consequence, and, reinforced by the "will theory" of Continental jurists such as Savigny, rose to prominence in the law of offer and acceptance. In the celebrated case of Adams v. Lindsell, decided in 1818, counsel for the sellers relied upon Cooke v. Oxley in arguing that the letter posted by the buyers accepting the

25. Id. at 27.
26. J. RASTELL, LES TERMES DE LA LEY (1636), under "Agreement."
27. 1 COMYN'S DIGEST OF THE LAWS OF ENGLAND 311 (1762).
29. See DICTIONARY OF ENGLISH LAW (W. Jowitt ed. 1959), under "Agreement"; Martin-Dell v. Fiduciary Counsel, 133 N.J. Eq. 408, 413, 30 A.2d 281, 284 (1943); 1 CORBIN § 105.
31. See Patterson, Equitable Relief for Unilateral Mistake, 28 COLUM. L. REV. 859, 861 (1928); Schmidt, Model, Intention, Fault: Three Canons for Interpretation of Contracts, 4 SCANDINAVIAN STUDIES IN LAW 179, 181 (1950).
offer which the sellers had mailed did not complete the contract since
the sellers had already sold the goods to another while the buyer’s letter
was in transit. The Court of King’s Bench rejected this conclusion. But
rather than rest its decision on the ground that there had been no revo-
cation since the sellers had taken no steps to notify the buyers of their
change of mind, the court laid down the rule that an offer by mail can-
not be revoked after an acceptance has been posted. In wrestling with
the problem of how to square the requirement of a meeting of the
minds with the necessity for conclusion of contracts by correspond-
ence, the court reasoned that the offerors “must be considered in law as
making, during every instant of the time their letter was travelling, the
same identical offer . . . and then the contract is completed by the
acceptance. . . .”

But though the metaphor accorded well with the “will theory” of
contracts, which attained hegemony in the nineteenth century, before
a half a century was out the tide had turned in favor of an objective
theory of contract, based on the justifiable expectation aroused in the
promisee rather than on the subjective will of the promisor. The courts
had come around to the position that a mere change of mind by the
offerer, uncommunicated to the offeree, was not enough. Now they
were basing the rule in *Adams v. Lindsell* on a different, although
equally specious, argument that the offeror had made the post his
agent. Although judges faced with questions of contract formation
continued to pay lip service to the requirement of a meeting of the
minds, the requirement ceased to have any practical consequences in
this area.

The grip of the metaphor in matters of contract interpretation must
have appeared even more tenuous. Here, too, courts reiterated the re-
quirement that there be a meeting of the minds, but here there was
never a recognized body of case law, comparable to *Cooke v. Oxley* and
*Adams v. Lindsell*, that gave it practical consequences. No responsible
authority seems ever to have suggested that the process of interpretation
dealt only with those terms on which there was a meeting of the minds
at the time of the agreement. Unhappily, many commentators, as ex-
emplified by Hand’s dictum, have jumped from the premise that a

33. *Id.* at 683.
34. *See* Patterson, “Illusory” Promises and Promisors Options, 6 Iowa L. Bull. 129, 133 (1921).
35. *See* Dickinson v. Dodds, 2 Ch. D. 463 (1876).
36. *Henthorn v. Fraser*, 2 Ch. D. 27, 32 (1880); *Byrne v. Van Tienhoven*, 5 C.P.D. 344, 348
meeting of the minds is unnecessary to the conclusion that the actual intentions of the parties are irrelevant to the process of interpretation.

We can explore the merit of this conclusion by formulating three competing definitions of "meaning" which differ in the extent to which they take account of the actual intentions of the parties. These three definitions are:

1. That to which either party believes the other to be referring.
2. That to which either party refers.
3. That to which either party ought to be referring.

The first definition was proposed by the eighteenth-century moral philosopher, William Paley, who maintained that a promise is to be performed in "the sense . . . in which the promisor believed that the promisee accepted the promise." In support of his principle, Paley put his case of Temures who, after promising the garrison of Sebasta that no blood should be shed if they surrendered, buried them alive when they accepted his terms. It was the sense in which he should have apprehended that the garrison received his promise that should have controlled. John Austin criticized this rule of pure expectation on the ground that it would be particularly unfair in the case where the promisor underrates the promisee's expectation. Archbishop Whately amended the rule so that "the right meaning of any expression is that which may be fairly presumed to be understood by it." So transformed, this rule derived from Paley is essentially that later adopted for unintegrated contracts by both Williston and the Restatement. The Restatement sets up a standard of "reasonable expectation" under which "words or other manifestations of intention forming an agreement . . . are given the meaning which the party making the manifestations should reasonably expect that the other party would give to them. . . ." The first definition has now become one of reasonable belief: that to which one party has reason to believe the other party is

88. 1 J. AUSTIN, JURISPRUDENCE 456 n.89 (4th ed. 1873).
90. RESTATEMENT § 233. The Restatement makes several exceptions to this general rule. That in § 233(a) is dealt with under Illustration 1. See text accompanying note 44 infra. That in § 233(b) reads as follows: "where a party manifest his intention ambiguously, knowing or having reason to know that the manifestation may reasonably bear more than one meaning, and the other party believes it to bear one of those meanings, having no reason to know that it may bear another, that meaning is given to it. . . ." If "ambiguity" is here used, as elsewhere in the Restatement, to include vagueness, this exception would swallow up the rule, since vagueness and ambiguity infect all language.
Meaning in Contracts

referring. Note that at no point in its evolution has this definition of “meaning” taken any account of either party's actual expectation, as opposed to what the other party believed, or had reason to believe, it to be.

The second definition is purely subjective. Although no modern writer favors it as an exclusive test, Corbin argued for a modified version of it:

[A] party should be permitted to determine the operative meaning of the words of agreement by proving that both parties so understood them, or that he so understood them and the other party knew that he did, or that he so understood them and the other party had reason to know that he did.41

Thus recast, the second definition defines meaning as that to which either party refers if it is the same as that to which the other party refers or believes or has reason to believe the first party to be referring. This definition does take account of the parties’ actual expectations.

The third definition, that to which either party ought to be referring, involves the consideration of “common usage,” criticized by Ogden and Richards in their discussion of the definition of meaning as connotation.42 It relies upon the way in which language is used in the community, and it is commonly associated with definitions found in dictionaries. This is the standard that the Restatement and Williston bid us apply to integrated agreements, and it will be discussed later in connection with the search for “plain meaning.” Note that this definition, like the first, takes no account of either party's actual expectation. For the present, however, our attention will be confined to the first two definitions.

These two definitions, in their modified forms, can be compared through a series of hypotheticals based on the celebrated case of Raffles v. Wichelhaus.43 In that case, it will be recalled, the parties agreed upon the sale of cotton to arrive “ex Peerless” from Bombay without realizing that there were two ships named “Peerless” leaving Bombay at different times. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December. The court held that there was no contract. At the outset it may be well to dispose of the exceptional group of cases of which the “Peerless” case itself is typical.

41. 3 Corbin § 538, at 59-61. See also Corbin, Conditions in the Law of Contract, 28 Yale L.J. 739, 740 (1919).
42. Ogden & Richards 187-91.
43. 159 Eng. Rep. 375 (Ex. 1864).
Illustration 1. A offered to sell B goods shipped from Bombay "ex Peerless." B accepted. There were two steamers of the name "Peerless" sailing from Bombay at materially different times. A referred to Peerless No. 1, and he neither believed nor had reason to believe that B referred to Peerless No. 2. B referred to Peerless No. 2, and he neither believed nor had reason to believe that A referred to Peerless No. 1.

Under the first definition, no meaning of "Peerless" can be determined because neither party had reason to believe that the other referred to a different ship. Under the second definition, no meaning of "Peerless" can be determined because each party referred to a different ship and in neither case did the other believe or have reason to believe this. Such cases rarely arise, and when they do, they are often dealt with under the rubric of "mistake." Neither definition fares better than the other and courts have reluctantly followed the original "Peerless" case in holding that no contract has been formed.\(^4\)

More significant are the cases in which the parties make different references, but one and only one party has reason to know that made by the other.

Illustration 2. The facts being otherwise as stated in Illustration 1, A referred to Peerless No. 1 but had reason to believe that B referred to Peerless No. 2. B referred to Peerless No. 2, and he neither believed nor had reason to believe that A referred to Peerless No. 1.

Under the first definition, the meaning of "Peerless" is Peerless No. 2 because A believed that B referred to Peerless No. 2. Under the second definition, the meaning of "Peerless" is also Peerless No. 2 because B referred to Peerless No. 2 and A had reason to believe it. The great majority of the cases relied upon by the proponents of both definitions turn out on inspection to be instances of this sort in which the result would have been the same regardless of which definition had been used.\(^4\) The frequency of this kind of situation bears out the fact that it is human nature for a contracting party to tend to give the language an interpretation favorable to himself, even when he suspects that it differs from that of the other party.

Another large group of cases comprehends those in which it cannot be established what reference was made either by one party, or by both parties.

\(^4\) RESTATEMENT (SECOND) OF CONTRACTS § 21A (Tent. Draft No. 1, 1964); RESTATEMENT §§ 71, 233(a).

\(^4\) See cases cited in 3 CORBIN § 538 and 4 WILLISTON § 605.
Illustration 3. The facts being otherwise as stated in Illustration 1, it cannot be established to what A referred, but he had reason to believe that B referred to Peerless No. 2. It cannot be established to what B referred, but he neither believed nor had reason to believe that A referred to Peerless No. 1.

Under the first definition, the meaning of "Peerless" is Peerless No. 2, for the same reason given under Illustration 2. Under the second definition, however, no meaning of Peerless can be determined since it is not known what either actually referred to. In such situations, which are of frequent occurrence, the first definition must be applied if a contract is to result.

In many contemporary business transactions, no thought is given by the parties to many matters that are likely later to become important in the event of controversy. Perhaps the contract is embodied in a printed form which has not been prepared by either party; perhaps its clauses have been lifted from a form book; perhaps the deal is a routine one struck by minor functionaries for two contracting business giants. For these and many other reasons the court may have no choice but to look to a standard of reasonableness.

But this is not to say that the references actually made by the parties should not be controlling if it should be possible to establish what they were and that they were the same.

Illustration 4. The facts being otherwise as stated in Illustration 1, A referred to Peerless No. 1 but had reason to believe that B referred to Peerless No. 2. B, however, referred to Peerless No. 1 and had reason to believe that A referred to Peerless No. 2.

Under the first definition, the meaning of "Peerless" is Peerless No. 2, because each party had reason to believe that the other referred to that ship. Under the second definition the meaning of "Peerless" is Peerless No. 1 because both parties referred to that ship (even though it may not have been reasonable for them to have done so).

Illustration 5. The facts being otherwise as stated in Illustration 1, A referred to Peerless No. 1 and had reason to believe that B did too. B referred to Peerless No. 1 but had reason to believe that A referred to Peerless No. 2.

Under the first definition there are two conflicting "meanings" of "Peerless" because each party had reason to believe that the other referred to a different ship. Under the second definition the meaning of "Peerless" is Peerless No. 1 because each party referred to this ship.

It is difficult to believe, however, that any court would reach the re-
sults required by the first definition in these last two illustrations. It is hardly surprising that opinions in which that definition has been applied and where the issue has been presented in these stark terms are not to be found. On the other hand, *Berke Moore Co. v. Phoenix Bridge Co.* well illustrates the proper application of the second definition to this kind of situation. There a general contractor undertook to construct the superstructure of a bridge for New Hampshire upon terms which allowed it $12.60 per square yard of concrete on the bridge deck. It then engaged a subcontractor to do the concrete work for $12.00 per square yard of "concrete surface included in the bridge deck." The subcontractor claimed that it was entitled to payment for the number of square yards included in the outer surfaces of the deck, including top, bottom and sides, a total of 8,100. The general contractor refused to pay for more than the number of square yards contained in the upper surface of the deck, a total of 4,184, for which it had been paid by the state. The trial court concluded that at the time of contracting both parties intended that payment be made according to the latter formula. It relied upon their negotiations in concluding that this had been the intention of the subcontractor at the time of contracting. Although there was no direct evidence of the general contractor's intention at that time, the trial court concluded that it must have been the same since the parties, both experienced contractors, had reached very similar figures of $12.60 and $12.00, while the area claimed by the subcontractor was nearly twice that insisted upon by the general contractor. The Supreme Court of New Hampshire upheld the trial court's conclusion, adding:

The rule which precludes the use of the understanding of one party alone is designed to prevent imposition of his private understanding upon the other party to a bilateral transaction. . . . But when it appears that the understanding of one is the understanding of both, no violation of the rule results from determination of the mutual understanding according to that of one alone. Where the understanding is mutual, it ceases to be the "private" understanding of one party.47

Since the court could determine that to which each party referred by the words "concrete surface included in the bridge deck," and since each party made the same reference, it was able to determine the meaning of the language without ever having to determine that to which

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47. 98 N.H. at 269, 98 A.2d at 156.
Meaning in Contracts

either party had reason to believe the other referred. Other opinions are in accord with the point that if the two parties made the same reference, it is unnecessary to decide whether the reference was a reasonable one or what either party had reason to believe.\(^\text{48}\)

The point is not that there must be a “meeting of the minds” in order for there to be a contract, but only that if there should be a “meeting of the minds,” it ought to be controlling in matters of interpretation regardless of what either party had reason to believe. Corbin maintained that “it is certain that the purpose of the court is in all cases the ascertaining of the ‘intention of the parties’ if they had one in common.”\(^\text{49}\)

Folke Schmidt assumed that “all agree upon one very essential point: that what both parties have intended should decide the content of the agreement.”\(^\text{50}\) And happily, the draftsmen of the Restatement Second of Contracts appear to have tacitly adopted the same principle.\(^\text{51}\)

The object of contract law is to protect the justifiable expectations of the contracting parties themselves, not those of third parties, even reasonable third parties. A formula, such as the first definition, which takes no account of the actual expectation of either party is unlikely to render good service. “Meaning” for the purpose of contract interpretation should therefore be defined as: (1) that to which either party refers, where it can be determined and where it can be established that it is the same as that to which the other party refers, or believes or has reason to believe the first party to be referring; and, only failing this, (2) that to which either party has reason to believe the other to be referring. Interpretation then becomes the process applied to the language of the parties by which this meaning is determined. It is sometimes supposed, however, that language can be so clear that no recourse need be had to external circumstances to determine its meaning. Are there circum-

\(^{48}\) Campbell v. Rockefeller, 134 Conn. 585, 59 A.2d 524 (1948) ("We find nothing in the law which . . . forbids the trial court to give effect to the actual understanding of the parties. . . . When the trial court found that both parties understood that . . . the plaintiff was to receive a reasonable profit upon the materials, it properly gave effect to that understanding." Id. at 590, 59 A.2d at 526; Stevens v. G. L. Rugo & Sons, 115 F. Supp. 61, 62 (D. Mass. 1952), vacated on other grounds, 209 F.2d 135 (1st Cir. 1953) ("Where there is ambiguity in the words used, one party's understanding of his own words and of the other party's words is always admissible in the interpretation of a contract. . . . And such understanding not only is admissible, but governs interpretation, when, as here, it coincides with the other party's understanding. . . .") On appeal the court concluded that the plaintiff did not have the understanding assumed by the district court.

\(^{49}\) 1 CORBIN § 105.

\(^{50}\) Schmidt, supra note 31.

\(^{51}\) RESTATEMENT (SECOND) OF CONTRACTS § 21A, Illustration 1 at 98 (Tent. Draft No. 1, 1964). There is, however, no statement of the principle in the text on which that illustration is hung.

951
stances under which the meaning of language is so "plain" that some other definition of that term is appropriate?

The Search for Plain Meaning

In Semantics

The very concept of plain meaning finds scant support in semantics, where one of the cardinal teachings is the fallibility of language as a means of communication. Waismann lamented that,

Ordinary language simply has not got the "hardness," the logical hardness, to cut axioms in it. It needs something like a metallic substance to carve a deductive system out of it such as Euclid's. But common speech? If you begin to draw inferences it soon begins to go "soft" and fluffs up somewhere. You may just as well carve cameos on a cheese soufflé.62

Much of this softness of language comes from the differing ways in which we learn to use words, for the use of a symbol for communication is ordinarily preceded by an elaborate process of conditioning which may vary greatly with the individual. According to Skinner, a leading figure among psychologists and philosophers who study language learning, this process takes place in roughly the following manner. In late infancy children begin to emit sounds in a random way, to babble. The parents show pleasure when they hear patterns that sound like words among the random noises. Their display of pleasure serves as a reward for the child, which reinforces both his ability and desire to repeat these sound-patterns. In this way a vocabulary is acquired. The child learns to use this vocabulary correctly and to respond to words themselves as stimuli by associating words with the stimuli presented at the time of a rewarded bit of babbling. A rudimentary form of trial and error serves to weed out irrelevant stimuli.53

This account of language learning shows two reasons why vagueness pervades language. First, each person learns words on the basis of different sets of stimuli. To borrow Quine's example of the word "red," some will have learned this word in situations where red was sharply contrasted with other colors that differ greatly; others will have learned it by being rewarded for distinguishing red from other reddish colors. It seems clear that the former group will use "red" more freely than the latter group. Second, the abilities of people to group stimulations into

Meaning in Contracts

sets differ somewhat. Thus, some children will simply respond “red” when either a red object or a crimson object comes into view and will remain incapable of distinguishing them.

Quine has built upon Skinner’s theory of language learning to explain the concept of vagueness. According to Quine, “stimulations eliciting a verbal response, say ‘red,’ are best depicted as forming not a neatly bounded class but a distribution about a central norm.”54 The idea of a central norm is useful in explaining the concept of vagueness, for a word is vague to the extent that it can apply to stimuli that depart from its central norm.

Contract language abounds in perturbing examples of vagueness. The parties provide for the removal of “all the dirt” on a tract; may sand from a stratum of subsoil be taken?265 An American seller and a Swiss buyer agree upon the sale of “chicken”; is stewing chicken “chicken”? 56 Vagueness may even infect a term that has an apparently precise connotation. The parties contract for the sale of horsemeat scraps “Minimum 50% protein”; may evidence be admitted to show that by trade usage scraps containing 49.5% or more conform?257

Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word “light” may be when applied to dark feathers.58 Such a word is ambiguous.59

Whether an ambiguity arises may depend upon the medium of communication. Some ambiguities (ordinarily homonyms), such as “beer” and “bier” arise only in speech and disappear in writing; others such as “tear” (a rip or a drop), arise only in writing and disappear in speech. Speech will do much to remove the ambiguity from sentences such as, “Do you think that one will do?” which can be read aloud in a variety of ways by stressing a different word each time.60 Gestures also play a

54. W. QUINE, WORD AND OBJECT 85 (1960). See also Id. at 126.
58. The example is from W. QUINE, WORD AND OBJECT 129 (1960).
59. Young, following Elphinstone, prefers the term “equivocation” to “ambiguity” on the ground that the latter is too encrusted with confusion and misunderstanding in legal literature. See Young, Equivocation in the Making of Agreements, 64 COLUM. L. REV. 619, 626 (1964) citing Elphinstone, 2 L.Q. REV. 110 (1886). Since “ambiguity” is widely—and properly—used by writers in semantics and philosophy, it seems better to clean up that term for use in legal discourse.
60. C. CHERRY, ON HUMAN COMMUNICATION 120 (1957). And try “pretty little girls’ camp” suggested in W. QUINE, WORD AND OBJECT 54 (1960).
part in normal face-to-face conversation, and habits of speech have been shown to change when conversation is over a telephone and normal gesture reinforcement is lost.\textsuperscript{61} Ambiguity may arise in a telegram because of the lack of punctuation which would ordinarily be supplied in a letter.\textsuperscript{62} And even given an ambiguity, it may be resolved by its context: one drinks a beer, not a bier, and sheds a tear (drop) not a tear (rip).

Ambiguities may be classified into those of term and those of syntax. As Young has pointed out,\textsuperscript{63} true examples of ambiguity of term are rare in contract cases. A contract specifies “tons”; are they to be long or short tons?\textsuperscript{64} A charter party provides that a vessel must be “double-rigged,” which by usage can refer to either two winches and two booms per hatch, or four of each per hatch; how many must the vessel have?\textsuperscript{65} An important variety of ambiguity of term, for our purposes, is proper name ambiguity, the kind of ambiguity that plagued Shakespeare’s Cinna,\textsuperscript{66} the kind of ambiguity that we deliberately create when we name a child after someone. It was this kind of ambiguity that was involved in the celebrated case of the ships “Peerless.”

An ambiguity of syntax is, in the strictest sense, an ambiguity of grammatical structure, of what is syntactically connected with what. A classic example is, “And Satan trembles when he sees/ The weakest saint upon his knees,”\textsuperscript{67} in which the ambiguity is that of pronominal reference.

Ambiguity of syntax is probably a more common cause of contract disputes than is ambiguity of term. An insurance policy covers any “disease of organs of the body not common to both sexes”; does it include a fibroid tumor (which can occur on any organ) of the womb?\textsuperscript{68}

\textsuperscript{61.} C. Cherry, On Human Communication 77 (1957).
\textsuperscript{62.} See Petroleum Financial Corp. v. Cockburn, 241 F.2d 312 (5th Cir. 1957). See also Falck v. Williams, [1900] A.C. 176, in which the parties differed over the reading of an unpunctuated telegram in code.
\textsuperscript{63.} Young, supra note 59, at 627.
\textsuperscript{65.} See Amicizia Societa Navegazione v. Chilean Nitrate \& Iodine Sales Corp., 184 F. Supp. 116 (S.D.N.Y. 1959) (held: arbitrators’ decision that two of each per hatch suffices sustained).
\textsuperscript{66.} “Cinna: I am Cinna the poet. ... I am not Cinna the conspirator! Second Plebian: It is no matter, his name’s Cinna; pluck but his name out of his heart and turn him going.” Julius Caesar, III, iii.
\textsuperscript{67.} From Philip E. B. Jourdain, quoted in W. Quine, Word and Object 135 (1960).
A contract provides that, "Before the livestock is removed from the possession of the carrier or mingled with other livestock, the shipper shall inform in writing the delivery carrier of any visible injuries to the livestock"; is it enough that he notify before mingling although after removal?

Syntactical ambiguity is often the result of inadequate punctuation. Note, for example, the confusion that sometimes results from contracts concluded by an unpunctuated telegram. Sometimes the ambiguity is caused by the dropping of words to make shorthand expressions. A contract for the sale of "approx. 10,000" heaters adds "All in perfect condition"; is this, as buyer contends, an express warranty ("All to be in perfect condition") or, as seller contends, a limitation on the quantity ("All that are in perfect condition")?

Particularly hazardous as a source of ambiguity for the contract draftsman are the words "and" and "or." Layman Allen’s extensive analysis of the ambiguities associated with these terms suggests three that are particularly likely. The first is the ambiguity between "or" as a disjunctive (P or else Q) and as a complicative (P, that is to say Q). The second ambiguity is that between "or" as an exclusive disjunctive (P or else Q, but not both) and as an inclusive disjunctive (P or else Q, or else both). The third is that between "and" as a conjunctive (only both P and Q) and as an inclusive disjunctive (P or else Q, or else both). The classic case of Cuthbert v. Cumming shows the complexity that can occur in a single case of this type. A charter party obliged the char- terer "to load a full and complete cargo of sugar [A], molasses [B], and/or other lawful produce [C]", what may he load? A and B and C, or else A and B, or else C?

69. See Atlantic Coast Line R. Co. v. Holman, 33 Ala. App. 319, 33 So. 2d 365 (1946), rev’d, 250 Ala. 1, 33 So. 2d 367 (1947), analyzed in Allen, Symbolic Logic and Law: A Reply, 15 J. Legal Ed. 47, 50-51 (1962). The lower court read it: “either before the livestock is removed from the possession of the carrier, or before it is mingled with livestock" and answered in the negative. 33 Ala. App. at 322, 33 So. 2d at 367 (emphasis added).


73. Alderson, B., below, in Cuthbert v. Cumming, 10 Ex. 809, 814, 156 Eng. Rep. 668, 670 (Ex. D.), aff’d, 11 Ex. 405, 156 Eng. Rep. 889 (Ex. Ch. 1855), said he could have loaded “a full and complete cargo of sugar and molasses and other lawful produce, or a full and complete cargo of sugar and molasses, or a full and complete cargo of other lawful produce.”

74. Coleridge, J., 11 Ex. at 408, 156 Eng. Rep. at 891, said “the charterer would have the option of loading sugar and molasses either with or without other produce.”
B?75 A or else B or else C?76 A or else A and B or else A and C?77 A or else B or else C or any combination of two or three?78

Ambiguity in contracts may also result from inconsistent or conflicting language. A buyer agrees to pay “at the rate of $1.25 per M” for all the timber on a designated tract, and that “the entire sale and purchase price of said lumber is $1400.00”; how much must he pay for 4,000 M feet?79 In many of these cases the conflict is between language in a form contract and that added by the parties for the particular transaction. A printed warranty in the sale of a house requires the owner to give notice of breach “within one year from . . . the date of initial occupancy” and also provides that “notice of nonconformity must be delivered no later than January 6, 1957,” the date having been inserted by hand; when must the buyer give notice if he moves in on May 16, 1955?80

It would be wrong to assume that the failure of contract language to dispose of a dispute that later arises is invariably due to some inherent fallibility of language as a means of communication. The parties may simply not have foreseen the problem at the time of contracting. An insurance contract on a motor vessel covers “collision with any other ship or vessel”; is a collision with an anchored flying boat included?81 Or one or both may have foreseen the problem but deliberately refrained from raising it during the negotiations for fear that they might fail—the lawyer who “wakes these sleeping dogs” by insisting that they be resolved may cost his client the bargain. An elderly lady enters a home for the aged, paying a lump sum, to be returned to her “if it should be found advisable to discontinue her stay” during a two-month probationary period; must the home refund her money if she dies within that time?82 Or both may have foreseen the problem but chosen to deal with it only in general terms, delegating the ultimate resolution of particular controversies to the appropriate forum. A contract for the

75. Cresswill, J., 11 Ex. at 408, 156 Eng. Rep. at 891, said “the contract must be read as if the charterer had undertaken to load a full and complete cargo of sugar and molasses without any other things.”
76. See opinion of Lord O’Hagen in Stanton v. Richardson, 45 L.J.Q.B. 78, 86 (1875), discussed in D. MELLINKOFF, supra note 72, at 151-52.
77. See opinion of Lord Hatherley in Stanton v. Richardson, 45 L.J.Q.B. 78, 85 (1875).
78. See opinion of Lord Chancellor, id. at 82-83.
Meaning in Contracts

sale of wool requires “prompt” shipment from New Zealand to Philadelphia; does shipment in 52 days conform? It is interesting to note that while either ambiguity or vagueness may result from the other causes just suggested, only vagueness is suitable for use in such a conscious attempt at delegation.

Having seen, then, that vagueness and ambiguity represent different concepts and that for various reasons they pervade contract language, we now pursue the search for “plain meaning” into the field of contract interpretation itself.

In Contract Interpretation

The concept of a plain meaning of language has found a more hospitable climate in the field of contract law than it has in semantics. The problem is not, however, that courts engaged in interpreting contracts have assumed that there is always a fixed connection between a word and its referent. While they may have made that assumption for the interpretation of such formal instruments as wills and deeds, they seem not to have done so for the interpretation of informal contracts, since from earliest times courts have been willing to vary the meaning of words according to custom or usage. An early example is *Wing v. Earle*, 8 decided in Queen’s Bench in 1592. The defendant had contracted to sell wooded land near the town of Rye to the plaintiff. A statute designed to prevent the depletion of woodlands by iron mills forbade the use for the making of iron of any wood within four miles of Rye, and it was made a condition of the contract that the land in question be four miles from Rye. The land was over four miles from Rye by the nearest route, but less than four miles as the crow flies. Generally, distances were measured by the “English form,” that is, by the nearest route, and they were so measured under the statute. Nevertheless the plaintiff had judgment because the case was on the condition and not the statute, and it was the local usage to measure it “as a bird shall fly.”

While courts engaged in contract interpretation, then, have not adopted the idea that there is *always* a fixed and inevitable connection between word and object, they have found it difficult to rid themselves

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84. 8 Cro. Eliz. 212, 267 (1592). *But cf. St. Cross v. Walden*, 101 Eng. Rep. 583 (K.B. 1793), in which a customary definition of “quarter” in a lease was rejected in favor of a definition found in a statute, Lawrence, J., explaining that “when a word is used having a legal meaning, it must be understood to be used in its legal acceptation.”
of the influence of this view. They have tended to attribute a definitive quality to written words. This tendency is exemplified by the parol evidence rule, which deserves close examination in light of the points we have just discussed.

Of the parol evidence rule, Thayer wrote: "Few things are darker than this, or fuller of subtle difficulties." Typically, the rule is called into play where the parties have reduced their contract to writing after oral or written negotiations in which they have given assurances, made promises, or reached understandings. When, in the event of litigation, one of them seeks to introduce evidence of these negotiations to support his version of the contract, he will be met with this rule which, if it applies, will preclude his reliance on such "parol evidence," that is to say, on prior oral or written or contemporaneous oral negotiations.

The principle behind the parol evidence rule has been the subject of speculation. McCormick saw it through the eyes of an authority on evidence. He argued that where parties of unequal economic status advance conflicting claims based upon the written word and the oral word, respectively, the party relying on the written word is more likely to be the richer, the one relying on the oral word the poorer. Since, under these circumstances, the jury is not likely to take sufficient account of the unreliability of the narrative of an interested witness, there is a "grave danger that honest expectations, based upon carefully considered written transactions, may be defeated." McCormick's explanation is faulty, however, since it goes only to prior oral negotiations and fails to account for the exclusion of prior written negotiations, as to which his arguments have little force. A more satisfactory rationale is that of Corbin, who viewed it as a specialist in contracts:

Any contract, however made or evidenced, can be discharged or modified by subsequent agreement of the parties. . . . This, it is believed, is the substance of what has been unfortunately called the "parol evidence rule." . . . If the foregoing is true of antecedent contracts that were once legally operative and enforceable, it is equally true of preliminary negotiations that were not themselves mutually agreed upon or enforceable at law. . . . [T]he legal relations of the parties are now governed by the terms of the new agreement. This is so because it is the agreement of today, whether that which had happened yesterday was itself a contract or was nothing more than inoperative negotiation.

87. 3 Corbin § 574, at 371, 376.
Meaning in Contracts

For the rule to apply at all, a court must first conclude that the parties regarded the documents as a sort of exclusive memorial of their transaction, an "integration." This happens if the parties adopt a writing as the final, complete, and exclusive expression of their agreement. Once it is judicially determined that the agreement is "integrated," then the parol evidence rule applies, and prior oral or written and contemporaneous oral agreements are "inoperative to add to or to vary the agreement." It is generally recognized, however, that this prohibition against addition and variation does not necessarily preclude resort to parol evidence when it is offered for the purpose of interpretation of language. Here there are two conflicting views.

Under the older and more restrictive, parol evidence may only be used for the purpose of interpretation where the language in the writing is "ambiguous." The decision to admit parol evidence, that is, consists of two steps: first, one decides whether the language is ambiguous; second, if it is ambiguous, then one admits parol evidence only for the purpose of clearing up that ambiguity. This is the view adopted both by Williston and by the Restatement of Contracts. The standard for integrated agreements is a variant of the last of the three definitions of meaning set out earlier, "That to which either party ought to be referring." Accordingly, the Restatement provides that in the absence of ambiguity, the standard of interpretation to be applied to an integration is "the meaning that would be attached . . . by a reasonably intelligent person" familiar with all operative usages and knowing all the circumstances other than oral statements by the parties about what they intended the words to mean.

Under the newer and more liberal view championed by Corbin, the parol evidence rule is not applicable at all to matters of interpretation. On this view there is only one standard, applicable alike to integrated and unintegrated agreements, and parol evidence is always admissible in either of these two cases so long as it is used for the purpose of interpretation. The court need not first determine that the language is "ambiguous." This latter version of the rule seems more meaningful.

The principal instance in which the two views give conflicting results occurs when the parties reach an oral understanding whose meaning

88. Restatement § 237. On partial integration, see Restatement §§ 228 and 229.
89. Restatement § 230.
90. Corbin, The Interpretation of Words and the Parol Evidence Rule, 50 Cornell L.Q. 161 (1965). This view seems to be supported by Uniform Commercial Code § 2-202, which states the parol evidence rule so as to forbid contradiction but not interpretation, without regard to "ambiguity."
differs from what would be inferred by the *Restatement's* "reasonably intelligent person." This can be illustrated by another example based on the Peerless case.

**Illustration 6.** A, by an agreement evidenced by an integration, contracted to sell B goods shipped from Bombay "ex Peerless." There were two steamers of the name "Peerless" sailing from Bombay at materially different times. A and B orally agreed that they were referring to Peerless No. 1, but a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances, other than the oral agreement, would have referred to Peerless No. 2.91

Under the more restrictive view, it will be remembered, the court must determine whether "Peerless" as used in the writing is ambiguous. Assuming that it would conclude that it is not, parol evidence would be excluded. And since the reasonably intelligent person would have referred to Peerless No. 2, the court will find that to be the meaning of "Peerless." Under the more liberal view, however, since the purpose for which the evidence is offered is clearly that of "interpretation" of "Peerless," the court will admit evidence of the oral agreement and find the "meaning" of "Peerless" to be Peerless No. 1.

Under the more restrictive view, therefore, the parties do not have absolute freedom to attach special meanings to ordinary words. This view is kin to the much discredited "plain meaning" rule in the field of statutory interpretation, which excludes from consideration the statute's legislative history where the meaning of the statutory language is "plain." For if parol evidence may only be used to interpret the language of an integrated agreement where that language is ambiguous, the effect is to exclude the "transactional history" of the contract where the meaning of the integration is "plain."

The problem then becomes one of determining what constitutes ambiguity for this purpose. A hoary distinction between a patent ambiguity, one apparent from the face of the writing (e.g., that inherent in "and" or "or"), and a latent ambiguity, one apparent only from extrinsic circumstances (e.g., that inherent in "Peerless") has come down to us from Bacon's maxims. The distinction has long been used to explain

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91. The comparable *Restatement* example is Illustration 1 to § 230, which involves an integrated agreement for the sale of certain patents, which A, the seller, understands to be only the English, but B, the buyer, understands to be the English, French and American. If a reasonable person under the standard of limited usage would understand this as a sale of the English and American, but not French, patents, then A and B are bound by the meaning. As Corbin points out, this example seems to be a distortion of Preston v. Luck, 27 Ch. D. 497 (1884). See 3 Corbin § 539 n.60.
the result in the "Peerless" case, which is then regarded as being limited to latent ambiguities. 92 Thayer, however, rejected the distinction as an "unprofitable subtlety" and it appears to have lost currency. 93 Once it is recognized, as Quine has shown, that the referent of a word is heavily dependent upon its context, the distinction becomes blurred and many supposedly latent ambiguities can be seen instead as patent ones. Thus once the ambiguity inherent in proper names is granted, even the supposedly latent ambiguity in the "Peerless" case takes on the character of a patent one, apparent on its face to an observer versed in Quine.

Generally, the term "ambiguity" is used loosely under the more restrictive view of the parol evidence rule, so that it includes not only patent and latent ambiguities, but vagueness as well. In one recent case, for example, the issue was whether the word "liabilities" included liabilities that were unknown and unforeseen and not stated on the balance sheet. 94 Strictly, the problem was one of the vagueness of "liabilities" and not of its ambiguity. The court, nevertheless, held that parol evidence was admissible because the word "liability" was ambiguous, explaining: "An ambiguous contract is one capable of being understood in more senses than one; an agreement obscure in meaning through indefiniteness of expression, or having a double meaning." 95 In other words, the court defined "ambiguity" to include vagueness as well as ambiguity, and then admitted parol evidence where only vagueness existed. Indeed, some formulations of the traditional view specifically use the term "uncertainty" in addition to "ambiguity." 96 Furthermore, courts have become increasingly willing to recognize the presence of both ambiguity and vagueness. 97

In spite of this liberalization of the more restrictive view, is there any excuse for the continued insistence upon ambiguity or vagueness in the integration in an era when the concept of a "plain" meaning of words has become justifiably suspect? Williston defended the more restrictive view on the ground that in unintegrated contracts the parties are not primarily paying attention to the symbols which they are using but have in mind the things for which the symbols stand. He claimed that just the

92. See Young, supra note 59, at 625.  
93. Thayer, supra note 85, at 422-26, 471-74. See Young, supra note 59, at 626; 4 WILLISTON § 627.  
95. Id. at 784.  
96. The Restatement tries it both ways, using "ambiguous" in § 230 and "uncertain or ambiguous" in § 231.  
opposite is true in the case of an integration. The basis for this assumption does not appear, and the image of the parties considering the things for which the symbols stand rather than the symbols themselves seems as appropriate to a contract made on a standard printed form containing an integration clause among its boilerplate as to a more informal sort of transaction. On a more practical level, Williston suggested that exclusion of parol evidence, even for the purpose of interpretation, may be dictated by two factors: first by fairness to the other party, who may have been justified in assuming an intention different from that which actually existed; and second, by the desirability of a reasonable certainty of proof of the terms of the contract. The first argument is scarcely compelling if it has been determined that both parties used words in a way different from that dictated by general or limited usage. As to the second, the curious fact that the Restatement formulation of the more restrictive view speaks only to "oral statements," while the parol evidence rule generally applies to prior written statements as well, suggests that this branch of the rule places more reliance on the desirability of certainty of proof for its justification. Since, however, interpretation is ordinarily regarded as a matter of law rather than one of fact, so that it falls within the province of judge rather than of jury, there is an adequate safeguard, if one is needed, against the risk of insubstantial evidence.

The more liberal view is more persuasive. This view makes it unnecessary to determine whether the language of an integrated writing is "plain" as opposed to "ambiguous" or "vague." Instead the task is to characterize the process involved as that of "interpreting" the writing on the one hand, or as that of "adding to" or "varying" it on the other. The distinction can be justified on the ground that although the writing is an integration and the parties have assented to it as a complete and exclusive statement of terms, the imprecise nature of language still leaves room for interpretation.

The question is then, when does "interpretation" end and "addition" or "variation" begin? The answer under the definition of "interpretation" arrived at earlier must be, interpretation ends with the resolution of problems which derive from the failure of language, that is to say with the resolution of ambiguity and vagueness. Accordingly, even under the liberal view, parol evidence is admissible only where vagueness

98. 4 Williston § 606. See also Restatement § 230, comment b.
99. 4 Williston § 608.
100. 3 Corbin § 554; 4 Williston §§ 600, 600A, 601.
101. 3 Corbin § 539.
or ambiguity is claimed. In many cases this will produce the same result as the restrictive view—that parol evidence is admissible only where the meaning of the writing is not “plain.” The principal departure is that while the restrictive view confines the court to the language of the integration itself and requires it to decide whether there is ambiguity or vagueness, the liberal view simply requires the court to look to the purpose for which the parol evidence is sought to be introduced, without the necessity of deciding beforehand whether the language is, in fact, ambiguous or vague. The significance of this difference will be more apparent after a discussion of some of the cases in which courts have wrestled with these problems.

Many of the cases in which courts claim to have rejected the more liberal view and excluded parol evidence which was offered for the purpose of interpretation turn out on careful analysis to be cases in which the evidence was not actually offered for this purpose at all. In Imbach v. Schultz,102 for example, an integrated deposit receipt for a real estate deal contained an agreement to pay “as commission on closing the sum of Eighteen Thousand Five Hundred 18,500 Dollars, or one-half the deposit in case same is forfeited by purchaser.”103 The sum was written and the words “on closing” were interlined in ink on a printed form. When the purchaser defaulted, the broker claimed one half of the $15,000 deposit, or $7,500. The seller maintained that he had an understanding with the broker that nothing was to be paid unless the sale was closed. The Supreme Court of California held it error to admit this. Parol evidence is “not admissible when it is offered, as here, to give the terms of the agreement a meaning to which they are not reasonably susceptible . . . .”104 But here the evidence was not offered for the purpose of interpretation of the language of the contract. No term was claimed to be vague or ambiguous. Rather, the evidence was offered to establish an additional term that plainly contradicted the terms of the integrated writing.

Where, in contrast to the case just discussed, parol evidence is offered purely for the purpose of interpretation, courts have generally been ready to admit it, at least after a finding of “vagueness” or “ambiguity.” Asheville Mica Co. v. Commodity Credit Corp.105 is typical. The CCC and the General Service Administration both had contracts to buy mica from the plaintiff. The CCC agreed to match any increase in “the unit

103. Id. at 589, 377 P.2d at 274, 27 Cal. Rptr. at 162.
104. Id. at 860, 377 P.2d at 274, 27 Cal. Rptr. at 162.
105. 335 F.2d 768 (2d Cir. 1964).
prices under GSA's purchase contracts." The plaintiff negotiated new contracts with the GSA, but the CCC refused to match these prices, claiming that the term "GSA's purchase contracts" referred only to contracts in existence at the time the contracts with the CCC were made. The federal court of appeals reversed the district court, which had held that the contract sued upon was "so clear on its face as to preclude resort to oral testimony . . .". The court of appeals relied on parol evidence and approved Corbin's view that parol evidence is always admissible for the purpose of interpretation. Since the purpose for which the evidence was offered was to clear up the claimed vagueness of the word "contracts" and to show that the new contracts were "contracts," the court was correct in its conclusion that only interpretation was involved. Although on this view it was unnecessary for the court to find vagueness or ambiguity, it gratuitously added that "the provision in question is not wholly unambiguous" since it was not limited to existing contracts with GSA.107

Upon elimination of the first group of cases in which the rejection of the more liberal view has concerned controversies not actually involving interpretation, and of the second group where courts admitted parol evidence offered for the purposes of interpretation, there remains, of course, a hard core of cases in which the more liberal view has been rejected. American Sumatra Tobacco Corp. v. Willis108 is an example. A tobacco grower was sued on his contract to sell his "entire crop . . . to be grown by me on about 30 acres." He offered parol evidence to show that he had two farms, that only one of them was referred to by the contract, and that his crop had failed on that farm. The court held that this evidence should have been excluded under the parol evidence rule. Parol evidence was "not admissible to vary, alter, or contradict the terms of a complete and unambiguous written contract."109 Under the more liberal view this unsatisfactory result would have been avoided. The evidence would have been admitted since it was offered for the purpose of interpretation; that is, to resolve a claimed ambiguity in the term "30 acres." Applicability of the parol evidence rule would have turned simply upon a determination of the purpose for which the evidence was offered, not upon a decision as to whether or not the term was ambiguous.

A similar problem arises in connection with what are sometimes re-
Meaning in Contracts

ferred to as “private conventions” as to interpretation. Holmes argued against accepting parol evidence of such conventions where the language was “plain,” and rejected the notion that the parties to a contract, making sense as it was written, could show that they had orally agreed “that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church.” 110 But as applied to cases of private conventions as well as generally, the unhappy effect of this more restrictive view is to impose upon contracting parties interpretations that were expected by neither of them. It has been suggested that reformation is the proper remedy in these cases.111 These are not, however, situations where the parties have mistakenly used words which they did not intend, and so where reformation is appropriate to insert the correct words. These are situations where the parties have used the very words intended by them, but have used them in a way not sanctioned by the usage of others. Reformation is neither a necessary nor even an appropriate remedy; judicial interpretation is sufficient.

It is increasingly difficult to justify the restrictive view of the parol evidence rule. Once it is recognized that all language is infected with ambiguity and vagueness, it is senseless to ask a court to determine whether particular language is “ambiguous” or “vague” as opposed to “plain.” But it is possible to give content to the terms “ambiguity” and “vagueness,” and it does make sense to ask a court to determine whether evidence is offered for the purpose of resolving ambiguity or vagueness. By limiting “interpretation” to the resolution of ambiguity or vagueness, we can give meaningful content to the more liberal rule.


111. Thus the court in Cooper v. Cleghorn, 50 Wisc. 113, 6 N.W. 491 (1880), pointed out that mistake was not claimed and reformation was not sought. Id. at 123-24, 6 N.W. at 493. The same suggestion appears in Restatement § 230, comment a and § 231, Illustration 2.