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# Understanding of History of Contract Interpretation Can Benefit Attorneys

**Focus Column**

**Business Law**

**By Daniel Lee Jacobson**

"A page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921). With these words, Justice Oliver Wendell Holmes explained why some rules of law do not seem to comport to the dictates of logic. Contract interpretation is an area where history seems sometimes to have trumped logic. Yet whether brought to us by the pages of history or by the dictates of logic, the contract interpretation rules are vital.

Who decides the meaning of a written contract, the judge or the jury? Factual decisions are within the province of the jury, while legal decisions are left for the judge. Evidence Code Sections 310, 312. A matter of fact matures into a matter of law where only one reasonable conclusion can be reached. *Dahl-Beck Electric Co. v. Rogge*, 275 Cal.App.2d 893 (1969).

Some distinguish fact from law by stating that fact involves the specific while law involves the general. *Antilles Steamship Ltd. v. Members of the Am. Hull Ins.*, 733 F.2d 195 (2d Cir. 1984) (Newman, J., concurring).

Professors Arthur L. Corbin and Samuel Williston said that interpretation of a contract is always a question of fact. 3 "Corbin on Contracts" Section 554 (1960); 4 "Williston on Contracts" Section 616 (W. Jaeger 3d ed. 1961).

Yet the general rule, followed by California, is that decisions regarding the intent of the parties and other matters of interpretation of a written contract are assigned to the judge rather than to the jury. Evidence Code Section 310; *Parsons v. Bristol Dev't Co.*, 62 Cal.2d 861 (1965).

While some court decisions and Section 310 state that this rule is based on the proposition that such an interpretation is a matter of law (see, for example, *Markley v. Beagle*, 66 Cal.2d 951 (1967)), at least one state court has admitted that the rule exists in spite of the fact that contractual interpretation "involves what might properly be called questions of fact." *Kusmark v. Montgomery Ward & Co.*, 249 Cal.App.2d 585 (Cal. App. 2nd Dist. 1967).

So what is the issue of what particular words mean doing in the hands of judges instead of the juries? Holmes' comment on the explanatory usefulness of history is instructive.

Various scholars have concluded that, in what many would argue is not a proud history for democratic principles, "fear of the jury has helped shape the law in the area of interpretation [of contracts], with the result that the law often seems confused and inconsistent with some basic contract values." William Whitford, "The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts," 2001 Wisc. L. Rev. 931 (2001).

Professor Charles T. McCormick believed that common-law judges were uneasy with the conscious thought of taking the interpretation of contracts from juries because doing so tended to insult "the jury as a symbol of political liberty." So, McCormick contended, the judges disguised this taking in doctrinal rhetoric that has survived the centuries. Charles T. McCormick, "The Parol Evidence Rule as a Procedural Device for Control of the Jury," 41 Yale L. J. 365 (1932). Thus, history seems to have triumphed over the simple axiomatic logic that matters such as intent are matters of fact.

However, the development of the rule requiring that judges interpret written contracts has brought with it an exception - juries will decide matters of contractual interpretation when there is an ambiguity in the contract. *Loree v. Robert F. Driver Co. Inc.*, 87 Cal.App.3d 1032 (Cal. App. 4th Dist. 1978); *Walsh v. Walsh*, 18 Cal.2d 439 (1941).

Many of the things that the court (or the jury) must consider in interpreting a contract are based on logic. For example, "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." Civil Code Section 1636. A court should look to the actual language of the contract to derive the intention of the parties. *Healy Tibbits Constr. Co. v. Employers' Surplus Lines Ins. Co.*, 72 Cal.App.3d 741 (Cal. App. 1st Dist. 1977); *Hensler v. City of Los Angeles*, 124

Cal.App.2d 71 (Cal. App. 2nd Dist. 1954).

In construing the meaning of the words, unless parties use those words in a technical or other special manner, the court should use the ordinary meaning of the words. Civil Code Section 1644; *Berman v. Dean Witter & Co. Inc.*, 44 Cal.App.3d 999 (Cal. App. 2nd Dist. 1975).

The ordinary sense of a word is to be found in a general dictionary. *Scott v. Continental Ins. Co.*, 44 Cal.App.4th 24 (Cal. App. 4th Dist. 1996).

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civil Code Section 1638.

What if the language of a contract is not clear and explicit? Or what if that language does involve an ambiguity? Several rules speak to this issue.

"A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civil Code Section 1647. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civil Code Section 1648.

"If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civil Code Section 1649.

However, "[t]he [civil] code provision[s] permitting the showing of surrounding circumstances ... is applicable only where the language used in the contract is doubtful, uncertain, or ambiguous." *Pope v. Allen*, 225 Cal.App.2d 358 (Cal. App. 4th Dist. 1964).

California's liberal general parol evidence rule is noteworthy not because of the extrinsic evidence that it keeps from admission but because of the circumstances in which it allows such evidence to be admitted.

"Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." Code of Civil Procedure Section 1856 (a). But consistent additional terms are allowed unless the writing is intended to be "complete and exclusive." Section 1856 (b).

Contrary to what many learned in law school, in California, a written contract "may be explained or supplemented by course of dealing or usage of trade or by course of performance" (Section 1856(c)), without there being any ambiguity in the contract. Law Revision Commission Official Comment to Code of Civil Procedure Section 1856.

Also, to the extent that the words of a contract are "explained or supplemented by course of dealing or usage of trade or by course of performance," the definitions resulting from such explanation or supplementation rule over the definitions that such words might otherwise have. Law Revision Commission Official Comment to Code of Civil Procedure Section 1856.

The parol evidence rule contained in Commercial Code Section 2202 is similar in its liberality.

To the surprise of many attorneys who have tried to find the best evidence rule lately, the Legislature abolished the rule in 1998. Law Revision Commission Comments to Evidence Code Section 1521. The Legislature replaced the best evidence rule with what is current Evidence Code 1521, known as the "Secondary Evidence Rule."

Under the secondary evidence rule, "[t]he content of a writing may be proved by otherwise admissible secondary evidence." Section 1521(a).

However, the court must exclude such evidence if "[a] genuine dispute exists concerning material terms of the writing and justice requires the exclusion[; or] [a]dmission of the secondary evidence would be unfair." Sections 1521(a)(1), (a)(2).

The general statute of frauds is codified at Civil Code Section 1624. That section requires contracts covering certain subjects, such as the sale of land, to be evidenced by a writing. The combination of the statute of frauds and the parol evidence rule is powerful when applied to material terms of a contract. When the statute of frauds is invoked, recovery may not be based on parol proof of material terms omitted from the written memorandum. *Lombardo v. Santa Monica Young Men's Christian Ass'n*, 169 Cal.App.3d 529 (Cal. App. 2nd Dist. 1985); *Ontario Downs v. Lauppe*, 192 Cal.App.2d 697 (Cal. App. 3rd Dist. 1961); and *Burge v. Krug*, 160 Cal.App.2d 201 (Cal. App. 2nd Dist. 1958).

The "[p]urpose of the statue of frauds is to prevent fraud and perjury with respect to certain agreements by requiring for enforcement the more reliable evidence of some writing signed by the party to be charged." *Sousa v. First Cal. Co.*, 101 Cal.App.2d 533 (Cal. App. 1st Dist. 1950).

But one wonders whether this logical explanation should be tempered by the history documented by McCormick and others. If a goal of the framers of the statute of frauds was to keep the interpretation of certain types of contracts from juries, then those framers have been successful.

In order to be enforced, the types of contracts listed in the statute of frauds must be in writing. Unless a written contract is ambiguous, the court, rather than the jury, will interpret it. Therefore, unless there is an ambiguity, the court, not the jury, will interpret a contract covering a subject listed in the statute of frauds.

These rules of interpretation must work together in a given case. Recall that Whitford said that the historical basis for some of the rules of interpretation has resulted in the law of contracts often seeming "confused and inconsistent with some basic contract values."

But knowledge of the uneven origins of those rules is empowering. It allows for a deeper understanding of those rules and greater adeptness in their implementation.

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