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A PLEA FOR A UNIFORM PAROL EVIDENCE RULE AND PRINCIPLES OF CONTRACT INTERPRETATION

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Any reader of advance sheets is well aware that most of the contract decisions reported do not involve offer and acceptance or other subjects usually explored in depth in a course in contracts but rather involve the parol evidence rule and questions of interpretation,¹ topics given scant attention in most courses in contracts.² Although a number of articles have appeared recently on these subjects, for the most part they tend to express the individual view of the writer as to what the law should be.³ While the authors of this paper will state their views, their principal purpose is to set forth the basic problems involved and to offer a guide for comprehending the reasons for the many contradictory decisions in these areas. Much of the fog and mystery surrounding these subjects stems from the fact that there is basic disagreement as to the meaning and effect of the parol evidence rule and as to the appropriate goals to be achieved by the process of contractual interpretation. The cases and treatises of the contract giants tend to conceal this conflict. While frequently masking disagreement by using the same terminology, Professors Williston and Corbin are often poles apart in the meaning they attach to the same term. Often starting from what superficially appear to be the same premises, they frequently advocate different results in similar fact situations. The polarity of their views reflects conflicting value judgments as to policy issues that are as old as our legal system and that are likely to continue as long as courts of law exist. Although many writers and courts have expressed their views on the subject and have made major contributions to it, concentration on the analyses of Professors Williston and Corbin will point up the fundamental bases upon which the conflicting cases and views rest.

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1. Shepherd, *Contracts in a Prosperity Year*, 6 STAN. L. REV. 208, 223, 226 (1954).

2. No attempt will be made here to discuss these subjects as they relate to non-contractual subjects such as wills and trusts.

3. See, e.g., Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965); Murray, *The Parol Evidence Rule: A Clarification*, 4 DUQUESNE L. REV. 337 (1966); Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964); Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619 (1964).

I. THE PAROL EVIDENCE RULE

The Area of Substantial Agreement

There is a rule of substantive law which states that whenever contractual intent is sought to be ascertained from among several expressions of the parties, an earlier tentative expression will be rejected in favor of a later expression that is final.⁴ More simply stated, the contract made by the parties supersedes tentative promises made in earlier negotiations. Consequently, in determining the content of the contract, the earlier tentative promises are irrelevant.

The parol evidence rule comes into play only when the last expression is in writing.⁵ Professor Corbin states the rule 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."⁶ Professor Williston's formulation is not to the contrary: "Briefly stated," he writes, "this rule requires, in the absence of fraud, duress, mutual mistake, or something of the kind, the exclusion of extrinsic evidence, oral or written, where the parties have reduced their agreement to an integrated writing."⁷ Both agree that this, too, is a rule of substantive law that also operates as an exclusionary rule of evidence merely because prior understandings are irrelevant to the process of determining the content of the final contract.⁸ The similarity between the parol evidence rule and the rule stated in the preceding paragraph is obvious. The main and important difference is that where the last expression is not in writing the jury determines whether the parties intended the second expression to supersede the first.⁹ This is to say that this question of intention is determined as is any other question of intention stemming from oral transactions. Where the later expression is in writing, however, this question is usually determined by the trial judge. At an early date it was felt (and the feeling strongly remains)

4. 3 CORBIN, CONTRACTS § 573 (rev'd ed. 1960) [hereinafter cited as CORBIN]; MCCORMICK, EVIDENCE § 213 (1954) [hereinafter cited as MCCORMICK].

5. RESTATEMENT, CONTRACTS § 228, comment *b* (1932), suggests that the words of an oral agreement may be chosen with such precision that there is an equivalent of an integration. It adds that such a case is so unusual as not to require separate discussion. Cf. 3 CORBIN § 573 n.11.

6. 3 CORBIN § 573.

7. 4 WILLISTON, CONTRACTS § 631 (3d ed. Jaeger 1961) [hereinafter cited as WILLISTON].

8. 3 CORBIN § 573; 4 WILLISTON § 631.

9. MCCORMICK § 214. Of course if reasonable men could reach only one reasonable conclusion the question would be one for the court.

that writings require the special protection that is afforded by removing this issue from the province of unsophisticated jurors.¹⁰

While it is unanimously agreed that the parol evidence rule applies to *prior* expressions, and has no application to an agreement made *subsequent* to the writing,¹¹ there is no unanimity as to expressions *contemporaneous* with the writing. Williston and the *Restatement* take the position that contemporaneous expressions should be treated the same as prior expressions except that contemporaneous writings should be deemed to be a part of the integration.¹² Corbin appears to argue that expressions are either prior or subsequent to the writing and that therefore the word "contemporaneous" merely clouds the issue.¹³ Everyone agrees that the parol evidence rule does not apply to a separate agreement; that is, an agreement that has a separate consideration.¹⁴

A distinction is drawn between a total and a partial integration. Where the writing is intended to be *final* and *complete*, it is characterized as a total integration and may be neither contradicted nor supplemented by evidence of prior agreements or expressions. But where the writing is intended to be *final* but *incomplete*, it is said to be a partial integration; although such a writing may not be *contradicted* by evidence of prior agreements or expressions, it may be *supplemented* by evidence of consistent additional terms.¹⁵ Thus, in approaching a writing, two questions must be asked: (1) Is it intended as a final expression? (2) Is it intended to be a complete expression?

10. McCORMICK §§ 214-16. But see Murray, *supra* note 3, at 342, where he asks: "If the parol evidence rule is based on distrust of juries because they lack sophistication in comparing an oral expression with a subsequent writing, why should the rule apply when both expressions are written?"

It is often assumed that the parol evidence rule protects the "haves" against the "have nots," since it is the former who ordinarily draft written contracts and the latter who receive the sympathy of the jury. See McCORMICK 427-28. Surprisingly, however, a substantial number of the reported cases dealing with the rule involve sizable transactions between persons with apparently strong bargaining power. See, e.g., Hunt Foods & Indus., Inc. v. Doliner, 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966) (transaction involving over \$5,000,000); Millerton Agway Corp. v. Briarcliff Farms, 17 N.Y.2d 57, 268 N.Y.S.2d 18, 215 N.E.2d 341 (1966) (\$1,000,000 guarantee); Hicks v. Bush, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962) (involving 1,475,000 shares of a holding company); Crowell-Collier Pub. Co. v. Josefowitz, 5 N.Y.2d 998, 184 N.Y.S.2d 859, 157 N.E.2d 730 (1959) (sale of business for \$3,000,000).

11. Wagner v. Graziano Constr. Co., 390 Pa. 445, 136 A.2d 82 (1957); 3 CORBIN § 574 4 WILLISTON § 632. Under certain statutes, parties may, by agreement, bar a subsequent oral modification. E.g., UNIFORM COMMERCIAL CODE § 2-209(2); N.Y. GEN'L OBL. LAW § 15-301.

12. RESTATEMENT, CONTRACTS § 237, comment a; 4 WILLISTON § 628.

13. 3 CORBIN § 577.

14. 3 CORBIN § 594; 4 WILLISTON § 637.

15. 4 WILLISTON § 636. While Corbin is in agreement with the statement in the text, he advocates abandonment of the term "partial integration" and argues that parties rarely intend that an incomplete writing be considered final. 3 CORBIN § 581.

Is the writing intended as a final expression? Writings that evidence a contract are not necessarily "final" embodiments of the contract. Exchanges of letters or memoranda that show the conclusion of a contract may have been intended to be read in the light of more far-ranging conversations and documents. Or, the parties may have intended their writing to be tentative and preliminary to a final draft. In these cases, the parol evidence rule does not bar enforcement of the entire agreement as proved by the writing read in the context of prior and contemporaneous expressions.¹⁶ It is agreed that any relevant evidence is admissible to show that the writing was not intended to be final.¹⁷ Although the question of finality is frequently characterized as one of law in order to remove it from the province of unsophisticated jurors, it is actually a question of fact—one of intention—which the trial judge determines.¹⁸ To be considered final the writing need not be in any particular form and need not be signed. The crucial requirement is that the parties have regarded the writing as the final embodiment of their agreement.

Sometimes confused with this question of finality, but clearly distinguishable, is the frequently raised question of whether parties who have made a tentative written agreement intended that no contract would exist until a final writing was executed.¹⁹ On this issue of the existence of the contract, the parol evidence rule is even more clearly inapplicable.²⁰ This question is treated as a normal question of intention, in accordance with the rules of interpretation discussed in Part II of this article. The

16. *Hechinger v. Ulacia*, 194 App. Div. 330, 185 N.Y. Supp. 323 (1920); *Atwater v. Cardell*, 21 Ky. L. Rep. 1297, 54 S.W. 960 (1900). It is common to equate "finality" with "completeness." *E.g.*, in a case involving lack of completeness, *Cardozo, C.J.*, wrote: "As soon as the inquiry is pursued, the defendant's concession of incompleteness meets us, and the inference of finality is rebutted." *Di Menna v. Cooper & Evans Co.*, 220 N.Y. 391, 397-98, 115 N.E. 993, 995 (1917). This kind of imprecision, although frequent, seems not to have affected the decisions. Another inconsistency in the use of language is the frequent use of the term "integration" to mean "total integration."

17. RESTATEMENT, CONTRACTS § 228, comment *a*; 3 CORBIN § 588; 4 WILLISTON § 633 n.13.

18. MCCORMICK §§ 214-15. Corbin would allow greater participation by the jury. See 3 CORBIN § 595.

19. 1 WILLISTON § 28; 1 CORBIN § 30.

20. See cases cited 9 WIGMORE, EVIDENCE § 2429 n.2 (1940) [hereinafter cited as WIGMORE]; 3 CORBIN § 588. The parol evidence rule, as a rule of substantive law, cannot come into play until it is determined that the writing sought to be protected is operative. Thus Williston states: "Accordingly, it may be shown by parol evidence not only that a writing was never executed or delivered as a contract, but also that the validity of the agreement was impaired by fraud, illegality, duress, mistake, lack of or failure of consideration rendering the agreement voidable or void. . . . If the writing is unsealed, it may be shown that the parties agreed by parol that the writing in question should not become effective until some future day or the happening of some contingency, if this is not inconsistent with the express terms of the writing." 4 WILLISTON § 634. A good recent illustration of the last proposition is *Hicks v. Bush*, 10 N.Y.2d 488, 225 N.Y.S.2d 34, 180 N.E.2d 425 (1962).

determination is frequently made by the jury.²¹

Is the writing a complete or partial integration? Once it is determined that the writing is intended to be final and therefore an integration, it becomes necessary to ascertain whether the integration is complete (so that it cannot be contradicted or supplemented) or only partial (so that it cannot be contradicted but may be supplemented by evidence of consistent additional terms). It seems to be generally agreed that this is a question of law in the sense that it is determined by the trial judge.²²

The Parol Evidence Rule: The Major Area of Conflict

Apparent agreement by Professors Williston and Corbin, except as noted, on the rules stated above conceals real conflict. The battleground upon which they express disagreement is a major one: the concept of total integration. This, of course, is the area in which most of the cases arise. Both assert that the existence of a total integration depends on the intention of the parties. Williston does so primarily in a section entitled, "Integration Depends Upon Intent."²³ Corbin's emphasis on intent runs throughout his entire discussion of the rule.²⁴ It appears, however, that in this context they use the term "intent" in ways that are remarkably dissimilar. A typical fact situation will illustrate this. *A* agrees to sell and *B* agrees to purchase Blackacre for \$10,000. The contract is in writing and in all respects appears complete on its face. Prior to the signing of the contract *A*, in order to induce *B*'s assent, orally promises him in the presence of a number of reputable witnesses that if *B* will sign the contract, *A* will remove an unsightly shack on *A*'s land across the road from Blackacre. May this promise be proved and enforced?²⁵ This depends upon whether the writing is a total integration.

Williston argues that if the intention to have a total integration were to be determined by the ordinary process of determining intention, the parol evidence rule would be emasculated.²⁶ He points out that the mere existence of the collateral oral agreement would conclusively indicate that the parties intended only a partial integration and that the only question that would be presented is whether the alleged prior or contemporaneous

21. See *Universal Prod. Co. v. Emerson*, 36 Del. 553, 179 Atl. 387 (1935) (collecting cases).

22. MCCORMICK § 215. Corbin dissents in part, arguing for the propriety of a jury verdict in many cases. 3 CORBIN § 595.

23. 4 WILLISTON § 633.

24. 3 CORBIN §§ 573-95.

25. The facts given here are suggested by *Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928).

26. 4 WILLISTON § 633.

agreement was actually made. This would be a question of fact for the jury, thus eliminating the special protection which the trial judge should afford the writing.²⁷

Williston, therefore, suggests that the issue of partial or total integration should be determined according to the following rules.

(1) If the writing expressly declares that it contains the entire agreement of the parties (what is sometimes referred to as a merger clause), the declaration conclusively establishes that the integration is total unless the document is obviously incomplete or the merger clause was included as a result of fraud or mistake or any other reason exists that is sufficient to set aside a contract.²⁸ As previously indicated, even a merger clause does not prevent enforcement of a separate agreement supported by a distinct consideration.²⁹

(2) In the absence of a merger clause, the determination is made by looking to the writing. Consistent additional terms may be proved if the writing is obviously incomplete on its face³⁰ or if it is apparently complete but, as in the case of deeds, bonds, bills and notes, expresses the undertaking of only one of the parties.³¹

(3) Where the writing appears to be a complete instrument expressing the rights and obligations of both parties, it is deemed a total integration unless the alleged additional terms were such as might naturally be made as a separate agreement by parties situated as were the parties to the written contract.³²

Thus in the hypothetical case given, Williston's view is that the collateral promise to remove the unsightly shack could not be enforced. The writing was apparently complete on its face and contracting parties would ordinarily and naturally have included such a promise in the writing. Many might agree with this result,³³ but can it be seriously argued that this result is based on the parties' intent that the agreement be integrated? How can a rule based on the intention of the parties be emasculated by seeking to determine their actual expressed intent? It is quite clear that

27. At 9 WIGMORE § 2430, the author states that if the judge decides that the parol evidence rule applies "he does not decide that the excluded negotiations did not take place, but merely that *if* they did take place they are nevertheless legally immaterial." If he determines that the parol evidence rule does not apply "he does not decide that the negotiations did take place, but merely that *if* they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place." (Emphasis his.)

28. 4 WILLISTON § 633; *cf.* 3 CORBIN § 578.

29. See text accompanying note 14 *supra*.

30. 4 WILLISTON §§ 633, 636.

31. 4 WILLISTON § 645; 3 CORBIN § 587.

32. 4 WILLISTON §§ 638, 639.

33. As did the court in *Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928).

the expressed intent shown by overwhelming evidence is at variance with an intent to have the writing serve as their complete agreement.

Professor Corbin takes a contrary view as to the proper result in our hypothetical case: "It can never be determined by mere interpretation of the words of a writing whether it is an 'integration' of anything, whether it is 'the final and complete expression of the agreement' or is a mere partial expression of the agreement."³⁴ Elsewhere, he states: "Since the very existence of an 'integration' . . . is dependent on what the parties thereto say and do (necessarily extrinsic to the paper instrument), at the time they draw that instrument 'in usual form,' are we to continue like a flock of sheep to beg the question at issue, even when its result is to 'make a contract for the parties,' one that is vitally different from the one they made themselves?"³⁵ When Professor Corbin speaks of the intent of the parties he emphatically means their actual expressed intent.

Thus, two schools of thought are on the scene, one determined to seek out the intent of the parties, the other speaking of intent but refusing to consider evidence of what the intent actually was. Let us examine Williston's approach further, since it is, at least linguistically, the more puzzling. A key to understanding this approach is *Gianni v. Russel & Co.*,³⁶ which followed the not dissimilar approaches of Williston and Wigmore.³⁷ The parties signed a three-year lease in which the tenant agreed not to sell tobacco in any form on the premises but was permitted to sell soft drinks. The tenant alleged that his agreement to refrain from the sale of tobacco was in consideration of an oral promise by the defendant to give him exclusive rights to the sale of soft drinks on the premises. The court held that evidence of the oral agreement was inadmissible, citing Williston and Wigmore. The court stated:

34. 3 CORBIN § 581.

35. 3 CORBIN § 582.

36. 281 Pa. 320, 126 Atl. 791 (1924).

37. Dean Wigmore's approach is by no means similar in all respects to Professor Williston's. While Williston would ordinarily require that a writing be incomplete on its face before permitting parol evidence to be introduced (4 WILLISTON § 633), Wigmore argues that "intent must be sought where always intent must be sought . . . , namely, in the *conduct and language* of the parties and the *surrounding circumstances*. The document alone will not suffice." 9 WIGMORE § 2430 (emphasis his). They each, however, approach the question of intent to have a total integration mechanistically. Wigmore suggests that the "chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all in the writing*." 9 WIGMORE § 2430 (emphasis his). This is somewhat different from Williston's test of "the inherent probability of parties who contract under the circumstances in question, simultaneously making both the agreement in writing which is before the court, and also the alleged parol agreement. The point is not merely whether the court is convinced that the parties before it did in fact do this, but whether parties so situated generally would or might do so." 4 WILLISTON § 638.

In cases of this kind, where the cause of action rests entirely on an alleged oral understanding concerning a subject which is dealt with in a written contract it is presumed that the writing was *intended* to set forth the entire agreement as to that particular subject.³⁸ (Emphasis added.)

While the court spoke of the parties' intention, it excluded evidence of that intention. Logically, since the quantum of evidence would appear to be irrelevant under the court's test, it would so rule if the transaction were entered into on a national television network and were witnessed by tens of millions of viewers. The key to the court's decision may be found elsewhere in the opinion :

We have stated on several occasions recently that we propose to stand for the integrity of written contracts. . . . We reiterate our position in this regard.³⁹

Fictions have been enormously important in the development of our law. In an era when the law was deemed unchangeable and eternal, they provided almost the only mechanism for avoiding the impact of rules deemed unwise. Their use today serves only to obfuscate what should be clear. Shorn of language indicating a fictitious search for intent, the courts and writers who adopt a Willistonian approach are saying this: *When parties adopt a written form that gives every appearance of being complete and final, they are required to incorporate in that form their entire agreement. If they fail to do so, unincorporated agreements relating to the same subject matter are void.*

That the intention of the parties is not relevant in courts adopting the same approach as Williston has been recognized in a number of opinions. In a California case, testimony in violation of the parol evidence rule was admitted without objection. The question presented was whether the rule could be invoked despite the lack of objection. The court held that the rule could be invoked, stating that the parol evidence rule did not merely prohibit the proof of contemporaneous oral agreements; rather it prohibited the making of such agreements.⁴⁰

38. *Gianni v. Russel & Co.*, 281 Pa. 320, 324, 126 Atl. 791, 792 (1924).

39. *Id.* at 325, 126 Atl. at 792.

40. *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499 (1910). Williston is in accord as to the holding. 4 WILLISTON § 631, text at n.18, indicating this view to be the weight of authority. Many courts adopting this approach have not been so forthright in language, preferring to say that writings apparently complete on their face are "conclusively presumed to contain the whole contract as made." *Eighmie v. Taylor*, 98 N.Y. 288, 296 (1885). The semantic tangle is shown by the dissenting opinion of an able jurist in *Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928). He commences his discussion with the concept that the parol evidence rule creates a "conclu-

Professor Corbin has an easy task in demolishing the Willistonian approach. In treating the matter of integration as a question of intent, as Professor Williston purports to do, he shows the absurdity of excluding all relevant evidence of intent except the writing itself. But, as we have seen, Williston, and such courts as the Supreme Court of Pennsylvania in *Gianni v. Russel & Co.* are unconcerned about the true intention of the parties. Rather, shorn of rote language of fiction indicating a search for intention, they are advocating and applying a rule of form. Since (and even before) the common law had its genesis,⁴¹ there has been a deeply-felt belief that transactions will be more secure, litigation will be reduced, and the temptation to perjury will be removed, if everyone will only use proper forms for his transactions. The Statute of Wills and the Statute of Frauds are but examples of this belief. Professor Corbin, by attacking the apparent arguments of Williston's position has not expressly come to grips with the substance of his position. This is not to suggest that either he or Professor Williston have been unaware of the true nature of their disagreement. Rather, they seem for the most part to have been content not to make explicit the basis of their differing views. The purpose of the above discussion is to bring their differences into bold relief so that the debate on this matter can break away from the bland assumption that everyone agrees as to the statement of the parol evidence rule and that there is merely some confusion as to its application.

The debate involves the question: is the public better served by giving effect to the parties' entire agreement written and oral, even at the risk of injustice caused by the possibility of perjury and the possibility that superseded documents will be treated as operative, or does the security of transactions require that, despite occasional injustices, persons adopting a formal writing be required, on the penalty of voidness of their oral and written side agreements, to put their entire agreement in the formal writing.⁴²

The conflict is an old one. Rules excluding evidence on the ground

sive presumption." Almost imperceptibly he shifts to "presumed to have intended," and concludes by discussing what "was [actually?] intended." In the majority opinion, rigorously Willistonian in result, despite "overwhelming evidence" that a collateral oral agreement had been made, ("We are not dealing, however, with their [defendants'] moral delinquencies"), the court significantly refrains from using the term "intent."

41. On the historical development of the rule see 9 WIGMORE § 2426. For a classic discussion of the desirability of requiring contracts to be put in writing, see 2 BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 454-513 (1827). It is to be noted, however, that, as a prerequisite to imposition of such a rule, he advocated that the requirement be widely publicized throughout the country. Moreover, he deemed it unfair that failure to comply with the requirement should result in voidness of the agreement. Rather, an alleged agreement not made in proper form would merely be regarded with suspicion.

42. For the policy considerations involved, see 3 CORBIN § 575; 4 WILLISTON § 633; McCORMICK §§ 210-16.

that it is likely to be false are not strangers to the law. Formerly, parties and interested third persons were incompetent to testify on the ground that their testimony would be unworthy of belief.⁴³ The Statute of Frauds and the Statute of Wills embody similar considerations.⁴⁴ The authors believe, however, that the possibility of perjury is an insufficient ground for interfering with freedom of contract by refusing to effectuate the parties' entire agreement.

The whole thrust of our law for over a century has been directed to the eradication of exclusionary rules of evidence in civil cases. Thus parties may now testify, their interest in the outcome affecting only the weight and not the admissibility of the evidence. Dissatisfaction with rigid application of the parol evidence rule has resulted in the strained insertion of fact situations into the categories where the parol evidence rule is inapplicable. Thus, to circumvent the rule fraud has been found⁴⁵ and reformation has been granted⁴⁶ in situations where these concepts are not ordinarily deemed applicable. Moreover, whole categories of exceptions have been carved out; for example, a deed absolute may be shown to be a mortgage.⁴⁷ Professor Thayer's summation of the parol evidence problem warrants repetition: "Few things are darker than this, or fuller of subtle difficulties."⁴⁸ When any rule of law is riddled through with exceptions and applications difficult to reconcile, it is believed that litigation is stimulated rather than reduced.⁴⁹ If the policy of the parol evidence rule is to reduce the possibility of judgments predicated upon perjured testimony and superseded documents, it may be effectuated to a large extent by continuing to leave control over determining the question of intent to integrate in the hands of the trial judge.⁵⁰ Finally, the trend of modern decisions, as Williston suggests, "is toward increasing liberal-

43. See McCORMICK § 65.

44. See 3 CORBIN § 575.

45. *E.g.*, *Bareham & McFarland Inc. v. Kane*, 228 App. Div. 396, 240 N.Y. Supp. 123 (1930) (language sounding in warranty of performance held to be factual representations). See Sweet, *Promissory Fraud and the Parol Evidence Rule*, 49 CALIF. L. REV. 877, 896 (1961) ("It does not take much manipulation to classify a promise as either a warranty or a fact.")

46. *E.g.*, *Winslett v. Rice*, 272 Ala. 25, 128 So. 2d 94 (1960) (breach of oral collateral agreement constitutes "fraud" justifying reformation).

47. 3 CORBIN § 587; 4 WILLISTON § 635; 9 WIGMORE § 2437.

48. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 390 (1898).

49. See 3 CORBIN § 575. See also FISCH, NEW YORK EVIDENCE § 64, at 42 (1959):

"Because the decisions are ineffective as guides to determine in advance whether or not the facts of a given transaction will come within one of the exceptions to the rule, the assumption, frequently enunciated in judicial opinions, that the rule is indispensable to business stability is specious . . . The decisions as to these matters are valueless, contrary holdings being reached on almost identical facts."

50. The most thorough text treatment of this point is in McCORMICK §§ 214-16. See also Murray, *supra* note 3.

ity in the admission of parol agreements."⁵¹ This tendency of the courts is in no small measure due to the influence of Professor Corbin's treatise.⁵²

It is of little moment whether the views of the authors of this article as to what the law should be are convincing. The essential point being made here is that there is no uniform parol evidence rule. Rather, there are at least two rather dissimilar rules which, for convenience, may be denominated the Corbin Rule and the Williston Rule. In view of the confusion engendered by having two contradictory rules expressed in the same terminology, it is remarkable that a few states have shown a degree of consistency. New York, despite some inconsistent cases,⁵³ generally maintains a rigorously Willistonian approach.⁵⁴ Rhode Island seems recently to have adopted the Corbin approach with a Willistonian touch, admitting extrinsic evidence out of the presence of the jury to determine whether a total integration exists; the trial judge decides this question on the Willistonian test of whether the alleged collateral agreement "is such that the parties would naturally or normally" have included it in the writing.⁵⁵ This seems to be a sound indicia of intent, but not a conclusive one. If the norm is that of the "reasonable man," this good citizen would probably insist that the entire agreement be reduced to writing. The end result would seem to be pure Williston. Some states, such as Connecticut, reach results consistent with Corbin's test, while utilizing the most varied reasoning.⁵⁶ Perhaps most states are consistently er-

51. 4 WILLISTON § 638.

52. Ample authority for this proposition can be found in the cases relying upon Professor Corbin's analysis and cited by him in 3 CORBIN §§ 573-95. See, more recently, *United States v. Clementon Sewerage Authority*, 365 F.2d 609 (3d Cir. 1966) (New Jersey law).

53. See *Peo v. Kennedy*, 16 App. Div. 2d 306, 227 N.Y.S.2d 971 (1962) (purporting to rely upon the exception to the rule that states that a condition precedent to formation of a contract may be proved by parol; this case clearly involved no such condition); *Higgs v. De Maziuff*, 263 N.Y. 473, 189 N.E. 555 (1934) (parol evidence improperly admitted without objection may be considered).

54. *Mitchell v. Lath*, 247 N.Y. 377, 160 N.E. 646 (1928); *Oxford Commercial Co. v. Landau*, 12 N.Y.2d 362, 190 N.E.2d 230, 239 N.Y.S.2d 865 (1963); 49 CORNELL L.Q. 311 (1964); *Meadowbrook Nat'l Bank v. Bzura*, 20 App. Div. 2d 287, 246 N.Y.S.2d 787 (1964). Recent law review material indicates a similar consistency in two states. See Comment, *The Parol Evidence Rule in Missouri*, 27 Mo. L. REV. 269, 279-82 (1962); McDonough, *The Parol Evidence Rule in South Dakota and the Effect of Section 2-202 of the U.C.C.*, 10 S.D.L. REV. 60 (1965).

55. *Golden Gate Corp. v. Barrington College*, —R.I.—, 199 A.2d 586 (1964). In a somewhat surprising passage Professor Corbin (CORBIN § 595, last paragraph) lends support to this test. This seems inconsistent with his entire discussion of the question of intent.

56. *State Finance Corp. v. Ballestrini*, 111 Conn. 544, 150 Atl. 700 (1930) (articulating Williston's test, but was it in fact applied?); *Harris v. Clinton*, 142 Conn. 204, 112 A.2d 885 (1955) (although he is not cited, the reasoning seems to be pure Corbin); *Greenwich Plumbing & Heating Co. v. A. Barbaresi & Son, Inc.*, 147 Conn. 580, 164 A.2d 405 (1960). (parol evidence of collateral agreement admitted because of ambiguity of the writing; analysis, but not result, criticised in 3 CORBIN § 582 n.84 [Supp. 1964]).

matic.⁵⁷ Such is the confusion that in any state a decision may be reached which is ludicrous in result and analysis⁵⁸ or sensible in result but strained in analysis.⁵⁹

It is hoped that once the source of confusion is comprehended, courts will achieve a greater degree of consistency by consciously choosing one of the competing rules. The widespread adoption of the Uniform Commercial Code may give impetus to a consistent and enlightened approach if it is applied to cases not specifically under its coverage. An official comment to section 2-202 states:

[C]onsistent additional terms, not reduced to writing, may be proved unless the court finds that the writing was intended by both parties as a complete and exclusive statement of all terms. If the additional terms are such that, if agreed upon, they would *certainly* have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact. (Emphasis added.)

Thus, the Code requires the court to ascertain the intention of the parties, and it can be assumed that the codifiers meant a true expressed intention and not a fictitious intention. The trial judge has an important function in making this determination. If he finds that it is certain the parties would have incorporated the additional term into the writing if they had agreed upon it, he excludes evidence of the alleged term from the jury's consideration. If it is merely improbable that the parties would have agreed to the term without incorporating it into the writing, the jury must determine whether the additional term was agreed upon.⁶⁰ The Code, of course, does not purport to affect the power of the court to set aside or direct a verdict where the evidence supporting an alleged supplementary term is flimsy. Thus, the writing is protected at two stages. First, there is a preliminary finding, based on an external standard, as

57. *E.g.*, Virginia, see Note, 7 WM. & MARY L. REV. 189 (1966); Pennsylvania, see CORBIN § 577 n.34 (Supp. 1964).

58. In *Townsend v. Standard Indus., Inc.*, 235 Ark. 951, 363 S.W.2d 535 (1962), the parties had been operating under an oral agreement for some time. They subsequently memorialized this in a writing which was held to be inoperative for lack of "mutuality of obligation." The court further held, on the pleadings, that since the writing had been adopted as an integration, evidence of the prior oral agreement was inadmissible. The decision is scorchingly criticised in Note, 17 ARK. L. REV. 220 (1963). An integration supersedes prior agreements because it is a final contract. A writing which is not a contract is no integration. Moreover, a glance at the writing reproduced in the opinion shows it to be a brief memorandum and, even if mutuality of obligation were shown, probably not a total integration.

59. See cases cited notes 45 & 46 *supra*.

60. *Hunt Foods & Indus., Inc. v. Doliner*, 26 App. Div. 2d 41, 270 N.Y.S.2d 937 (1966).

to whether any evidence will be heard by the jury. Second, the court retains its control over the quality and quantity of evidence required to support a verdict.

II. INTERPRETATION

Standards of Interpretation

Since there is no "lawyers' Paradise" where "all words have a fixed precisely ascertained meaning,"⁶¹ frequently⁶² the problem is to interpret⁶³ the language and other manifestations of the parties. The *Restatement* says: "Interpretation of words and of other manifestations of intention forming an agreement [or having reference to the formation of an agreement]⁶⁴ is the ascertainment of the meaning to be given to such words and manifestations."⁶⁵

The question then is whose meaning is to be given to an agreement, communication, or other manifestation of intent. The *Restatement* lists six possible standards of interpretation, that is, six vantage points which might be used in making this interpretation.⁶⁶ These standards are:

1. the standard of general usage;
2. a standard of limited usage, which would attach the meaning given to language in a particular locality, or by a sect or those engaged in a particular occupation, or by an alien population or those using a local dialect (the distinction between 1 and 2 is a difference in degree, since generality of usage does not necessarily imply universality);
3. a mutual standard, which would allow only such meanings as conform to an intention common to both or all the parties, and would attach this meaning although it violates the usage of all other persons;
4. an individual standard, which would attach to words or other manifestations of intention whatever meaning the person employing them intended them to express, or that the

61. THAYER, *op. cit. supra* note 48, at 428-29.

62. See note 1 *supra*.

63. On the distinction between interpretation and construction see 3 CORBIN § 534; 4 WILLISTON § 602; Patterson, *supra* note 3, at 835-36. Note that these authorities are not in accord as to the proper use of these terms.

64. The words in brackets indicate that this process called interpretation is also utilized to determine whether there is a contract. Accord, 3 CORBIN § 32. But § 58 of the RESTATEMENT and the RESTATEMENT SECOND seem to indicate that the normal process of interpretation does not apply to an acceptance. See also *United States v. Braunstein*, 75 F.Supp. 137 (S.D.N.Y. 1947).

65. RESTATEMENT, CONTRACTS § 226.

66. *Id.* § 227.

- person receiving the communication understood from it;⁶⁷
5. a standard of reasonable expectation, which would attach to words or other manifestations of intention the meaning which the party employing them should reasonably have apprehended that they would convey to the other party;
 6. a standard of reasonable understanding, which would attach to words or other manifestations of intention the meaning which the person to whom the manifestations are addressed might reasonably give to them.

Williston chooses two different standards depending upon whether there is an integration. When there is no integration the standard is the meaning that the party making the manifestation should reasonably expect the other party to give it—the standard of reasonable expectation, a test based upon the objective theory of contracts.⁶⁸ However, there are two exceptions. First, where there is an ambiguity⁶⁹ the following rules are applicable: (a) Where neither party knows or has reason to know of the ambiguity or where both parties know or have reason to know of the ambiguity it is given the meaning that each party intended it to bear.⁷⁰ This means as a practical matter that if the parties give the ambiguous expression the same meaning there is a contract, but if they give it a different meaning there is no contract,⁷¹ at least if the ambiguity relates to a material term. (b) Where one party knows or has reason to know of the ambiguity and the other does not, it bears the meaning given to it by the latter—an individual standard.⁷² As a practical matter this means that there is a contract based upon the meaning of the party who is without fault.⁷³ A second exception to the standard of reasonable expectation is that “where the law gives to certain words an established meaning, this meaning is less readily controlled by the standard of interpretation . . . than is the meaning of other words.”⁷⁴

As to integrated⁷⁵ writings Williston’s standard of interpretation “is

67. Standards (3) and (4) are subjective, the others are objective.

68. 4 WILLISTON § 605.

69. No distinction is made between latent and patent ambiguity. 4 WILLISTON § 627. The best known illustration of a latent ambiguity is *Raffles v. Wichelhaus*, 2 Hurl. & Co. 906, 159 Eng. Rep. 375 (Ex. 1864) (the “Peerless” case). See also Young, *Equivocation in the Making of Agreements*, 64 COLUM. L. REV. 619 (1964); Paterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833 (1964).

70. RESTATEMENT, CONTRACTS § 233; 4 WILLISTON § 605.

71. RESTATEMENT, CONTRACTS § 71; 4 WILLISTON § 605.

72. RESTATEMENT, CONTRACTS § 233; 4 WILLISTON § 605.

73. RESTATEMENT, CONTRACTS § 71; 4 WILLISTON § 605.

74. RESTATEMENT, CONTRACTS § 234. See also 4 WILLISTON §§ 614, 615.

75. Williston, for the purposes of interpretation, treats a non-integrated writing which is necessary to satisfy the Statute of Frauds as if it were an integration. 4 WILLISTON § 604.

the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."⁷⁶ This is the standard of limited usage.⁷⁷ Local and trade usages of terms used in the contract are to be considered and, if the parties contracted with reference to them, are determinative.⁷⁸

Basically there are two differences in Williston's approach to an integration as opposed to a non-integration.⁷⁹

First, in the case of a non-integration the issue of ambiguity may be raised simply by the assertion that the parties mutually manifested an intention to adopt a meaning different from the ordinary or local meaning; for example, that the word "horse" means "cow" or that the word "buy" means "sell."⁸⁰ However, this could not be done in the case of an integration because in determining whether there is an ambiguity "oral statements of what the parties intended it to mean," even if expressed to one another, are excluded. Stated differently, an integration contains an ambiguity only when, in the light of all of the surrounding circumstances (except the oral statements of what the parties intended), the words admit of several normal or popular meanings or there is doubt whether the normal or some local trade meaning was intended. Thus if there were evidence that in a particular locality the word "buy" meant "sell," evidence of what the parties intended would be admissible.⁸¹

According to Williston there is a second difference between an integrated and a non-integrated transaction. We have already seen that where both parties to a non-integrated agreement justifiably attach different meanings to a material term there is no contract.⁸² But in similar circumstances if the agreement is integrated, there is, according to Williston, a contract in accordance with the meaning of "a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration."⁸³ In the exceptional case in which this test produces an un-

76. RESTATEMENT, CONTRACTS § 230.

77. 4 WILLISTON § 607.

78. See generally Levie, *Trade Usage and Custom Under the Common Law and the Uniform Commercial Code*, 40 N.Y.U.L. REV. 1101 (1965). See also UNIFORM COMMERCIAL CODE §§ 1-205, 2-202.

79. It should be noted that the rule relating to the situation where "the law gives to certain words an established meaning" is also applicable to integrated writings. WILLISTON §§ 614, 615.

80. 4 WILLISTON § 605.

81. 4 WILLISTON §§ 608-13, 617, 629, 630.

82. See text accompanying notes 71-73 *supra*.

83. RESTATEMENT, CONTRACTS § 230; 4 WILLISTON § 610A.

certain or ambiguous result, the rules governing the interpretation of non-integrated agreements are applicable.⁸⁴

Williston expressly recognizes that his standards of interpretation may result in the interpretation of an agreement in such a way as to conform to the intention of neither party.⁸⁵ For him the contract acquires a life and meaning of its own, separate and apart from the meanings the parties attach to their agreement. "It is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used."⁸⁶ He is explicit in stating why this should be so. "A facility and certainty of interpretation is obtained, which, though not ideal, is so much greater than is obtainable" by use of a less rigid standard.⁸⁷ The certainty so obtained "is more than an adequate compensation for the slight restriction put upon the power to grant and contract."⁸⁸

Williston's position has deep roots in our legal system. Long ago, Justice Brook thundered from the bench: "The party ought to direct his meaning according to the law, and not the law according to his meaning, for if a man should bend the law to the intent of the party rather than the intent of the party to the law, this would be the way to introduce barborousness and ignorance and to destroy all learning and diligence."⁸⁹

Bentham, for one, disagreed vehemently, calling such an approach "an enormity, an act of barefaced injustice . . . a practice exactly upon a par (impunity excepted) with forgery."⁹⁰ Professor Corbin, although slightly more restrained in language, agrees that in every case one must take into account "the intention and the understanding of each of the two parties."⁹¹ If they coincide there is a contract. If they do not coincide as to material terms there is no contract unless one of the parties is more guilty than the other for the difference in meaning attached.⁹² This is the position taken by the *Restatement, Second*.⁹³ At first glance

84. RESTATEMENT, CONTRACTS § 231.

85. 4 WILLISTON §§ 607-07A; RESTATEMENT, CONTRACTS § 230, illus. 1.

86. 4 WILLISTON § 613.

87. *Id.* § 612.

88. *Ibid.*

89. Throckmerton v. Tracy, 1 Plow. 145, 162, 75 Eng. Rep. 222, 251 (K.B. 1554)

90. 5 BENTHAM, *op. cit. supra* note 41, at 590.

91. 3 CORBIN § 542; Corbin, *supra* note 3, at 189.

92. 3 CORBIN §§ 538, 539.

93. RESTATEMENT, CONTRACTS (SECOND) § 21A reads as follows:

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and

(a) neither party knows or has reason to know the meaning attached by the others; or

(b) each party knows or each party has reason to know the meaning attached by the other.

it might appear that, under this test, in a great many cases no contract results since rarely do the intentions of the parties completely coincide, even as to material terms. However, in determining whether the parties justifiably misunderstood one another, the standard of reasonable expectations is utilized⁹⁴—the standard adopted by Williston for non-integrated contracts. A contract exists in accord with the understanding, if any, that the promisee reasonably could rely upon, provided the promisor had reason to foresee this understanding. Consequently, in the usual case, despite the presence of a misunderstanding, a contract results on the terms understood by the party who is less at fault for the misunderstanding. This properly takes into account that speech is not only and not primarily the expression of thought, but is used “in order to influence the conduct of others.”⁹⁵

Rules of Interpretation and Their Relationship to Standards of Interpretation

In addition to the standards of interpretation just discussed there are also rules of interpretation. Here again Williston and Corbin take a different approach dictated primarily by their difference in approach to the question of standards of interpretation.

Williston distinguishes between primary and secondary rules of interpretation. The primary rules as stated in section 235 of the *Restatement* are set forth in footnote 96. These primary rules apply to both integrated and non-integrated transactions and “serve merely as guides to achieving a final result, namely, the correct application of the proper

(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or

(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

It is interesting to note that although illustration 2 of § 71 of the *Restatement* is the same as illustration 5 of § 21A of the *Restatement Second*, the result reached is different.

94. 3 CORBIN § 538.

95. GARDINER, *THE THEORY OF SPEECH AND LANGUAGE* 19 (1932).

96. The following rules aid the application of the standards stated in §§ 230, 233.

(a) The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.

(b) Technical terms and words of art are given their technical meaning unless the context or a usage which is applicable indicates a different meaning.

(c) A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together.

(d) All circumstances accompanying the transaction may be taken into consideration, subject in case of integrations to the qualifications stated in § 230.

(e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.

standard."⁹⁷ The secondary rules set forth in footnote 98 are also applicable to both integrated and non-integrated transactions, but need not be invoked except where the meaning of words or other manifestations of intent remain doubtful after application of the appropriate standard of interpretation, aided by the primary rules of interpretation.⁹⁹

Corbin, of course, does not distinguish between primary and secondary rules; the principal standard of interpretation selected by him, the intention of the parties, does not require the aid of the primary rules.¹⁰⁰ Further, he does not agree that the secondary rules can be applied only in the case of an ambiguity.¹⁰¹ Corbin makes it clear that rules of interpretation "are to be taken as suggestive working rules only."¹⁰²

What Williston calls the secondary rules of interpretation would appear to have little relevance once it has been determined that the applicable standard of interpretation is a mutual or an individual standard. According to Williston, a mutual or individual standard is applied when there is an ambiguity and the parties testify to their understanding;¹⁰³

97. RESTATEMENT, CONTRACTS § 235 comment *a*.

98. RESTATEMENT, CONTRACTS § 236 reads as follows:

Where the meaning to be given to an agreement or to acts relating to the formation of an agreement remains uncertain after the application of the standards of interpretation stated in §§ 230, 233, with the aid of the rules stated in § 235, the following rules are applicable:

(a) An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, unlawful or of no effect.

(b) The principal apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof.

(c) Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.

(d) Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is prescribed by law.

(e) Where written provisions are inconsistent with printed provisions, an interpretation is preferred which gives effect to the written provisions.

(f) Where a public interest is affected an interpretation is preferred which favors the public.

Corbin's statement of these rules generally corresponds to Williston's. See 3 CORBIN §§ 545-50. Corbin adds some additional rules in § 552.

99. RESTATEMENT, CONTRACTS § 236, comment *a*. In his text Williston makes it clear that in the case of an integration these secondary rules come into play "only where after the primary rules or principles have been applied, the local meaning of the writing is still uncertain or ambiguous." He adds "the same rules are applicable to informal parol agreements, but, as has been seen, the standard there sought to be applied is slightly different." 4 WILLISTON § 617.

100. See note 91 *supra* and accompanying text.

101. 3 CORBIN § 542.

102. 3 CORBIN § 535.

103. 4 WILLISTON § 95. As we have seen, in the case of an integrated writing, an ambiguity exists, according to his test, only after application of the standard of limited

according to Corbin, it is applied in every case where the parties testify to their understandings.¹⁰⁴ The only relevance these rules of interpretation could have is on the issue of who knows or should know of the ambiguity (Williston) or who knows or should know of the understanding of the other party (Corbin).

Are Questions of Interpretation Questions of Fact or Questions of Law?

Williston's rules on this subject may be summarized as follows: Although the meaning of language is really a question of fact, in many instances it has been determined that this question should be treated as a question of law in the sense that the determination should be made by the trial judge.¹⁰⁵ The general rule is that the interpretation of a writing is for the court. Where, however, the meaning of a writing is uncertain or ambiguous¹⁰⁶ and extrinsic¹⁰⁷ evidence is introduced in aid of its interpretation, the question of its meaning should be left to the jury except where, after taking the extrinsic evidence into account, the meaning is so clear that reasonable men could reach only one conclusion, in which event the court should decide the issue as it does when the resolution of any question of fact is equally clear. Where the writing is ambiguous and extrinsic evidence is not introduced, the question is one of law. Even where the contract is oral, if the exact words used by the parties are not in dispute, the court will deal with the matter in the same way as if the contract were written.¹⁰⁸ It would appear that Corbin is generally in accord with these views.¹⁰⁹

III. THE RELATIONSHIP BETWEEN THE PAROL EVIDENCE RULE AND RULES AND STANDARDS OF INTERPRETATION

Before the parol evidence rule may be invoked, the judge must determine that the parties intended the writing to be final.¹¹⁰ The question of intent is determined according to the standards and rules of interpretation discussed above.¹¹¹ Conversely, the parol evidence rule should

usage, aided by the primary rules of interpretation, fails to give the writing one definite meaning.

104. 3 CORBIN § 538.

105. 4 WILLISTON § 616.

106. It is important to recall once again that under Williston's view the word ambiguous has different connotations in the cases of integrated and non-integrated transactions.

107. The term extrinsic evidence includes all evidence outside of the writing including parol evidence.

108. See note 5 *supra*.

109. 3 CORBIN § 554.

110. See note 18 *supra* and accompanying text.

111. See notes 61-95 *supra* and accompanying text.

have no effect on the question of interpretation—the *meaning* of language. Stated otherwise, before the parol evidence rule can be invoked to exclude evidence, the *meaning* of the writing must be ascertained since one may not determine whether a writing is being contradicted or supplemented until one knows what the writing means.

This should mean that evidence of prior and contemporaneous expressions is always admissible to aid in determining the meaning of the integration, and Corbin so states.¹¹² Williston is cautiously in accord. Such evidence may be introduced, he grants, but not to prove that the intention of the parties is at variance with the appropriate local meaning of the words.¹¹³ The evidence may be considered only on the question of whether the parties contracted with reference to a local or trade usage or, if this local or trade meaning is ambiguous, on the question of what meaning the parties attached to the words. Even accepting his premise that the true intention of the parties is usually irrelevant, there are two difficulties with Williston's position on the admissibility of this evidence. First, it assumes that the court can successfully ignore the parties' real intention when it is shown by the evidence. Second, it involves a great deal of tension with the exclusionary aspects of his version of the parol evidence rule. If evidence of prior and contemporaneous expressions is not admissible to prove terms supplementary to or at variance with a total integration,¹¹⁴ but is admissible to show the meaning of the integration, the astute trial lawyer will characterize his evidence on what are really supplementary or contradictory terms as evidence on the true meaning of the contract. Although the function of this evidence is to demonstrate the "meaning of the writing," once it is admitted the court may find it difficult (and unjust) to disregard what may be clear and convincing proof that the writing is not the complete agreement of the parties. Williston's grand structure meticulously separating the parol evidence rule, standards of interpretation, and primary and secondary rules of interpretation seems to collapse into this procedural pitfall.¹¹⁵

It is little wonder, then, that many courts that share Williston's concern for the "security of transactions" have retreated even further from the intention of the parties to the almost universally condemned¹¹⁶ "plain

112. 3 CORBIN §§ 542, 542A, 543, 579.

113. 4 WILLISTON § 630.

114. See text accompanying notes 14-15 *supra*.

115. There are other devices to achieve the same end. "[I]t is a rare set of facts that will forestall, without any exceptional ingenuity, the inclusion in a pleading of at least one cause of action or defense, such as fraud, delivery on condition or failure of consideration, which will open the door to the introduction of extrinsic evidence." Fisch, *New York Evidence* 42 (1959).

116. 3 CORBIN § 542; GRISMORE, *CONTRACTS* § 97 (1965); MCCORMICK § 219; THAYER, *op. cit. supra* note 48, ch. 10; 9 WIGMORE §§ 2461-62; 4 WILLISTON § 629.

meaning rule," holding that if a writing appears clear and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.¹¹⁷ This approach excludes evidence of trade usage and prior dealings between the parties as well as evidence of surrounding circumstances and prior and contemporaneous expressions. The latest legislative ruling on the matter, the Uniform Commercial Code, explicitly condemns the plain meaning rule¹¹⁸ and explicitly allows use of evidence of a course of dealing or course of performance to explain the agreement "unless carefully negated."¹¹⁹

IV. CONCLUSION

Professors Williston and Corbin are in fundamental disagreement as to the parol evidence rule and methods of interpretation. In addition, other writers have expressed their opinions. When one reads the cases of a particular jurisdiction one notes that very often there are inconsistent decisions which adopt the approaches of Williston, of Corbin, and even of other writers.¹²⁰

This confusion can be dissipated if it is realized that these different views exist, and if courts make an effort to follow one view consistently. The authors believe that Corbin's views, which are being incorporated in the *Restatement, Second*, merit adoption because they conform better to the expectations of contracting parties as to what the law should be. It seems intolerable that a party should be denied his day in court to prove what his contract was, on the mere ground that he is likely to mislead the

117. One can hardly know if a writing is clear and unambiguous without knowing the surrounding circumstances. 3 CORBIN § 542. However, even Corbin, the most severe critic of the rule, concedes that cases invoking it are "extremely numerous." 3 CORBIN § 542 n.78. Even so enlightened a court as the New York Court of Appeals has invoked it. *Oxford Commercial Corp. v. Landau*, 12 N.Y.S.2d 362, 190 N.E.2d 230, 239 N.Y.S.2d 865 (1963); *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 141 N.E.2d 590, 161 N.Y.S.2d 90 (1957). But see note 120 *infra*.

118. UNIFORM COMMERCIAL CODE § 2-202, comment 1. See also UNIFORM COMMERCIAL CODE § 1-205.

119. UNIFORM COMMERCIAL CODE § 2-202, comment 2. The Code may also eliminate another source of confusion in the area of interpretation. Frequently courts have used the tool of "strict construction" to deny clauses deemed unconscionable their intended effect. *E.g.*, *Ball v. Sharp & Dohme, Inc.*, 281 App. Div. 568, 121 N.Y.S.2d 20 (1953), *aff'd*, 307 N.Y. 646, 120 N.E.2d 836 (1954) (exculpation clause strictly construed); cf. *Tunkl v. Regents of Univ. of Cal.*, 32 Cal. Rptr. 33, 383 P.2d 441 (1963) (clause in similar circumstances held void). The Code encourages the forthright approach of striking down unconscionable clauses. UNIFORM COMMERCIAL CODE § 2-302.

120. For example, while there are cases in New York following the plain meaning rule (see note 117 *supra*), there are others which follow Williston. *E.g.*, *Rasmussen v. N.Y. Life Ins. Co.*, 267 N.Y. 129, 195 N.E. 821 (1935); *Lipson v. Bradford Dyeing Ass'n*, 266 App. Div. 595, 42 N.Y.S.2d 577 (1943). Cases purporting to follow the plain meaning rule are often quick to find an expression ambiguous. *E.g.*, *Udell v. Cohen*, 282 App. Div. 685, 122 N.Y.S.2d 552 (1953).

court by perjurious or fraudulent evidence. In many other fields of law this kind of *a priori* evaluation of evidence has been eliminated. The adoption of the Uniform Commercial Code creates a necessity for re-evaluation of this approach in commercial cases and the opportunity for its re-evaluation in all contract cases.¹²¹

121. It is unlikely that articles 1 and 2 of the Code will be restricted to the specific areas they explicitly govern. See Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965). Indeed, the process of applying § 2-202 of the Code to non-sales transactions has already begun. *Ciunci v. The Wella Corp.*, 26 App. Div. 2d 109, 271 N.Y.S.2d 317 (1966).