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INTERPRETATION AND CONSTRUCTION OF CON-
TRACTS.

The enforcement of contracts either by giving damages at law for their non-performance, or by decreeing their specific performance in equity, requires their proper interpretation and construction. By the former is understood the act of finding out the true sense of the words embraced in the contract, so as to enable others to derive from them the same idea which the contracting parties intended to convey. The latter relate rather to the drawing of conclusions concerning subjects lying beyond the direct expressions contained in the instrument; or to such as are fairly within its spirit, although not within its letter. The great object of both is to arrive at the intention of the parties by a fair construction of the words which they have made use of in mutually binding each other to the performance or omission of certain acts or things, which they have attempted to specify in their agreement. To facilitate this the more readily, the law, through the medium of Courts of justice, has devised certain rules of interpretation and construction, which are not merely conventional rules, but are the canons by which all writings are to be construed, and the meaning and intention of men to be ascertained. These rules or canons of construction are to be applied with consistency and uniformity.

In them are found the aids or assistants resorted to both by Courts of law and equity in the administration of justice. Our purpose will be simply to call attention to a few of the most important of these aids in which will be found embraced the canons of construction. Of these there are two principal sources.

First. The consideration of that which is embraced within the instrument which embodies the contract.

Second. That which lies outside of the instrument, but which is accessible for the purpose of modifying its terms, and giving it proper effect.

First. In regard to the first, parties may so draw their contracts as to leave little, if anything, to interpretation or construction. Whenever they clearly express their intention, that will prevail, although they may have been unfortunate in the terms selected for that purpose. Even where terms are omitted they will be supplied if the intention clearly calls for them: as in *Bache vs. Proctor*, 1 Doug. 382, where the condition of a bond of £2000 was to "render a fair, just, and perfect account in writing of all sums received." The Court held the condition broken by a neglect on the part of the obligor to *pay over such sums*. See also *Doe vs. Spry*, 1 B. & Ald. 617.

Where the terms of a promise admit of more senses than one, the question will naturally arise as to what is the rule or criterion to be adopted in the performance of it. The law here adopts the rule of ethics as laid down by Paley, viz., that "*the promise is to be performed in that sense in which the promissor apprehended, at the time, that the promisee received it.*" *Gunnison vs. Bancroft*, 11 Vermont 493.

Of those rules of construction that are so well settled as to have passed into canons, we may enumerate the following.

1. Whatever sense may be adopted, *the construction must be reasonable*. To apply this rule properly, it may sometimes become necessary to consider the subject-matter of the agreement. Expressions that may be susceptible of two meanings must be taken in that which best agrees with the matter of the contract. In *Guier vs. Page*, 4 Serg. & Rawle 1, a sale made for "approved

indorsed paper" was held to mean paper which ought to be approved. In *Jones vs. Shears*, 7 C. & P. 346, a tenant agrees to work a colliery so long as it is "fairly workable." Although there were still coals in the mine, but of such a description that it would not pay to work it, it was held that the tenant was not obliged to work the mine at a dead loss. The ultimate limit beyond which no latitude of construction can be carried is that the words and language of the instrument will bear the sense sought to be put upon them.

2. The construction *shall be liberal*; that is, the terms of the agreement shall be construed according to their most comprehensive, popular sense, provided there be nothing in it to show that they were intended to be used in a more confined interpretation. *Packard vs. Hill*, 7 Cow. 434. An indefinite expression shall be understood universally unless there be otherwise some reason to restrain it. Thus, in the Year Book, 19 Hen. 6, 41, two persons having goods in jointure give *all their goods*. Held, that this passes not only the goods they have in jointure, but also their several goods.

3. The construction *shall be favorable*—that is, it shall be of such a character as that the agreement, if practicable, shall be supported. Every presumption shall be in favor of the validity of a contract, and Courts will, if possible, so construe its terms as to give it some operation. Hence, words which are susceptible of two senses, one agreeable to, the other against the law, shall have given to them the former sense. Thus, in *Harrington vs. Klop-rogge*, 4 Doug. 5, a bond is given conditioned to assign all offices. Held to apply only to such offices as are by law assignable. A stipulation, by a particular construction, would be frivolous and ineffectual, but by a contrary exposition, though in itself less appropriate, a different effect would be produced; the latter interpretation shall be adopted. *Pugh vs. Duke of Leeds*, Cowper 714.

4. *The popular meaning of words shall be adopted*; that is, the terms of a contract are to be understood and taken in their plain, ordinary, and popular sense, unless they have, in respect to the subject-matter, acquired a *particular sense*, distinct from the popu-

lar one of the same words ; or unless by a reference to the context, it is manifest that in the particular instance they were understood by the parties in some *other special sense*. *Lord Dormer vs. Knight*, 1 Taunt. 417.

5. *The whole of the agreement must be carefully considered.* Courts are required to give a construction to the entire instrument, and although the difficulty may lie in a single clause, yet, in giving a construction to that, the context should be carefully examined, and the whole agreement referred to. The principle is to give, if possible, effect to every part of the instrument. Any sweeping clause contained in it is made to take effect only as to estates and things of the same nature and description as those that have been previously mentioned. *Moore vs. Magruth*, Cowper 9. The recital contained in an instrument is always important as indicating clearly the minds of the parties as to what is really the subject-matter of their agreement. That which is contained in a bond is resorted to for the purpose of limiting its condition. *Liverpool Waterworks vs. Atkinson*, 6 East 507. So, also, may a recital be examined to ascertain the meaning of the parties ; and the general words of a clause or stipulation may be explained or qualified by the matter recited. *Payler vs. Homersham*, 4 M. & Selw. 423. A recital may even amount to an agreement where it is to be called into action to discover and give effect to the obvious meaning of the parties, provided it is plain, from the whole tenor of the instrument, that the parties mutually contemplated and intended that the matter or act should be performed. *Samson vs. Easterby*, 9 B. & C. 505. Words introduced by way of exception may be so construed as to constitute an agreement. *Duke of St. Albans vs. Ellis*, 16 East 352. The principle extends further, and creates a contract out of words put into a clause which is introduced as a *proviso* or *condition*, if there is sufficient to show that the parties contemplated an agreement that the particular act mentioned in the clause should be done. *Halder vs. Taylor*, Brownlow 23. A lessee covenants to repair, "provided always, *and it is agreed*, that the lessor shall find timber, &c." Held, a contract to find the timber, &c.

Where there are exceptions, the rule of construction is, to allow them to control the instrument so far as the words of them extend and no farther; and whenever the case is taken out of the letter of the exception, the instrument is left to operate in full force.

6. *The contract shall be taken most strongly against the contractor.* The same principle applies to an *exception* which may occur in a lease or other instrument, and which being the words of the lessor, are to be construed against him and favorably to the lessee. This canon of construction, however, is subordinate to all the general principles of exposition of contracts. It is the last to be resorted to, and is never relied upon, but where other rules of construction fail. Even then it is subject to two conditions:

(1.) That there be an ambiguity in the instrument.

(2.) That there be an inability to collect the apparent intention of the parties from the whole context of the instrument. If the contract be so ambiguous that no meaning can be abstracted from it with any degree of moral certainty, it shall be treated as void; and further, this canon has no application given to it where a harsh construction would work a wrong to a third person. But where the language of the instrument is neither uncertain nor ambiguous, it is to be expounded according to its apparent import, and wherever the words are clear and definite, they must be understood according to their grammatical construction, and in their ordinary meaning: *Doe d. Oxenden vs. Chichester*, 4 Dow. P. C. 65.

7. When the intent of the parties to a contract is manifestly paramount to the manner chosen to effect it, if it cannot operate in the mode intended, it may operate in such mode as will legally effect the intention. *Roe vs. Tranmer*, 2 Wils. 75, holding that a deed intended to operate as a lease and release, and which in that form is void, may be construed as a covenant to stand seised to uses, and be thereby rendered operative.

8. Where one portion of a contract is wholly repugnant to the rest of it, and irreconcilable with the manifest intention of the parties, as apparent upon a consideration of the whole instrument, it will be stricken out, and effect will be given to the contract

without it. Thus if a thing be granted generally, but is accompanied with a proviso which annuls the grant, the proviso will be treated as a nullity: *Cleveland vs. Smith*, 2 Story 287. When a general and indeterminate stipulation occurs in a previous part of a contract, and a limitation is given to it by a subsequent clause, effect should be given to both clauses, the office of the latter being to qualify and limit the former; but if the subsequent stipulation contradict what was previously distinctly stated, and which constituted a principal inducement to the contract, it will be wholly rejected in giving effect to the contract.

9. It occasionally occurs in the descriptive words made use of in contracts and conveyances of land, that the courses, distances, admeasurement, and ideal lines described, conflict with the well known and fixed monuments, either natural or artificial, which are referred to in the instrument as marking out and determining its boundaries. In such case it is the latter which control and determine the rights of the parties: *Cleveland vs. Smith*, 2 Story 279.

10. It also sometimes occurs that by the terms of the contract *an election* is given to either party of one of two several things, and in such case it becomes necessary to determine from the instrument which is the party to do the first act, because to such party belongs the election. One party conveys to another two acres of land, one for life and the other in fee. The grantee, who is the party to take possession, has the election to take either the one or the other in fee. But if the party otherwise entitled to it, by his own wrong or default lose his election, it then belongs to the other party. One party, for instance, is bound in the alternative, to do one of two things by a certain day, and fails to do either; the right to elect as to which shall be done, then passes to the other party: *McNitt vs. Clark*, 7 John. 465. In some cases the mere omission of the party having the election, to perform one of the alternatives, will of itself have the effect of transferring the election to the other: *Price vs. Nixon*, 5 Taunt. 338.

11. *The express mention of one thing implies the exclusion of another.* The proper limitation here is, that the thing thus im-

pliedly excluded must be of the same kind or class with that which is expressed. This canon is often invoked to silence all claims upon implied contracts when there are express ones relating to the same matter; as where a lease contains an express covenant on the part of the tenant to repair, there can be no implied contract to that effect arising out of the relation of landlord and tenant.

Second. Although the general rule is to interpret and construe an instrument by what appears upon its face, yet the instances are of frequent occurrence where reference is had to matters *dehors*, or without it, in order to give it complete effect, or more fully to carry out the intentions of the parties. In reference to this the law has a general maxim that "*that is sufficiently certain which can be made certain.*" This, however, can only be considered as correct within certain limitations. These limitations refer not so much to the means as to the boundaries within which the law permits that to be rendered certain which the parties in their written contract have left uncertain. As a general illustration of this canon, the case of *Owen vs. Thomas*, 3 Mylne & Keen 353, may be referred to. An agreement in writing for the sale of a house failed to give any description of it by which it could be identified, but referred to the deeds describing it as being in the possession of A. B., named in the agreement. The Court held this to be sufficient within the principle of this canon. This rule or canon is perhaps of sufficient breadth to include all that can possibly arise within this second class of cases. We shall therefore proceed to indicate some of the most important cases which arise under this general maxim, and which furnish instances of its special application.

1. The first we shall mention is where there is another or other written instrument or instruments referred to by the one which is offered for construction. The general rule is,—where several deeds are made at one time, to effect one object, they will be construed as one assurance; but so that each shall have its direct operation to carry on the main design. *Lawrence vs. Blatchford*, 2 Verm. 457. Even where two are executed on different days, but relate to the same subject-matter, the latter referring to and being based

upon the former, the two are to be read together and the general words contained in the last are to be restricted so as to conform to the intention of the parties, as derived from an examination of both instruments. *Coddington vs. Davis*, 1 Comst. 186. The Court will even presume such priority in the execution of instruments as will best effect the intention of the parties. *Newhall vs. Wright*, 3 Mass. 138. A case in which the effect of construing one instrument with another, and the qualifying effect had by one upon the other, are much discussed, is one in the Court of Errors of the state of New York—*Rogers vs. Kneeland*, 13 Wend. 114. The canon of construction under which these cases may be more specially included, is, that “*words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.*”

2. Another large class of cases are constantly presenting the problem, how far and under what circumstances parol evidence is admissible to affect the terms of a written instrument. The general principle is, that where there is no ambiguity in the terms employed, the instrument itself, being the only criterion of the intention of the parties, has the effect of excluding parol evidence contradicting the writing, although such parol testimony would clearly show the real intention of the parties at variance with the particular expression of the written agreement. *Williams vs. Jones*, 5 B. & C. 108. Where such instrument appears on the face of it to be complete, parol evidence is never admissible to contradict it. The only thing, therefore, that will justify the admission of such evidence is the existence of ambiguity. And this is of two kinds—patent and latent. The former is that which is apparent on the face of the instrument itself. Wherever this exists no parol evidence is admissible to clear it up. If parties have left their written contract so dubious on the face of it as to be equally capable of several different constructions and applications, although a clear definite meaning might be given to it by means of extrinsic oral evidence, yet it would then be the oral evidence, and not the writing, that would produce the definite effect; and hence it is excluded.

A latent ambiguity never appears upon the face of the instrument, but arises merely upon its application. The maxim here is, that "latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact, may, in the same manner, be removed." The carrying out of this canon of construction violates no legal principle. It only points the application to this or that subject-matter, and never seeks to usurp the authority of the written instrument. It performs the humbler task of acting in aid and assistance of the written instrument, by pointing out and connecting it with its proper subject-matter. *Murley vs. McDermott*, 3 Nev. & Per. 356. A very satisfactory test as to whether any given case comes within this principle or not is to determine whether the ambiguity itself is raised by facts extrinsic of the instrument; because it is only when so raised that parol evidence is admissible to explain it. For instance, there is a grant or devise of the manor of A. Parol evidence shows two manors of that name belonging to the grantor or devisor. And as parol evidence has raised the ambiguity, and created the obstacle to the enforcement of the grant or devise, the law allows a resort to the same species of testimony to clear it up and to show which of the two manors was intended as the subject of the grant or devise. It is not, perhaps, too much to say that parol evidence is admissible to some extent to determine the application of every written instrument. It must be resorted to to show what it is that corresponds with the description, and it must be allowed to extend to all such extrinsic facts as determine the application of the instrument to one subject, rather than to others, to which, on the face of it, it might appear equally applicable.

3. Another branch of inquiry relates to what acts of the parties, and what circumstances, it is admissible to produce in evidence in order to explain a latent ambiguity. The law admits evidence to be given of all the acts of the parties that were previous to, or contemporaneous with, the agreement, but not of those that were subsequent. But no parol evidence can be received to add to a written agreement any stipulation orally agreed upon between the parties either before or at the time the contract was reduced to writing,

and which was to be parcel of the written instrument, but was not introduced into it. *Lord Irnham vs. Child*, 1 Bro. Chan. Rep. 92; *Small vs. Quincy*, 4 Greenl. 497. But a different rule prevails in regard to introducing evidence of such stipulations subsequent to the execution of the written agreement. *Brewster vs. Countryman*, 12 Wend. 446. It is held entirely competent in all cases not affected by the Statute of Frauds, after the agreement has been reduced to writing, and after breach, for the parties to it to make a new contract, not in writing, by which they agree to waive, dissolve, or annul the former agreement, or add to, subtract from, vary, or qualify the terms of it, and thus to make a new contract, to be proved in part by the written agreement, and in part by the subsequent verbal stipulations. In all those cases where the written contract is not intended, and does not in fact purport to contain all the terms of the agreement, it is competent to introduce evidence of a distinct contract resting in parol, and which relates to terms not noticed in the written memorandum. *Jeffry vs. Walt*, 1 Stark. 267. And so also collateral terms may be ingrafted by parol, upon an agreement in writing, which is entirely silent on the subject of such terms, if the new matter be supported by some known custom or general understanding.

In regard to time and circumstances, the rule is, that "the best and surest mode of expounding an instrument is by referring it to the time when, and circumstances under which, it was made." Ancient grants are to be expounded according to the law of the time when they were made. *Adams vs. Frothingham*, 3 Mass. 352. So also the rule may be considered as fully established, that however general the words of an ancient grant may be, it is to be construed by evidence of the manner in which the thing granted has always been possessed and used, as this furnishes evidence of the intention of the parties. *Weld vs. Hornby*, 7 East 199.

In reference to circumstances, the Court will resort to those which are extrinsic, and which surround the transaction, so as to be, as nearly as possible, in the same situation as the parties whose language is to be construed; and with this view it is proper to look at all surrounding circumstances and the pre-existing relation be-