Restatement (First) of Contracts § 235 (1932)

Restatement of the Law - Contracts | October 2018 Update
Restatement (First) of Contracts
Chapter 9. The Scope and Meaning of Contracts
Topic 1. Interpretation

§ 235 Rules Aiding Application of Standards of Interpretation

Comment:
Case Citations - by Jurisdiction

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.

Comment:

a. The rules in the Section are applicable both to integrations and to unintegrated transactions. The rules are general in their character and serve merely as guides to achieving a final result, namely, the correct application of the proper standard. That standard is always the ultimate test.

***Comment on Clause* (a):**

b. Language, though it may bear locally or in certain groups of persons or under some circumstances an extraordinary meaning, in the vast majority of cases is used in its ordinary meaning. Therefore the ordinary sense of words both singly and in collocation is adhered to unless doing so would lead to some absurdity, or repugnance or inconsistency with the rest of the instrument. In such cases, so far as is necessary to avoid that absurdity or inconsistency, but no further, the ordinary sense of words may be modified and rules of grammar disregarded.

Illustrations of Clause (a):

1. A issues to B a policy of marine insurance upon the ship "Maria" and cargo "from any port in Brazil to the Cape of Good Hope, beginning the adventure upon the goods from the loading aboard said ship at such port in Brazil, and upon the ship in the same manner." The ship sails from the Cape of Good Hope to Brazil with cargo, and without loading leaves Brazil on return to the Cape. The words "in the same manner" are given their ordinary meaning, and since there has been no loading, the policy does not cover goods on the return voyage.

2. A transfers to B a joint interest in a business owned by A, the transfer to take effect February 15, 1915, by a

writing stating "A and B to have equal rights and powers and to be subject to equal liabilities with respect to the business from and after the vesting period." In consideration, B promises to pay A, half-yearly on March 1 and September 1 in each year during the continuance of the business, a sum equal to one-half of the aggregate of certain stated half-yearly payments "for which A is now liable to C" in respect of the business. Because of the inference from these facts that each half-yearly payment is intended as a return for enjoyment of the business for a half year a literal interpretation is not given, and the first payment promised by B to A is that of September 1, 1915.

***Comment on Clause* (b):**

c. Clause (b) is a special application of the rule stated in Clause (a). More frequently, however, than in the case of ordinary language technical terms may be misused, and if the context of a writing or other relevant circumstances show that a technical word was not used in its ordinary technical sense, another meaning may be given. Moreover the same word may have a variety of ordinary or of technical meanings. "Mules" may mean animals, shoes or machines; a "ram" may mean an animal or a hydraulic ram.

Illustration of Clause (b):

3. A, a baseball club, employs B as a player for the season beginning April 1, 1889 and ending October 31, 1889. It is agreed that A shall have the power to reserve B for the next ensuing season. On October 22, 1889, A informs B that it "exercises its option to reserve" B for the season of 1890. B refuses to play for A and makes a contract with C for the season of 1890. By articles known as the "national agreement" entered into by baseball associations, of one of which A is a member, it is a condition qualifying the power of reservation that a club shall inform other clubs by October 10 of its reserved list of players for the next season, and not to make a contract with players for the ensuing season prior to October 20. The provision in the contract between A and B giving a right to reserve bears the meaning the similar provision has in the national agreement, and does not mean that B has promised to play for A if A exercises an option prior to the beginning of the ensuing season.

***Comment on Clause* (c):**

d. Where a writing contains a sentence or paragraph of doubtful meaning when taken by itself, it may be made clear by other parts of the writing, and even words which have in themselves a clear meaning may be controlled and given a different meaning because of other parts of the writing.

Illustrations of Clause (c):

4. A and B are joint debtors of C. C gives A for sufficient consideration a writing which in its opening paragraph purports to release A from all duties, but adds thereafter a proviso that C reserves all rights against B. The writing is interpreted not as a release but as a covenant not to sue, since if it operated as a release of A, it would be impossible to reserve rights against B.

5. A, master of the ship "Jane," in order to make necessary repairs, transfers the cargo to the ship "Leslie," and executes a bottomry and respondentia bond hypothecating the transferred cargo of the ship "Jane" and the ship itself to secure payment by the consignees of the sum borrowed. The bond contains this clause, "if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen, then this obligation shall be void." After repairs are made the "Jane" continues the voyage, during which she collides with another ship and is totally lost. An intention that the lender shall surrender all right on the bond, while the cargo is still intact is so improbable that the literal meaning of the word "vessel" is controlled and the bond is interpreted as covering the cargo on the "Leslie." The consignees' undertaking also is not avoided in any part.

6. A building contract provides that payments shall be made at designated intervals upon certificates of the architect, that no payment is to be a waiver or acceptance of defective work, and that the architect's certificates, except the final certificate, shall not be conclusive on the owner's liability. This, on interpretation, means that the final

certificate shall be conclusive.

7. In consideration of a loan from B to C, upon C's promissory notes, A promises B in writing "to guarantee full, prompt, and ultimate payment of all of said notes, and of any and all renewals thereof until all of said notes and any and all renewals thereof are fully paid and discharged." The word "ultimate" in connection with "full and prompt payment," and in connection with the renewal provision shows that A's promise covers notes "ultimately" given, and is not merely a promise to pay after diligent effort has been made to collect the amount due.

***Comment on Clause* (d):**

e. The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.

f. In an integrated contract, however, if accompanying circumstances indicate an intent at variance with any meaning that can be attached to the words of the contract, even when the words are looked at in the setting in which they were used, that intent can be given no effect unless the facts justify reformation of the contract. Yet, as all language will bear some different meanings, evidence of surroundings is always admissible. Its operative effect depends on how far the words will stretch, and how alien from the ordinary meaning of the words is the intent they are asked to include.

g. Even if a contract is not integrated, words when explicit ordinarily have a higher probative value than accompanying circumstances can have.

Illustrations of Clause (d):

8. A, who has an established business, forms a corporation, "A Company," and transfers to it the business, including the good will. A is the sole shareholder. Subsequently the A Company passes into the hands of a receiver, who after carrying on the business for several months sells the assets including the "business, good will, and trade names" to B, who organizes a new corporation under the name of "A and Company, Inc." Thereupon A starts a competing business in his own name. He may do so. At the time of the transfer from A to A Co. the assumption that A ever intended to compete with himself, or that either he or the directors in any way considered whether upon A's retirement the business should be sold is unwarranted. A's purpose was plainly to enable him to do business in a corporate form. It is fairly to be inferred that A's promise was never understood or intended to go beyond the business life of the corporation, and the contract cannot be held to embrace a restriction which the parties never had in mind.

9. In midwinter, A promises to sell and B to buy a quantity of flour at Neenah, on Lake Michigan, to be sent to Boston "free on board steamer at Neenah," where the flour is stated to be then "stored." A, by implication, promises to keep it stored free of expense to B until the opening of navigation in the spring.

10. A, a mining corporation, and B, the owner of a smelter, make a contract whereby A promises to furnish B cinders not to exceed 25,000 tons per year. Subsequently A and B make another contract whereby B promises to take A's entire output of cinders, "estimated at 12,000 tons per year." Afterwards, war occurs and A's output of cinders increases to 15,000 tons. B refuses to take more than 12,000 tons. B's promise is interpreted as one to take this increased output, since it is not grossly disproportionate to the estimate. Where words are positive and clear the fact that recitals and other circumstances show that if this meaning is given the contract will impose a more onerous duty on one of the parties than was anticipated does not limit the meaning of the words.

***Comment on Clause* (e):**

h. Under the rule stated in this Clause the meaning of the contract cannot be stretched by the acts of the parties beyond what the language will bear. Such conduct of the parties, however, may be evidence of a subsequent modification of their contract.

Illustrations of Clause (e):

11. A contracts in October with B to manufacture 50 machines for B, under patents owned by B. At the same time B, in a separate written instrument, warrants that he is financially responsible for the price of 50 machines to be delivered to him by March 1, and that, if upon investigation that is not found to be the fact, he will execute a bond before he requires delivery of the machines. A, upon investigation, finds reason to doubt B's financial standing and demands additional security. B replies, "before you are required to manufacture any of the machines, I will furnish you such security as may be satisfactory." There ensues a lengthy correspondence in which A takes the position that he will not start manufacture until the security is given, and B acquiesces. Notwithstanding the apparent meaning of the word "delivery," in view of the purpose of the requirement and the interpretation placed upon the language by both A and B, the provision means that A need not start manufacture until B furnishes security.

12. In 1854 A grants to B, a railroad company, a right to make railways through A's land for the term of 1000 years. B in consideration thereof covenants to make a specified payment to A on coal carried over "any part of its railways" which should be shipped from Port X. For more than 40 years B pays A rent for coal carried over its railway and shipped from Port X only when the coal passes over A's land. Because the language is so clear the words mean that B promises to make the agreed payments on coal shipped over its railroad from Port X though not shipped over A's land.

Case Citations - by Jurisdiction

U.S.
C.A.1
C.A.2
C.A.3
C.A.4
C.A.5
C.A.6
C.A.7
C.A.8
C.A.9
C.A.10
C.A.D.C.
U.S.Cl.Ct.
U.S.Ct.Cl.
N.D.Ala.
D.Ariz.
N.D.Cal.
S.D.Cal.
D.Del.
D.D.C.
M.D.Fla.Bkrtcy.Ct.
S.D.Fla.
D.Ky.
W.D.Ky.
E.D.La.
W.D.La.
D.Md.
D.Mass.
E.D.Mich.

E.D.Mo.
W.D.Mo.
D.Neb.
D.N.J.
S.D.N.Y.
M.D.N.C.
W.D.Okla.
E.D.Pa.
W.D.Pa.
D.R.I.
W.D.Va.
D.V.I.
S.D.W.Va.
Ala.
Alaska
Ariz.
Ariz.App.
Ark.
Cal.
Cal.App.
Colo.
Conn.
Del.Ch.
D.C.App.
Fla.App.
Hawaii
Idaho
Ill.
Ill.App.
Ind.
Iowa
Kan.
Ky.
La.App.
Md.
Mass.
Mass.App.
Mich.
Minn.
Minn.App.
Miss.
Mo.
Mo.App.
Neb.
N.H.
N.J.
N.J.Super.
N.J.E. & A.
N.M.
N.Y.
N.Y.Sup.Ct.App.Div.
N.Y.Sup.Ct.
N.Y.Surr.
N.Y.Ct.Cl.

N.C.
N.D.
Ohio App.
Or.
Or.App.
Pa.
Pa.Super.
Pa.Northampt.C.P.
Pa. Erie C.P.
Pa.Phila.M.C.
Pa.D. & C.
R.I.
S.D.
Tenn.
Tenn.App.
Tex.Civ.App.
Utah
Wash.
Wash.App.
W.Va.
Wis.
Wyo.

U.S.

U.S.1970. Cit. subd. (e) in ftn. in diss. op. in sup. The United States against which judgment had been obtained in a Federal Tort Claims Act suit brought by employee of contractor for injuries, brought this action against the contractor for indemnity. After dismissal by the District Court and affirmance by the Court of Appeals, the United State Supreme Court, in reversing, held that under provision in the contract between the United States and the contractor the contractor was responsible for all damages to persons or property that occurred as a result of contractor's fault or negligence, but the contractual language could be stretched to encompass negligence of the United States as well. United States v. Seckinger, 397 U.S. 203, 204, 90 S.Ct. 880, 890, 25 L.Ed.2d 224, rehearing denied, 397 U.S. 1031, 90 S.Ct. 1255, 25 L.Ed.2d 546 (1970).

C.A.1

C.A.1, 1981. Cit. in disc. Parties to a contract disagreed about whether and where they must arbitrate a dispute arising under the contract between them. The Massachusetts corporation sought to arbitrate the dispute before the American Arbitration Association in Massachusetts. The French corporation opposed the arbitration and filed an action in federal court seeking to enjoin the Massachusetts arbitration. The lower court entered a temporary restraining order enjoining the Massachusetts arbitration and an appeal was taken. This court held that, under the Massachusetts law, the lower court had the authority to stay the arbitration of a dispute between a Massachusetts corporation and a French corporation, and the court did not abuse its discretion by enjoining the arbitration because the arbitrators, in Switzerland, the place for arbitration provided for in the original contract, were more likely to be familiar with commercial dealings and with French law. The judgment of the lower court was affirmed. Societe Generale, etc. v. Raytheon, etc., 643 F.2d 863, 868.

C.A.1, 1962. Com. e cit. in sup. Where corporation had entered into product development agreement with now-bankrupt debtor whereby debtor agreed to render its skills and services to corporation, corporation could still receive debtor's expertise without court approval, since debtor, receivers and trustee chose to keep contract in force. Walker Manufacturing Co. v. Bloomberg, 298 F.2d 688, 695.

C.A.2

C.A.2, 1965. Cl. (c) Cit. in sup. Plaintiff's father was a song lyricist, who during his career had written lyrics to a number of songs. He had assigned all rights to songs which he might write to Youman Inc. Sometime later Youman Inc. released all rights it had in the songs to Gordon who contemporaneously assigned all songs to defendant. The assignment contained a schedule which listed 19 songs not including the one now litigated. Shortly thereafter Youman Inc. assigned its rights to the song here in question to defendant. The question is whether this song had been released to Gordon previously and therefore passed by descent to his son, the plaintiff, or whether it became the property of defendant. The court held that reading all pertinent documents together the meaning of the release by Youman Inc. to Gordon is not clear, and a question of fact existed as to whether the song now in litigation was retained by Youman or not. The court held that summary judgment should not have been granted. Gordon v. Vincent Youmans Inc., 358 F.2d 261, 263.

C.A.2, 1959. Illus. 12 cit. in sup. In contract action where minor league baseball team contended baseball commissioner breached agreement that no minor league territory should be included in major league territory, court held rule of practical construction inapplicable in construing the contract terms. Portsmouth Baseball Corp. v. Frick, 278 F.2d 395, 400, certiorari denied, 364 U.S. 831, 81 S.Ct. 71, 5 L.Ed.2d 58 (1960).

C.A.2, 1951. Subsec. (d) com. e cit. in sup. in ftn. In proceedings to review order of Securities and Exchange Commission which allowed premium over par value to shares of preferred stock in liquidation, because liquidation could be considered involuntary as it was in justifiable apprehension of what commission was going to demand, commission was justified in disregarding charter provisions of liquidated corporation and awarding $10 premium for each preferred share plus interest. Federal Liquidating Corp. v. Securities and Exchange Commission (Edelstein et al. v. Securities & Exchange Commission), 187 F.2d 804, 807, certiorari denied, 341 U.S. 949, 71 S.Ct. 1016, 95 L.Ed. 1372 (1951).

C.A.3

C.A.3, 1977. Cit. in ftn. A corporation sued to recover income taxes imposed upon it in connection with payments made by it on obligations denominated "debentures." The issue involved whether the payments in question were deductible as interest, or were, in reality, disguised dividends, and, therefore, not deductible. The district court entered judgment in favor of plaintiff, notwithstanding a jury verdict in defendant's favor. The Court of Appeals affirmed, holding, inter alia, that in view of the ambiguity of the language used in a debenture subordination provision, the district court properly took testimony as to what the language was intended to mean, and as to what the corporation treated it as meaning. Scriptomatic, Inc. v. U. S., 555 F.2d 364, 371.

C.A.3, 1977. Subsec. (e) quot. in disc. in sup. An electric supply company, as the assignee of a subcontractor, brought a diversity action to recover an amount which the general contractor allegedly owed on the assignor's subcontract. The trial court entered judgment for the assignee subject to two set-offs, and the assignee appealed. Applying the law of the forum state, Pennsylvania, the court affirmed, holding that where the original contract agreement between the contractor and the owner of the premises was modified, the subsequent agreement had the effect of satisfying and discharging the prior contractual duties of the parties so that under the electrical subcontract, the subcontractor was required to comply with change orders issued by the building owner, and where the general contractor incurred expenses in purchasing electrical switches to carry out the change orders, and the subcontractor agreed to absorb a portion of those expenses, a set-off for the difference was properly allowed. Westinghouse Elec. Supply Co. v. Fid. & Dep. Co. of Md., 560 F.2d 1109, 1114.

C.A.3, 1976. Cit. This was an appeal from a tax court determination that legal expenses incurred by the taxpayer were capital expenditures rather than ordinary expenses. Taxpayer had retained counsel in a dispute with his employer regarding payments for an invention by the taxpayer. The court affirmed, holding that the "origin of the claim" test applied and hence this was a capital expenditure as it related to the disposition of a capital asset. The court said that the tax treatment of the expenditure would not depend on contract construction. Estate of Baier v. C.I.R., 533 F.2d 117, 120.

C.A.3, 1974. Cit. but dist. in conc. and diss. op. Plaintiff entered into a contract with a carrier for the transport of plaintiff's generator. The carrier agreed to secure liability insurance. The carrier's subsidiary contracted with a stevedoring operation, and the carrier's overland shipping agent was involved in the transport of the generator from the dock to the site. Plaintiff brought this action against the carrier, the subsidiary, the stevedore, and the overland transporter for damages to the generator while en route from the dock to the site. The trial court dismissed the action against the subsidiary, held the carrier liable for breach of promise to insure the generator, and held the stevedore and the overland shipping agent liable for negligence, but held that the overland shipping agent's liability was contractually limited to $500. On appeal, the court held that the trial court did not abuse its discretion when it admitted the testimony of a witness who, in violation of a pretrial order, was unlisted; that the stevedore and the overland transporter's liability was not limited to $500 by the Carriage of Goods by Sea Act because the documents did not make express provision for third parties; and that the action would be remanded for a determination as to the comparative negligence of the stevedore and the overland transporter. The dissenting justice, who concurred in part, would have admitted evidence of prior dealings to explain the intent of the contracting parties to limit the liability of the transporter to $500. De Laval Turbine, Inc. v. West India Industries, Inc., 502 F.2d 259, 272.

C.A.3, 1973. Subsecs. (c) and (e) cit. in ftn. in sup. The plaintiff's bus was damaged while being driven in the franchise area of the defendant. Plaintiff sued for damages. The court held that the contract between the parties governed their respective liabilities and not general agency principles. The bus driver was the plaintiff's employee, but the defendant received all revenue benefits of the bus' operations in the area in which it had been damaged. After considering the contract as a whole and interpreting it in light of the parties' own interpretation of it in practice, the court held that the defendant was to be deemed the operating carrier under the contract and, therefore, it was held liable for the damages. Capitol Bus Co. v. Blue Bird Coach Lines, Inc., 478 F.2d 556, 560.

C.A.3, 1972. Cit. subsec. (d) in sup. Plaintiff, a subcontractor, sued its general contractor for labor and materials furnished in a building financed by the F.H.A. The contract between defendant and the F.H.A. required F.H.A. approval of any change in the building plans. Plaintiff's contract with defendant incorporated this contract into their agreement, but also stated that any changes had to be agreed to in writing by the contractor. During construction, plaintiff proposed and defendant approved of changes in the construction. Neither party notified the F.H.A. of the changes. The court reversed summary judgment for plaintiff. Liability depended on the intent of the parties. Because the contract between the contractor and the subcontractor was ambiguous, parol evidence could be used. The ambiguity might disappear if testimony were brought out with respect to the customs and usages of the construction industry. Thompson-Starrett Internat'l, Inc. v. Tropic Plbg., Inc., 457 F.2d 1349, 1352.

C.A.3, 1971. Cit. in sup. In a previous action the court held that the defendant car manufacturer breached its contract with the plaintiff car dealer by discontinuing production of one model of cars. The defendants argued that damages, if found, should be limited to those profits which the plaintiff lost by reason of not being given a 35-day notice of the model's discontinuance under a contract provision which permitted the defendant to amend the contract in any manner it "deemed advisable" upon such notice. The court held that argument untenable because the discontinuance of the model of cars would not only change but would also destroy the substance of the contract which clearly was not the plain and ordinary meaning of the wording. Buono Sales, Inc. v. Chrysler Motors Corporation, 449 F.2d 715, 721.

C.A.3, 1970. Cit in ftn. in sup. The plaintiff employees instituted a class action, challenging the validity of a termination clause in the defendant employer's pension plan. Stating that no countervailing public policy overrides the orthodox principles governing the interpretation of contracts, the court held that defendant's right to terminate, when duly exercised, constituted an operative condition subsequent extinguishing defendant's obligations under the plan, and that the termination applied even to retired employees, since there was no express condition exempting them from the termination. Boase v. Lee Rubber & Tire Corporation, 437 F.2d 527, 533.

C.A.3, 1970. Quot. subsec. (e) in sup. This was an action against a corporation for anticipatory breach of contract for manufacturer and repair of mechanical devices by plaintiff and against a majority stockholder, defendant, on guarantees on performance of contract. The court held, inter alia, where the majority stockholder of defendant had switched manufacturing firms in an effort to insure quality production with knowledge that design defects existed in its product and reimbursed plaintiff, the new manufacturer, for expenditures in incorporating design changes the stockholder suggested, plaintiff was not precluded from recovering for anticipatory breach of contract for manufacture and repair of the product on the ground that it had represented that it would correct defects and inadequacies of the device if defendant would employ plaintiff to manufacture the product. Philips Electronics & Pharmaceutical Ind. Corp. v. Leavens, 421 F.2d 39, 45.

C.A.3, 1969. Subsec. (c) quot. in sup. in ftn. A building contract provided for the payment in current funds of the costs of constructing a building, a fee of $35,000 also being payable to the contractor by the owner of the property, defendant in this action. The contract specified the contractor agreed to supply all additional funds needed to complete the job not raised by placing the first mortgage, these funds to be advanced at the beginning of the job. The defendant-owner never obtained the first mortgage and unilaterally cancelled the contract after the contractor had rendered engineering services and incurred other expenses for which the district court had awarded him $27,823. A contract must be construed so as to give effect to all its parts and any construction that would render the agreement meaningless should be avoided. The trial judge had concluded that until the owner obtained the first mortgage loan the contractor was not required to advance the additional funds beyond the first mortgage loan needed to complete the building contract. Since the defendant-owner did not perform its part of the contract by obtaining the first mortgage, the plaintiff was entitled to recover the money it expended and for services performed, the completion of the contract having been rendered impossible. The defendant was also held responsible for paying the architect, in spite of the contract provision the architect was to be paid out of the money received from the first mortgage. Pan American Realty Trust v. Twenty One Kings, Inc., 408 F.2d 937, 939.

C.A.3, 1962. Com. e cit. in sup. Where licensee brought action for declaratory judgment to interpret license agreement, court held that non-exclusive license to use any invention in alkyd-resin field applied to all those products which went into production of alkyd-resins. American Cyanamid Co. v. EllisFoster Co., 298 F.2d 244, 246.

C.A.3, 1961. Cit. in ftn. in sup. Under partnership withdrawal agreement in which operating partner agreed to pay retiring partner 15% of damages to be recovered in pending patent infringement suit in which partnership was plaintiff, damages were construed in its commonly accepted legal sense, and did not include royalties paid to partnership as part of settlement of patent infringement suit. Miller v. Weller, 288 F.2d 438, 440, certiorari denied, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32 (1961).

C.A.3, 1959. Cit. in ftn. in sup. In action for breach of contract, lease contract for trailer which stated that lessee's liability should be absolute, and provision that contract should not increase legal liability of any party thereto meant that there was no increase of liability beyond that stated in the contract. J. E. Faltin Motor Transp., Inc. v. Eazor Express, Inc., 273 F.2d 444, 445.

C.A.3, 1956. Cit. in ftn. in sup. of diss. op. Where it was held that a gain to a taxpayer resulting from the release of its debt was not a contribution to taxpayer's capital, the conduct of the parties contemporaneous with the formation of the contract of release was admissible. Joy Manufacturing Co. v. Commissioner of Internal Rev., 230 F.2d 740, 746.

C.A.3, 1956. Cit. in sup. Under contract between mother of child and couple wishing to adopt it, providing that child was "to be adopted" by couple, properly construed, in view of subsequent conduct of couple in providing for child, showed agreement of couple that child was to be treated as a natural child, including inheritance rights. Kilby v. Folsom, 238 F.2d 699, 701, 60 A.L.R.2d 1065.

C.A.3, 1956. Cit. in sup. In an action by taxpaper to obtain refund of income taxes allegedly erroneously paid, a construction against interest by a party to a contract was strong evidence of its meaning. Natco Corp. v. United States, 240 F.2d 398, 403.

C.A.3, 1955. Cl. (a) and cl. (d) cit. in sup. Parol Evidence was admissible to show that assignment of all claims of corporation in receivership did not include a subsequently adjudicated right of corporation to receive damages for fraud practiced on it when it was owner of certain stock certificates. Guaranty Trust Co. v. Williamsport Wire Rope Co., 222 F.2d 416, 420.

C.A.3, 1954. Quot. in ftn. 4 in sup. In construing an ambiguous insurance contract, the conduct of the parties in relation to the contract is to be considered and is persuasive evidence of the actual meaning. Continental Assur. Co. v. Conroy, 209 F.2d 539, 543.

C.A.3, 1954. Cl. (e) cit. in sup. in ftn. Where sales manager sued for bonuses due under employment contract with defendant, the meaning of the contract terms was to be determined according to the practical construction given them by the parties themselves. Wilson v. Homestead Valve Manufacturing Co., 217 F.2d 792, 797, certiorari denied, 349 U.S. 916, 75 S.Ct. 606, 99 L.Ed. 1250 (1955).

C.A.3, 1949. Com. d. cit. in sup. Evidence was insufficient to enable buyer to claim that contract gave him right to demand weekly shipments of selected units of dinnerware sets rather than weekly shipments of complete dinnerware sets, so that seller's refusal to deliver as per buyer's demand was not a breach of contract. Newspaper Readers' Service, Inc. v. Canonsburg Pottery Co., 176 F.2d 945, 949.

C.A.3, 1948. Cit. in sup. in ftn. Where plaintiff and defendant's agent had correspondence relating to the possible sale of trucks to plaintiff when and if plaintiff obtained the necessary government permits, the federal district court of New Jersey applied the New Jersey conflict of laws law to determine whether New York or New Jersey law controlled, with the result that a contract was found to be entered into which the defendant breached by acting in a manner that prevented plaintiff from obtaining the necessary permits, for which breach the proper measure of damages was to put plaintiff in as good as a position as if the contract was performed. Atlas Trading Corp. v. S. H. Grossman, Inc., 169 F.2d 240, 244.

C.A.4

C.A.4, 1980. Subsec. (b) cit. in ftn. in diss. op. Lender, a Virginia bank, brought diversity suit against defendant, a guarantor of two dishonored loans. The two original loan agreements were personally guaranteed by the borrowers and their wives individually. The guarantor against whom suit was instituted had executed a guaranty agreement a year after the original loan agreements were executed in order to induce plaintiff to release additional funds scheduled to be advanced under the terms of the original loan agreements. In the interim, the bank had learned that the borrowers did not have good title to certain property constituting security for the loans. When the loans were not paid, the bank wrote to the borrowers, their wives, the various corporate entities involved, and defendant guarantor notifying them that the makers were in default and demanding payment. With the loans still in arrears, the bank brought suit against defendant alone. Through his attorney, defendant called upon the bank to sue each maker, guarantor, and endorser of the two notes. Notwithstanding this demand, no suit was ever commenced against any of these parties other than defendant. At the time of default, the wife of one of the makers was the only party who remained both a resident of Virginia and not insolvent. The district court adjudged defendant liable. On appeal, the lower court judgment was reversed with directions to enter judgment for defendant. The court of appeals based its decision upon construction of a Virginia statute that gave a surety, guarantor, or endorser the right to require a creditor to institute suit "against every party to such contract" in the state and not insolvent and to prosecute the same with due diligence to judgment and by execution or forfeit his right to demand of such surety, guarantor or endorser and of his cosureties the money due under their contracts of guaranty or suretyship. The court of appeals, one justice dissenting in a written opinion, held that where the bank sued only one guarantor, the defendant, and refused to sue another guarantor who was solvent and a

Virginia resident at the time of default, the bank was precluded from enforcing the guaranty against defendant. The dissenting judge argued that defendant and the solvent wife were cosureties and not within the statutory description of "every party to such contract" since the cosurety is not a party to the contract between creditor and principal debtor. Colonial American National Bank v. Kosnoski, 617 F.2d 1025, 1030.

C.A.4, 1966. Quot. in sup. Plaintiff's decedent owned a life insurance policy issued by defendant which insured against accidental death occurring, inter alia, after he left his "place of employment" on business. Decedent was a vice president of Pilot Life Insurance Co. and while attending a country club owned by Pilot for the purpose of making promotional speeches, decedent choked to death on a piece of steak. In a suit by the spouse to recover the insurance proceeds, the court held that the words "place of his employment" were to be given their common or normal meaning unless circumstances indicated otherwise and as such included only the building in which he had his office and the surrounding parking lots. American Casualty Company of Reading, Pa. v. Gerald, 369 F.2d 829, 834.

C.A.4, 1946. Cl. (d) cit. in sup. Where contract to grade and construct a stone base course for roads at the rate of $1.55 per square yard contained a provision that additional compensation would be paid in the event any unsuitable material were encountered below the subgrade, the conditions under which the clause was inserted was admissible as to its interpretation, but where the contract did not specify the number of acres to be cleared, evidence of prior oral negotiations was not admissible to limit the area to 60 acres, and where materialman furnished material and labor to subcontractor which benefited general contractor, general contractor was liable on a contract implied in law to pay materialman for such items. Ross Engineering Co. v. Pace, 153 F.2d 35, 40.

C.A.4, 1942. Clause (e) quot. in sup. Bank which did not consider person doing incidental collection work for it as employee cannot thereafter assert he was employee. National Bk. of Burlington v. Fidelity & Cas. Co., 125 F.2d 920, 923, 140 A.L.R. 694.

C.A.5

C.A.5, 1984. Cit. in ftn. in disc. The plaintiffs sued in federal court to enforce a state court judgment imposing a constructive trust on the defendant's assets and awarding $72 million in damages for breach of fiduciary duty and fraud. The district court granted the defendant's motion for summary judgment, on the ground that the failure to comply with a bankruptcy court remand order and violation of an automatic stay voided the state proceedings. This court reversed and remanded, holding that the stipulation and agreement provided in the remand order were subject to the rules of construction of contracts. The court found that the parties had complied with the remand order, thus fulfilling the condition lifting the automatic stay and divesting the bankruptcy court of jurisdiction. Therefore, the court concluded, the subsequent state proceedings were valid. Browning v. Navarro, 743 F.2d 1069, 1081, rehearing denied 747 F.2d 1465 (5th Cir. 1984).

C.A.5, 1981. Cit. generally in disc. Savings and loan association petitioned for review of an order of the Federal Home Loan Bank Board requiring it to cease and desist from calculating interest under the 365/360 method when loan contracts called for the 365/365 method. The association claimed that the Board used its cease and desist power improperly in an attempt to enter the consumer protection field. The court held that the cease and desist order was not authorized by the provision of the Home Owner's Loan Act of 1933 authorizing the issuance of cease and desist orders to remedy "unsafe or unsound" practices. The court also held that, pursuant to a statute allowing the Board to issue cease and desist orders when a savings and loan association is "violating or has violated … the law," state law, not federal law, determined the question of whether the association's contracts with borrowers violated the law and thus, the association's policy of calculating interest under the 365/360 method, despite the loan contracts' calling for the 365/365 method, did not warrant the issuance of a cease and desist order by the Board. Accordingly, the judgment of the Federal Home Loan Bank Board was reversed. Gulf Fed. S. & L., etc. v. Federal Home Loan Bank Bd., 651 F.2d 259, 266, certiorari denied 458 U.S. 1121 102 S.Ct. 3509, 73 L.Ed.2d 1383 (1982).

C.A.5, 1979. Quot. in part in diss. op. and com. (d) quot. and com. (e) cit. in diss. op. Defendant chartered a vessel from plaintiff to be used for the transportation of petroleum products during consecutive voyages over a one-year period. A standard voyage charter was signed after it was modified so as to apply to a series of voyages. It provided for demurrage charges if the defendant spent excessive amounts of time loading or unloading cargo. Over the course of the charter, defendant incurred substantial demurrage charges and the plaintiff attached one of its cargoes. Though none of the charges pertained to this cargo, defendant was forced to post a security bond to gain its release. The trial court found that the charter permitted a lien to be applied against any cargoes carried so as to guarantee compensation for any charges incurred. The court felt that the modification of the standard charter created ambiguity in the unmodified lien, which made an analysis of the intent of the parties necessary. On appeal, the court stated that the lien clause was unambiguous and was only applicable to the cargo on which the charges were assessed. By permitting the unconditional delivery of prior cargoes without attaching them for demurrage charges, the plaintiff lost the use of the liens. As the charter clause did not permit recourse against subsequent cargoes, the court reversed. The dissent believed that the majority took the lien clause out of context and failed to interpret the charter as a whole. As language in the charter referred both to consecutive voyages and to single voyages, the dissent found ambiguity requiring an examination of the accompanying circumstances and operative usages of various terms. The usual arrangement in consecutive voyage charters was found by the dissent to allow the attachment of all cargoes. Atlantic Richfield Co. v. Good Hope Refineries, 604 F.2d 865, 873-874.

C.A.5, 1971. Subsec. (e) cit. in sup. This was an action by a supplier of marine fuels and lubricants to establish in rem in personam liability against the vessel and its owner. The court affirmed a lower court's judgment for the plaintiff, holding that there was sufficient evidence to show that a corporation organized by sole proprietorship which engaged in the steamship agency business had the express and implied authority to purchase supplies for the vessel. Esso International v. SS Captain John, 443 F.2d 1144, 1151.

C.A.5, 1955. Cit. in sup. Where trustee in bankruptcy of corporation sued president of corporation to have payments made by corporation on mortgage of president declared void, the validity of this payment being dependent on a contract between president and corporation, the conduct of the parties was admissible to interpret the contract. Bruce v. McClure, 220 F.2d 330, 337.

C.A.5, 1937. Clause (d) cit. in sup. The buyer of cotton cloth who agrees to pay to the seller the tax on the cloth which the seller must pay the government in return for the seller's promise to refund this money if the tax is declared unconstitutional within ninety days cannot recover this money if the tax is declared unconstitutional after one hundred and seventeen days. Casey Jones v. Texas Textile Mills, 87 F.2d 454, 456.

C.A.6

C.A.6, 2003. Subsec. (d) and com. (e) quot. in case quot. in sup. Hospital sued Medicare supplement (Medigap) insurer to recover amounts owed for services provided to insured patients. The district court granted insurer summary judgment. Affirming, this court held, inter alia, that insurance policies were unambiguous, and insurer was obligated to pay hospital only the per diem rates set by Medicare as defined in insurer's policies. Vencor, Inc. v. Standard Life and Acc. Ins. Co., 317 F.3d 629, 635.

C.A.6, 1973. Subsec. (d) quot. in part but not fol. General charged that Firestone infringed its patent on a certain synthetic rubber composition, and Firestone charged that the patent was invalid, and, alternatively, that it had a royalty free license. The court sustained the trial court's findings that the invention had not been anticipated by the prior art, that it was not obvious, and that the patent's claims were not vague and unduly broad. However, the court found that under General's research contract with the Reconstruction Finance Corporation, General became obligated, in return for the reimbursement of its research costs, to license the invention to the government and its nominees, of whom Firestone was one, on a royalty free basis. The court held that parol evidence was not admissible to alter the terms of the unambiguous research contract. General

Tire & Rubber Co. v. Firestone Tire and Rubber Co., 489 F.2d 1105, 1124, certiorari denied, 417 U.S. 932, 94 S.Ct. 2643, 41 L.Ed.2d 235, rehearing denied, 419 U.S. 886, 95 S.Ct. 160, 42 L.Ed.2d 131 (1974).

C.A.6, 1969. Subsecs. (a), (c) cit. in sup. The plaintiff sued the defendant-manufacturer for commissions claimed after plaintiff's contract had been terminated. The contract provided that plaintiff could be paid for orders accepted before termination although shipment may take place afterwards. General Electric had an open-ended purchase order with the defendant but had to send a material arrival schedule before the defendant could be bound. The plaintiff claimed commissions on goods specified, but for which there was no material arrival schedule. The court, taking the contract as a whole and giving the words their ordinary meaning, held that the defendant was not liable for the commissions if it was not bound to ship the goods at the time of termination of the contract. Robich v. Patent Button Co. of Tennessee, Inc., 417 F.2d 890, 892.

C.A.6, 1960. Cit. in sup. In breach of contract action wherein plaintiff alleged defendant was obligated under an existing contract to disclose and allow certain license to be used by plaintiff, there was no evidence of breach of contract on defendant's part, since the contract must be read as a whole, and plaintiff cannot rely on one provision of contract without reference to entire agreement. Florida Canada Corp. v. Union Carbide & Carbon Corp., 280 F.2d 193, 196, certiorari denied, 364 U.S. 902, 81 S.Ct. 234, 5 L.Ed.2d 194 (1960).

C.A.7

C.A.7, 1974. Quot. subsec. (e) in ftn. in sup. Under the tariff rules a proportional tariff rate is applied to multicar shipments of canned foodstuffs if the tonnage contained will be shipped to another destination within one year. Plaintiff carrier brought this action against defendant shipper when it discovered that defendant had substituted identical goods for those goods which had been shipped under proportional tariff rates. Plaintiff received judgment below and recovered the balance between the proportional rates and the higher flat rate. The court reversed, holding that the rules against substitution merely prohibited the substitution of different commodities, but permitted the substitution of identical goods. Chicago & N. W. R. Co. v. Hunt-Wesson Foods, Inc., 504 F.2d 905, 910.

C.A.7, 1972. Quot. in ftn. in sup. The plaintiff, purchaser corporation, brought an action against defendants, the sellers of capital stock of a corporation, involving the interpretation of language in noncompetition covenants of employment contracts which were ancillary to the contract of sale of the capital stock. The stock contract specified that Jan. 31 was the determination date for adjustment of the stock price. The noncompetition covenants in the employment contracts required that the sellers of the stock not compete with the purchaser for five years after the conclusion of the stock sale. On defendant's appeal from a judgment for plaintiff, the court reversed and remanded with directions and held, inter alia, that the employment contracts and the stock agreement were inextricably intertwined and must be construed together, and the noncompetition period began to run on Jan. 31, despite a later amendment of the stock contract providing for a closing date of April 3rd. Southwest Forest Industries, Inc. v. Sharfstein, 482 F.2d 915, 922.

C.A.7, 1955. Cit. in sup. Where transportation policy insured barge terminal and warehouse building against direct loss or damage caused by ice, driftwood and other articles carried by Ohio River and collapse of building, and terminal building failed due to pressure from collecting silt, there was no loss within coverage of policy since no object was moved along the river. Mead Johnson Terminal Corp. v. Northwestern Nat'l Ins. Co., 226 F.2d 103, 104.

C.A.7, 1938. Clause (e) cit. in sup. If the terms of a contract are unambiguous, the inconsistent conduct of the parties will not change its meaning. In re Chicago & E. I. Ry. Co., 94 F.2d 296, 300.

C.A.8

C.A.8, 1963. Quot. in sup. Where appellee, who owned land, and man who performed the physical farming operations had a meeting of minds and intended as a part of their "arrangement" that appellee would tell the other what to do and such was the case the conduct of the parties indicated that all parties placed a particular interpretation upon the "arrangement" and that meaning was adopted where a reasonable person could attach such an interpretation. Celebrezze v. Wifstad, 314 F.2d 208, 213.

C.A.8, 1962. Cit. in sup. To determine length of holding period for tax purposes, of stock acquired under stock option plan, entire agreement between taxpayer and employer was examined to conclude that taxpayer acquired sufficient interest in shares when option was exercised to commence running of the holding period. Swenson v. Commissioner of Internal Revenue, 309 F.2d 672, 676.

C.A.8, 1941. Cit. in sup. In interpreting contract executed 25 years ago, conduct of parties under it will be given important consideration. U. S. v. Tilley, 124 F.2d 850, 856, certiorari denied, 316 U.S. 691, 62 S.Ct. 1281, 86 L.Ed. 1762 (1942).

C.A.8, 1938. Cit. in sup. A clause in a contract whereby a purchaser of a property is to pay the value of the property will be construed as meaning the market value of the property as a business and not the value determined on the basis of original cost less depreciation. Barnsdall Ref. Corp. v. Cushman-Wilson Oil Co., 97 F.2d 481, 484.

C.A.9

C.A.9, 1992. Subsec. (c) quot. in sup. General contractor sued subcontractor, alleging, among other claims, that subcontractor was contractually obligated to perform all work related to erecting a steel structure. The district court allowed the jury to consider, despite the contract's integration clause, subcontractor's parol evidence that the parties intended the term "erect complete" to mean partial erection. The jury found for subcontractor and the court denied the contractor's motion for directed verdict, inter alia. Reversing denial of the motion and remanding to determine damages, this court held that the subcontractor's reliance on general boilerplate provision about work "customarily furnished" did not provide a meaning to which the contract was susceptible, since it would have rendered meaningless additional provisions detailing specific work, would have allowed general provisions to prevail over specific provisions, and would have let boilerplate provision prevail over written additions to the standard form. Brinderson-Newberg v. Pacific Erectors, 971 F.2d 272, 279, cert. denied 507 U.S. 914, 113 S.Ct. 1267, 122 L.Ed.2d 663 (1993).

C.A.9, 1970. Quot. in part in sup. The post office department brought administrative action against a corporation for misleading advertising. As a compromise settlement the parties signed an Affidavit of Discontinuance, and the corporation substituted for the original ad (and a second one also disapproved) an ad informally and unofficially approved by a post office attorney. The post office subsequently determined the third ad to be in breach of the affidavit, impounded funds received in the mails, and ordered refund to all those answering the ad. The defendant-postmaster appealed from a summary judgment for the plaintiff corporation in an action to enjoin enforcement of the impounding order. The court affirmed, holding that the department's refund order was arbitrary and unwarranted by the affidavit, and that the department's construction of the contract rendered the breach-cure provisions meaningless by permitting the department to avoid the normal requirement for a fraud order that an "intent to deceive" be proven, and upon finding a breach, ordering refund of all impounded remittances regardless of (1) revisions which might have cured the breach, or (2) when the revisions were made. Mark Eden v. Lee, 433 F.2d 1077, 1085.

C.A.9, 1968. Subsec. (c) cit. in sup. The parties here, a manufacturer of musical equipment and games and a distributor of its products, which it was buying out, had entered into a contract, later supplemented, under which the manufacturer would sell its products to the distributor, the latter would sell to an operator, and the operator would execute a contract guaranteed by both parties, who would discount the transaction as commercial paper. In the specific transaction in question, the distributor was also contracting in the capacity of an operator. There had been a delinquency, and the plaintiff manufacturer had paid the

whole sum thereafter, selling its products in the hands of the defendant distributor-operator and suing it for a deficiency. The defendant counterclaimed, asserting that it had no opportunity to take over the products. The court, after finding that the supplement to the contract must be interpreted together with the rest of the contract, held that the contract gave the defendant in its capacity as operator, special rights, of which it had been deprived, and it reversed a judgment n.o.v. for the plaintiff, which the court below had rendered after a verdict for the defendant on both the claim and the counterclaim. Minthorne v. Seeburg Corp., 397 F.2d 237, 241.

C.A.9, 1964. Cl. (e) cit. in sup. A contract for the sale of realty required the purchasers to pay $48,000 in two years following the consummation date, but fixed no time for payment of the balance to be based on water produced from the lands sold, and provided that voluntary payments of $28,000 made before the consummation date should be credited on the purchase price. The court held that the voluntary payments could not be credited against $48,000 due, because despite having made the voluntary payments of $28,000 prior to the consummation date, the buyers proceeded to pay an additional $30,000 during the first fifteen months after the consummation date, therefore manifesting an understanding that the voluntary payments were not to be a credit against the monies due under the contract during those months, but merely reduced the total purchase price. Riess v. Murchison, 329 F.2d 635, 642, certiorari denied, 383 U.S. 946, 86 S.Ct. 1196, 16 L.Ed.2d 209 (1966), appeal after remand, 384 F.2d 727 (9th Cir. 1967).

C.A.9, 1959. Cit. in ftn. 4 in sup. of diss. op. A shipping company, found negligent in unloading bags from its ship's hold when they fell and injured the stevedores unloading them, was entitled to indemnity from the company actually responsible for the unloading, even though the contract of indemnity did not mention the method by which the unloading would be done, so that parol evidence was admissible to show the method, because the jury's verdict in the shipper's trial showed that the unloader was negligent. Curtis v. A. Garcia Y. Cia, Ltda., 272 F.2d 235, 240.

C.A.9, 1958. Cit. in ftn. 2 in sup. In action by buyer against seller under contract which provided that any equipment which seller had constructed or acquired specifically and solely for use on buyer's order should be and remain seller's property, evidence, including the terms of the contract, sustained finding that dies constructed by seller were not solely for use on buyer's order, and that seller did not agree to keep such dies for sole and exclusive use of buyer and that "die charge" was a service fee for use of dies in manufacturing articles for buyer. Panaview Door & Window Co. v. Reynolds Metals Co., 255 F.2d 920, 923.

C.A.9, 1958. Cit. in sup. In action by executrix of deceased secretary-treasurer of corporation against corporation and general manager to require general manager to transfer 1,000 shares of stock to executrix in accordance with alleged agreement of general manager, the contract was held enforceable as interpreted by the parties themselves even though it was ambiguous on its face. Pekovich v. Coughlin, 258 F.2d 191, 193.

C.A.9, 1958. Cit. in ftn. in sup. A previous opinion of the court, which was a rehearing of the same case, did not establish as "the law of the case" that an agreement between two mining companies that one would convey mining lands on return for royalties on smelting was clearly unambiguous, so that, the trial court on remand was competent to take evidence to show the common usage of "smelting" in the trade, since this would determine the intention of the parties. United Mercury Mines Co. v. Bradley Mining Co., 259 F.2d 845, 848.

C.A.9, 1950. Subsec. (e) cit. in sup. Where contractors agreed to furnish ready mixed concrete under construction contract which did not list proportions of material to be used, but contract provided that tests be used so that concrete would withstand designated pressures, and dispute as to proportions to be used arose and parties agreed that they would abide by results of four tests, subsequent agreement was controlling and therefore contractors could not recover on alleged ground that they were required to furnish cement in excess of that required by contract. Lease et al. v. Corvallis Sand & Gravel Co. et al., 185 F.2d 570, 576.

C.A.9, 1949. Sec. Subsec. (d), coms. e-g cit. in sup. Where contract provided that if seller's "cost of production" of gypsum went up, the price of gypsum should be increased in an amount not to exceed the actual increase in seller's "cost of manufacture", finding that terms used were synonymous so that they included increase in indirect overhead expense as well as direct costs was not unreasonable. Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 178 F.2d 541, 552.

C.A.10

C.A.10, 1979. Subsec. (e) cit. in disc. (Erron. cit. in op. as § 234(e).) Lessors brought an action for an accounting and to recover additional royalty payments that they would have received had they joined a unit at the outset. The defendants, the working interest owners, interpleaded the lessors of all the other tracts in the unit. The trial court found that plaintiffs were entitled to an accounting and to the additional payments. The court also found that the interpleaded defendants had no claim to the monies awarded plaintiffs. On appeal, the judgment was reversed insofar as it gave relief to the plaintiffs, but was affirmed as to the interpleaded defendants. The court found that the plaintiffs understood before they signed the ratification that the defendants would not make retroactive payments for the three-year period if plaintiffs joined the unit. Salmon v. Cities Service Oil Co., 592 F.2d 1114, 1117.

C.A.10, 1968. Subsec. (e) cit. in sup. The plaintiff sued the defendant for an accounting of the liquidation proceeds from an unsuccessful joint venture between the parties to artificially inseminate a number of cows with semen from genetically superior bulls. The defendant counterclaimed for the loss in profit which it allegedly received from the plaintiff's not permitting it to sell the semen on the market. The court found that the meaning to be inferred from a contract provision stating that semen not sold to the plaintiff was to be sold by the joint venture—as evidenced by the defendant's conduct, which included an express recognition of the plaintiff's right to refuse to sell surplus semen for the joint venture and a failure to demand a sale—did not create a duty of the plaintiff to sell the semen for the joint venture, and it affirmed a dismissal of the counterclaim. C. H. Codding & Sons v. Armour & Co., 404 F.2d 1, 8.

C.A.10, 1968. Subsec. (e) cit. in sup. The plaintiff's several Indians, sought an accounting and a recovery of royalties allegedly due under two sets of mining leases between their ward, the Government, and the defendant mining company. The first set extending, from 1922 to 1945 provided a royalty on all ores mined or sold from the plaintiffs' land; the second set, extending from 1945, provided a royalty on all "ores and concentrates" mined by the defendant on the lands. The plaintiffs claimed that these leases entitled them to royalties on certain byproducts produced from ores taken from the land. The court, examining the intentions of the parties to the contract in interpreting them, found that different provisions were used or had been proposed when byproducts were meant to be included and affirmed judgments for the defendant. Whitebird v. Eagle-Picher Co., 390 F.2d 831, 836.

C.A.10, 1967. Com. e cit. in ftn. in sup. The plaintiff sought specific performance of an option contract for sale of all of the outstanding stock of a corporation against three defendants: the corporation, the owner of the stock, and the owner's husband. The defendants' claim that a paragraph in the contract stating that the purchase price should be "based on the defendant corporation's balance sheet" at the time of purchase rendered specific performance inappropriate because of the contract's ambiguity failed, the court holding that, looking at the relationship and circumstances of the parties, they meant to imply merely that a substantial change in the defendant corporation's balance sheet should alter the purchase price, and the lower court's decree for the plaintiff was affirmed. DeTar Distrib. Co. v. Tri-State Motor Transit Co., 379 F.2d 244, 250.

C.A.10, 1964. Cl. (c) cit. in sup. A contract provided for the first trucker to acquire control of a second trucker through purchase of stock, the merger of operating rights, for termination on the date of the refusal by the ICC to approve the application to purchase stock in its entirety without modification, and an option to terminate if the ICC revoked any part of the operating authority. The court held the contract not to be automatically terminated by the ICC's conditional order permitting the transaction if certain irregular routes authorized, but not used, by the second trucker were abandoned. Byers Transp. Co. v. Fourth National Bank & Trust Co., 333 F.2d 822, 825.

C.A.10, 1957. Cit. in sup. In suit by lessee against lessor for breach of mineral lease, since lessee had not agreed to certain method of mining, this fact precluded him from recovery against lessor for costs incurred thereunder. Utex Exploration Co. v. Garwood, 246 F.2d 547, 551.

C.A.10, 1949. Cit. in sup. In determining whether creditor of corporation was changed into stockholder, for purposes of deductibility of dividends as being interest payments, contract between corporation and creditor whereby creditor took stock in cancellation of his mortgage and contract between common stockholders and creditor whereby creditor would own corporation if dividends were not paid were viewed as one contract, with result that dividends paid to creditor were deductible. Bowersock Mills & Power Co. v. Commissioner of Internal Revenue, 172 F.2d 904, 907.

C.A.10, 1946. Cit. in sup. In construing a life insurance policy providing for double indemnity for accidental death, except for death resulting from "war or any act incident thereto", in the absence of contrary evidence, the words will be given their plain, popular meaning; so that where a Naval officer was killed in the attack on Pearl Harbor on December 7, insurer was not liable for double indemnity even though the Congressional resolution declaring war was not passed until December 8, 1941. New York Life Ins. Co. v. Bennion, 158 F.2d 260, 265, certiorari denied, 331 U.S. 811, 67 S.Ct. 1202, 91 L.Ed. 1831 (1947), rehearing denied, 331 U.S. 867, 67 S.Ct. 1530, 91 L.Ed. 1871 (1947).

C.A.D.C.

C.A.D.C.1973. Com. e and illus. 8 cit. in disc. Richmond and Anderson, two municipal power companies, sought reversal of a Federal Power Commission order accepting new rates filed by an electricity wholesaler with whom the petitioners had contracts which specified the means by which the wholesaler could change rates. The court, holding that the F. P. C. is bound by private contractual rate agreements that are not unlawful, ruled, with respect to Richmond, that the parties contemplated rates filed with the F. P. C. in addition to the appropriate state agency, and thus rejected the F. P. C.'s argument that it had full power over rates since the parties had not contemplated F. P. C. jurisdiction. With respect to Anderson, the court held, that notwithstanding the fact that the parties didn't contemplate F. P. C. jurisdiction, they did agree that rates could be changed only through affirmative action by the regulatory state agency, and not by the wholesaler merely filing new rates, as it did here. Richmond Pow. & L. Richmond, Ind. v. Federal Pow. Com'n., 156 App.D.C. 315, 481 F.2d 490, 499, certiorari denied, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1973).

C.A.D.C.1942. Subsec. (e) cit. in footnote in sup. Where lessee exercising right under lease to first refusal to purchase if another bona fide offer, imposed condition full commission be paid realty firm with exclusive right to offer property for sale, but firm waived right to half to another firm should it procure acceptance of offer, whether lessee imposed improper condition was issue in suit for specific performance by his successor. Shea v. Second Nat. Bank of Washington, 76 App.D.C. 406, 410, 133 F.2d 17, 21.

U.S.Cl.Ct.

U.S.Cl.Ct.1983. Subsec. (e) quot. in part in disc., cit. in ftn. A surety brought an action for breach of its takeover agreement with a government agency. The agreement provided that the plaintiff would undertake completion of an airport radar facility and that the defendant would make payments directly to the completion contractor specified by the plaintiff. Subsequently, the defendant disregarded the plaintiff's instructions not to pay the completion contractor directly. In denying the defendant's motion to dismiss, the court considered the plaintiff's argument that the payment provision required the defendant to pay whomever the plaintiff specified. Since both the plaintiff and the defendant, when it disbursed other payments according to the plaintiff's directions, attached that meaning to the provision, the court found evidence to support the reasonableness of the plaintiff's interpretation. Balboa Ins. Co. v. United States, 3 Cl. Ct. 543, 546.

U.S.Ct.Cl.

U.S.Ct.Cl.1977. Cit. in disc. Plaintiff, a common carrier by water, contracted with an agency of the Department of the Navy to transport for one year containerized cargo between the United States and various foreign ports. Plaintiff brought suit to recover two dollars per ton in excess of the contract price, due to drastic increases in bunker fuel costs. The Armed Services Board of Contract Appeal ruled against plaintiff, the Court of Claims remanded, but on remand the Board did not change its position. Court of Claims affirmed, holding that the express terms of the contract unambiguously excluded the escalation of freight rates to compensate for the increased cost of bunker fuel. Sea-Land Service, Inc. v. U.S., 553 F.2d 651, 656, certiorari denied, 434 U.S. 1012, 98 S.Ct. 724, 54 L.Ed.2d 755 (1978).

U.S.Ct.Cl.1973. Cit. in sup. Parties filed cross motions for summary judgment in an action to review a decision of the armed services board of contract appeals. The court affirmed the board's decision, dismissing plaintiff contractor's motion and granting summary judgment in favor of defendant, the United States. The court held that plaintiff's interpretation of the contract language, with respect to the method of pouring concrete, was unreasonable where plaintiff's interpretation of a term rendered the remainder of the paragraph meaningless and was inconsistent with a subsequent use of the term in the same instrument. The court found the contract specifications on the whole clear and unambiguous and characterized plaintiff's interpretation as strained, interpreting ordinary language to absurdity. Merando, Inc. v. United States, 201 Ct.Cl. 28, 475 F.2d 603, 605.

N.D.Ala.

N.D.Ala.1981. Subsec. (c) cit. in sup. Subcontractor brought an action for breach of contract against a general contractor and sought to recover under a labor and material payment bond. The court stated that the specific language of the contract, on which the subcontractor relied, controlled the more general provisions on which the general contractor relied, while the typewritten language of the first article of the subcontract took priority over the boiler plate provisions of the form subcontract and specifications, and that any remaining ambiguities or inconsistencies were to be resolved against the company that drafted the agreement. The court found that in the subcontract, wherein the subcontractor's proposal was stated to be "subject to the conditions and definitions contained herein," the "subject to" phrase did not make the proposal "subordinate to," "subservient to," or "limited by" the printed provisions of the subcontract, general contract and specifications, but placed the parties on notice that the proposal was not the whole agreement and that other provisions had to be considered. The court held that the language of the subcontract reflected the base price, not the lump-sum price, for the installation of eight drilled caissons, and the general contract documents did not bind the subcontractor to the lump-sum price merely because the general contractor had to bid in such a manner. Accordingly, the court entered judgment for the subcontractor. McKinney Drilling Co. v. Collins Co., Inc., 517 F.Supp. 320, 324, affirmed 701 F.2d 132 (11th Cir. 1983).

D.Ariz.

D.Ariz.2008. Cit. in disc., subsec. (e) quot. in sup. Remanufacturer of automotive starters and alternators sued retailer of automotive parts for breach of contract, inter alia, alleging that, on April 11, 2003, the parties entered into a contract to conduct business for a term of five years, but that defendant terminated the agreement in January 2004 and ceased doing business with plaintiff two months later. This court granted summary judgment for plaintiff on this claim, holding that the parties' contract was a five-year requirements contract, and not an indefinite-quantity contract as argued by defendant, and it was undisputed that defendant ceased purchasing products from plaintiff during the term of the agreement. The court reasoned that evidence of the parties' intent and course of dealing, and defendant's explicit commitment to plaintiff in doing business for a five-year term, established that the agreement was a five-year requirements contract. AGA Shareholders, LLC v. CSK Auto, Inc., 589 F.Supp.2d 1175, 1181, 1183.

D.Ariz.1973. Subsec. (e) cit. in sup. Employer brought an action against a competitor and former employees, who had resigned their positions with employer and accepted employment with competitor, for breach of contract. Plaintiff, employer, contended that a share option agreement executed with former employees constituted an employment contract which, when breached, would give rise to a cause of action. Defendants contended that the share option agreement was not an employment contract and they were free to terminate their relationship with the plaintiff at any time. The court held: The language in the option agreement clearly encompassed resignation by the employees, and, in any event, the contract specifically provided the sole remedy, the loss of the option right. Here the option agreements were drafted by the plaintiff, and the evidence was clear that the plaintiff deliberately refused to bind itself and drafted the contract in such a way as to retain maximum flexibility in dealing with its top executives, the defendants. There was no limitation in the option agreement that prevented the defendants from leaving the plaintiff in a group. Having no binding contract of employment, each employee was free to leave at any time and for any reason or no reason at all. Under the facts of the case, no actionable wrong was committed by the employee defendants. Motorola Inc. v. Fairchild Camera and Instrument Corp., 366 F.Supp. 1173, 1179.

N.D.Cal.

N.D.Cal.1977. Subsec. (e) cit. but dist. A licensed deck officer brought suit under the Labor Management Relations Act against the trustees of his pension plan, claiming that the trustees violated the plan's rules when they limited the officer's accrued credits to twenty years, rather than twenty-five or more years allowed under amendments to the plan's rules, thereby making him ineligible for a larger pension when he retired. On cross motions for summary judgment, the district court granted judgment to defendants, holding, inter alia, that to determine whether the trustees acted arbitrarily and capriciously, in bad faith, or beyond the scope of their authority as defined by the plan, the applicable law was federal law with respect to collective bargaining contracts and pension plans; and that under such law, the trustees acted properly. Stewart v. Trustees, Masters, Mates and Pilots Pension Plan, 432 F.Supp. 742, 748.

S.D.Cal.

S.D.Cal.1957. Cl. (e) cit. in ftn. in sup. Where in 1936 insured and insurer had executed a rider to the policy, but where the scrivener had used the wrong form, causing the rider to read that the surrender value was the appropriate figure from a schedule, per thousand dollars of insurance, instead of saying that the figure from the table was the total surrender value, thus making the present surrender value almost twice the sum of the insurance to be paid at the death of insured, and where insurer did not discover this mistake until 1954, within 3 years of when insured commenced this suit for the surrender value, insurer is entitled to reformation. Flax v. Prudential Life Ins. Co. of America, 148 F.Supp. 720, 731.

S.D.Cal.1956. Cit. in sup. In an action by insurer against beneficiaries and trustee to determine whether interest on life insurance policies of deceased should go to beneficiaries or trustee, the action of the parties after the formation of the contract was admissible in construing the agreement. Prudential Ins. Co. of America v. Heyn, 139 F.Supp. 602, 610.

S.D.Cal.1950. Com. b cit. in sup. Clause in aviation liability insurance policy providing for coverage if airplanes were operated only by private or commercial certified and qualified pilots and excluding student or renter pilots did not exclude from coverage certified private pilot who was taking additional instruction in order to become commercial pilot. Petro et al. v. Ohio Cas. Ins. Co., 95 F.Supp. 59, 61.

D.Del.

D.Del.2001. Subsec. (c) quot. in disc. Delaware patent holder based in California sued California company with which it had entered into a joint development agreement, alleging infringement of two patents. This court granted in part plaintiff's motion

for partial summary judgment, holding that the patents at issue were not within the scope of the license grants of the parties' joint development agreement. The court interpreted the agreement under California law, noting that the contract was to be construed as a whole. It determined that the express patent covenant section of the contract, rather than a general licensing section, defined the scope of the patent license grant. Intel Corp. v. Broadcom Corp., 173 F.Supp.2d 201, 211.

D.Del.1957. Cit. in sup. In an action by taxpayer for refund of income and excess profit taxes, where conduct of parties subsequent to manifestation of intention indicated that all parties placed a particular interpretation on it, that meaning was adopted since a reasonable person could attach it to the manifestation, and interest payments were held to be subject to the same conditions as repayment of principal by terms of contract. American Bemberg Corp. v. United States, 150 F.Supp. 355, 361, 363, affirmed, 253 F.2d 691 (3rd Cir. 1959), certiorari denied, 358 U.S. 827, 79 S.Ct. 45, 3 L.Ed2d 67 (1958).

D.D.C.

D.D.C.1980. Cit. in disc., subsec. (c) cit. in ftn. and subsec. (e) cit. and quot. in ftn. Former employee brought an action against former employer and chairman of the board for breach of his 20-year employment contract, seeking benefits allegedly owed him for the remaining 11 years of the contract as well as punitive damages. There was a dispute as to the interpretation of certain terms of the contract. Motions for summary judgment were filed. The court stated that the legal standard in the District of Columbia is that the court may determine whether a contract is ambiguous, and if not ambiguous, the court makes the determination of nonambiguity on summary judgment by looking at the contract language and giving to that language its plain meaning according to common speech, without employing the ordinary rules of construction summarized in ss 235 and 236 of the Restatement of Contracts. But if a court determines that the contract or a provision thereof is susceptible to different constructions or interpretations, or of two or more different meanings, an ambiguity exists, raising a genuine issue of material fact precluding summary judgment. The court held that the term "net profits" as used in the contract provision whereby the employee received a salary plus a percentage of "net profits" was susceptible of at least two interpretations, i.e., profits before or after taxes were deducted, thereby precluding summary judgment on the issue of whether the employer breached the employment agreement by changing from a before to an after tax method of calculating compensation. Motions for summary judgment were denied. Kass v. William Norwitz Co., 509 F.Supp. 618, 624-626.

D.D.C.1980. Cit. in sup. The plaintiff, a development corporation, filed a complaint for condemnation of a plot of land owned by the defendants, who were both trustees and landlords. Upon acquiring title to the land, the plaintiff deposited a specified sum with the court as an estimated compensation for the land. The defendant trustees moved for an allocation and distribution of these funds, requesting that the entire condemnation award be paid to them. But another defendant, a tenant who operated a garage on the condemned premises under a lengthy, detailed and sophisticated long-term lease, claimed that he was also entitled, as a matter of law, to compensation for the value of his leasehold. In the course of interpreting the lease to determine how the condemnation award should be divided between these two claimants, the court first applied the standards of interpretation outlined by the Restatement of Contracts. Although the lease in this case did not contain an explicit condemnation clause which specifically barred the tenant from any condemnation award, it specified that all of the tenant's rights and interests would automatically vest in the landlord upon termination by default, lapse of time, or for any other reason. The court concluded that the term "or for any other reason" was a clear, unambiguous phrase which parties similarly situated would understand as encompassing a total taking by eminent domain. It therefore held that the trustees were entitled to the entire condemnation fee because upon termination of the lease "for any reason" the entire leasehold interest of the defendant tenant vested in the defendant trustees and landlords. Pennsylvania Ave., etc. v. One Parcel of Land, 494 F.Supp. 45, 49.

M.D.Fla.Bkrtcy.Ct.

M.D.Fla.Bkrtcy.Ct.2012. Subsec. (c) quot. in ftn. Buyers of units in a hotel-condominium project brought adversary proceedings against Chapter 11 debtor that developed the project, seeking the return of their deposits. This court granted summary judgment for debtor on plaintiffs' claims that debtor violated the federal Interstate Land Sales Full Disclosure Act,

rejecting plaintiffs' argument that a provision of the parties' purchase agreements governing incidences of casualty impermissibly qualified debtor's two-year construction obligation by giving debtor the option of nonperformance. Interpreting the purchase agreements as a whole, the court concluded that the casualty provision was constrained by the requirement that construction of the project could only be extended for legitimate contract defenses and circumstances beyond a seller's control, and thus debtor's two-year construction obligation was not illusory. In re Mona Lisa at Celebration, LLC, 472 B.R. 582, 607.

S.D.Fla.

S.D.Fla.1975. Cit. in sup. This suit involved fifty-one patent and anti-trust actions concerning the yarn industry that were consolidated for trial. A major portion of the litigation involved a series of agreements between the patent-owners which resulted in the sharing of the benefits from their various patents among the patentees. The court undertook to interpret the various agreements, stating that since they were couched in plain and unambiguous language, their interpretation was a matter for the court. After analyzing carefully the meaning of the terms embodied in the contracts, considered in the light of the state of the art existing in the yarn industry the court concluded that the type of patent-pooling arrangement that had evolved, resulting in the control of the sale price of both patents and licenses, violated the Serman Anti-Trust Act. Re Yarn Process Patent Validity & Anti-Trust Litigation, 398 F.Supp. 31, 61.

D.Ky.

D.Ky.1959. Com. d cit. in sup. It was permissible to look at the circumstances surrounding the making of an unambiguous contract to find that the parties to it intended that the price of oil on which was to be based the lessor's royalties meant the price of the oil at the well-head. Lafitte Co. v. United Fuel Gas Co., 177 F.Supp. 52, 59, affirmed, 284 F.2d 845 (6th Cir. 1960).

W.D.Ky.

W.D.Ky.1999. Subsec. (d) and com. (e) quot. in disc. An operator of long-term, intensive-care hospitals received Medicare supplement insurance benefits from an insurer after it treated two insureds for health care services. The operator sued the insurer for breach of contract, subrogation, and promissory estoppel, alleging that the insurer failed to pay the full amount of the operator's standard rates. This court granted insurer summary judgment on the breach of contract claim, holding, inter alia, that the insureds' policies limited the insurer's obligation to pay the Medicare per diem rate to the operator once the insureds' Medicare benefits were exhausted. The court relied on the contract language and the general structure of Medicare reimbursement. Vencor Inc. v. Standard Life and Accident Insurance Company, 65 F.Supp.2d 573, 576.

E.D.La.

E.D.La.1960. Cit. in ftn. in sup. In suit for declaratory judgment of rights under agreements to use railroad bridge, contract was held not to permit original user to pay lower rental until bridge owner was refunded an amount equal to amount it paid over to liquidate bond issue. Texas and New Orleans R. Co. v. City of New Orleans, 185 F.Supp. 85, 93, modified, 292 F.2d 607 (5th Cir. 1961).

W.D.La.

W.D.La.2010. Subsec. (d) and com. (e) quot. in case quot. in disc. After architectural firm brought a copyright-infringement suit against insured owner of apartment complex that was allegedly based on firm's design, insurer brought suit for a

declaration that insured's commercial general liability policy did not provide coverage for the claims asserted by firm. Granting insurer's motion for summary judgment, this court held that, pursuant to the policy's unambiguous exclusion for injuries arising from a breach of contract, insurer had no duty to provide coverage, because the injuries alleged by firm would not have occurred but for insured's breach of his contract with firm. The court noted that, even when an agreement was unambiguous, a court could consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the contract's meaning. Looney Ricks Kiss Architects, Inc. v. Bryan, 761 F.Supp.2d 399, 408.

W.D.La.1962. Cit. in sup. Where pressure maintenance agreements between oil companies provided for enlargement of participating area only in same producing formation, subsequent acts of the parties demonstrated that defendant's well was not within the participating area covered by the agreement. Hunt Oil Co., 205 F.Supp. 885, 891, 892, affirmed sub nom Hunt Oil Co. v. Marathon Oil Co., 321 F.2d 702, (5th Cir. 1963), certiorari denied, 376 U.S. 910, 84 S.Ct. 664, 11 L.Ed.2d 608 (1964).

D.Md.

D.Md.1974. Subsec. (b) cit. in sup. The plaintiff contractor brought an action against the defendant owner of a shopping center, seeking to recover the balance which it claimed to be due on the contract price and the claimed value of extra work. The dispute centered around the interpretation of the term "turn-key job". The defendant understood the term to mean a job whereby a flat fee was to be set and the contractor would then do all the work required without additional charge. The plaintiff maintained that the contract should be limited to the plans received at the first meeting. The court noted that the defendant's interpretation of the term "turn-key job" was considerably broader than the trade usage, but, since, in the instant contract the term was expressly defined as requiring compliance with the tenant's lease requirements and bearing all costs, that definition was controlling over the trade usage. The provision of the contract dealing with modification had to be read in the context of the whole contract. The defendant's interpretation that the contractor must pay for all changes in the project including those changes negotiated subsequent to the contract date, was not, in the court's view, revealed in the language of the contract taken as a whole. Although leases would be incorporated by reference as part of the contract, subsequent agreements and changes between the landowners and tenants would not be a part of the contract. Glassman Constr. Co. v. Maryland City Plaza, Inc., 371 F.Supp. 1154, 1158.

D.Md.1958. Cit. in sup. Clause in charter for use of vessel which permitted owner to cancel charter if war was declared against any NATO country was applicable to allow defendant's cancellation during Suez conflict, since statements by President Nasser after English attack constituted a declaration of war under rules of international law, and since conflict had result on shipping which clause was intended to remedy. Navios Corp. v. The Ulysses II, 161 F.Supp. 932, 940, affirmed, 260 F.2d 959 (4th Cir. 1958).

D.Mass.

D.Mass.1967. Subsec. (c) cit. in sup. in case quot. in sup. A contract between a retail chain of stores and a shoe company provided, among other things, that, if the chain should be sold, the purchaser should have the option to purchase the assets of the shoe company, which operated departments within the chain stores. The purchaser attempted to exercise the option, but the shoe company rejected it as not conforming to the procedures outlined in the contract. The court, looking at the entire contract, found that the procedure, which was found not to be impossible of fulfillment, had not been followed, and that the plaintiff was barred from exercising the option. Spartans Indus., Inc. v. John Pilling Shoe Co., 263 F.Supp. 191, 197, reversed, 385 F.2d 495 (1st Cir. 1967).

D.Mass.1960. Com. e cit. in sup. In declaratory judgment action on insurance policy, since insured was under duty, by the unambiguous terms of the contract, to report any losses to insurer after a reasonable time to allow study of all claims and

costs, insurer's silence estopped it from claiming that later reports were untimely after delivery of first report because this silence manifested acceptance of the insured's conduct. Lexington Ins. Co. v. Seaboard Air Lines R. Co., 182 F.Supp. 523, 529.

D.Mass.1958. Cit. in sup. Although question of whether, under a collective bargaining agreement, a union brought a grievance to arbitration within a reasonable period of time was a question of law, it was to be decided by the arbitrator because he was more familiar with the particular circumstances and industry practices. In re Jacobson, 161 F.Supp. 222, 226, vacated sub nom Boston Mut. Life Ins. Co. v. Insurance Agents' International Union, 258 F.2d 516 (1st Cir. 1958).

D.Mass.1955. Cit. in sup. Where parties contracted for delivery of 42 lb. board, and such contract was unambiguous, the buyer may not show evidence adopting a custom of buyer having option as to weight and thus allowing him to call for 38 lb. board. A. & P. Corrugated Box Corp. v. St. Regis Paper Co., 134 F.Supp. 564, 570.

E.D.Mich.

E.D.Mich.1940. Clause (a) cit. in sup. A contract whereby an accountant was to render a complete audit of the books of a city treasurer will be construed according to its ordinary meaning and not according to an interpretation used by accountants. Maryland Casualty Co. v. Cook, 35 F.Supp. 160, 164.

E.D.Mo.

E.D.Mo.1945. Cls. (b) and (d) cit. in sup. in ftn. Where land grant agreement relating to joint railroad rates was unambiguous, the contemporaneous practice of the parties regarding it and the meaning of the terms in the industry are to be used in the interpretation of the contract. Thompson v. Baltimore & O. R. Co., 59 F.Supp. 21, 35, modified, 155 F.2d 767 (8th Cir. 1946), certiorari denied, 329 U.S. 762, 67 S.Ct. 122, 91 L.Ed. 657 and 329 U.S. 762, 67 S.Ct. 129, 91 L.Ed. 657 (1946), overruled, 72 F.Supp. 65 (1947).

W.D.Mo.

W.D.Mo.1980. Discussed in treatise quot. in ftn., com. (h) quot. in treatise quot. in ftn. The plaintiff, an employee, brought suit against the defendant, a pension fund, to recover his benefits. The plaintiff's employer had been making payments on the plaintiff's behalf to the fund, but the defendant declined to pay the plaintiff, claiming that the employer's contributions to the fund were not properly made because the plaintiff for parts of his employment had worked outside the geographic jurisdiction of the fund. The court held that the plaintiff was entitled to receive his pension funds. Though the geographic jurisdiction of the fund was not defined in the pension plan agreement, the court concluded that the conduct of the parties, especially the actions of the defendant, who accepted the employer's contributions made on behalf of the plaintiff as valid, indicated that the parties intended the plaintiff's work areas to be within the geographic jurisdiction. Evans v. Mo-Kan Teamsters Pension Fund, 519 F.Supp. 9, 14, order affirmed 655 F.2d 900 (5th Cir. 1981).

W.D.Mo.1971. Subsec. (d) cit. but dist. This was an action on a contract of insurance in which it was alleged that the plaintiff's property, which was in the possession of the defendant's insured, was destroyed or damaged by risks insured against by said policy. In holding for the plaintiff, the court found that although the court might consider all circumstances surrounding the transaction to aid in determining the meaning of the agreement, none of the offers of evidence purporting to show that not all of the plaintiff's property came within the policy limits would warrant varying a policy which clearly and unambiguously provided for coverage of the plaintiff's property, and, in fact, those offers tended to prove that coverage was intended. Folger Coffee Co. v. Great American Insurance Co., 333 F.Supp. 1272, 1281.

D.Neb.

D.Neb.1976. Quot. in part in sup. Plaintiff-lessor railroad brought suit to recover retirement losses incurred due to the closing of a station owned by plaintiff and used jointly by defendant under an 1898 lease agreement. The court initially determined that the doctrine of estoppel operated to prevent defendant from denying the 1898 agreement. One who takes a benefit from or misleads another party cannot subsequently take an inconsistent position which prejudices the other party. The issue thus became whether the agreement to share expenses included an intent to share retirement losses. The court found that there is no uniform custom or practice within the railroad industry for payment of retirement losses. Therefore, absent contractual provisions to the contrary, defendant did not agree to bear any of the capital loss or depreciation resulting from obsolescence. Judgment was entered for defendant. Union Pac. R. Co. v. Chicago, M., St. P. & Pac. R., 407 F.Supp. 1137, 1143.

D.N.J.

D.N.J.1953. Cit. in sup. In action by auto dealer against manufacturer for damages on alleged breach of contract, under which manufacturer was allowed to deliver 97 bonus cars where no time limit was stated in contract, the court will supply the term by considering conduct of parties. Packard Englewood Motors v. Packard Motor Car Co., 116 F.Supp. 629, 634, reversed, 215 F.2d 503 (3rd Cir. 1954).

S.D.N.Y.

S.D.N.Y.2014. Subsec. (c) cit. in case quot. in sup. Buyer of steel mills pursuant to a stock-purchase agreement sued sellers, alleging, among other things, that sellers breached a representation and warranty in which it agreed that it would not materially change certain business and payment practices, when it failed to disclose amendments to the pricing under sellers' coke-supply and transportation contracts with nonparties. Granting sellers' motion to dismiss, this court held that plaintiff did not plead how the alleged failure to disclose the amendments to the contracts constituted a breach of the provision at issue and not a mere failure to disclose a material contract, which was governed by a different provision of the agreement. The court reasoned that, to be meaningful, the two separate provisions had to constitute representations and warranties about different conduct. RG Steel, LLC v. Severstal U.S. Holdings, LLC, 993 F.Supp.2d 370, 378.

S.D.N.Y.1976. Cit. in disc. Action was brought by a public utility holding company and subsidiary electric companies against the seller-manufacturer of a steam turbine generator for alleged breach of express and implied warranties and for negligence, and the seller counterclaimed for the balance allegedly due under the contract for sale of the generator. Defendant moved for summary judgment, dismissing plaintiffs' claims in their entirety and awarding defendant judgment on Count 1 of its counterclaim. On December 28, 1965 American Electric Power Company (AEP) made an oral commitment to purchase a turbine generator, Mitchell 1. Subsequent negotiations over a period of two years culminated in the execution of a written contract signed by both plaintiff, Appalachian Power Company, and defendant by May 9, 1968. The contract provided that Westinghouse manufacture and deliver a steam turbine generator guaranteed to produce 760, 582 kilowatts of electricity under certain specified steam conditions. The court cited the Restatement section 235 for the proposition that it is difficult for one to conceive of a "guaranteed figure" and an "expected figure" giving rise to any interpretational ambiguity. In any event, it was unimportant for purposes of this motion. On April 22, 1970, Mitchell 1 was hooked up with the AEP system. The first major failure occurred in July 1971, when Mitchell 1 suffered a line-to-ground fault. It was out of service for 5 months. On March 1, 1972, the generator suffered a three phase short circuit. An inspection revealed loose bracing. Since completion of the second generator rewind in July, 1972, defendant recommended full load operation but plaintiff limited the load to 90 percent of the guaranteed contract capacity. The reason given by plaintiffs was that the generator is unable to absorb continuously the high vibration which developed in the generator when the unit is operated at or near capacity. The court considered both applicable Pennsylvania and New York law in discussing plaintiffs' contention that they were entitled to recover in this action as third party beneficiaries of the contract entered into between Westinghouse and Ohio Power

Company, since the choice of law issues presented could not have been resolved until trial. If Pennsylvania law applied, plaintiffs would recover as principals to the contract entered into by their agent. The court stated that it is well settled that a principal may sue to recover under a contract made by his agent, even where the agency relationship is undisclosed, and where the contract does identify the third party as a principal. There was no indication on the record that the Mitchell 1 contract excluded liability to any principal—undisclosed or otherwise. The record indicated that defendant was well aware of the relationship between Appalachian Power Company and the non-signatory plaintiffs. The existence of an agency relationship between Appalachian Power and the remaining plaintiffs was a question of fact which could not be resolved on the instant motion. If such relationship were found to exist, the non-signatory plaintiffs would be entitled to assert all remedies available to the actual signatory of the contract. In discussing New York law, the court noted, that it was no more liberal with respect to recovery by third party beneficiaries and does not require that the intent to confer a benefit affirmatively appear within the four corners of the agreement. Under New York law, citing the Restatement Second Contracts section 133, comments, a, c, d and section 136 and Restatement Contracts section 136 subdivision (2), an individual not named in an insurance contract was held to be an intended beneficiary of that contract. If New York law applied, the non-signatory plaintiffs would have been entitled to recover under the contract if they could have affirmatively demonstrated that the contract and the circumstances surrounding its formation evidenced an intent to confer a benefit on them. The non-signatory plaintiffs' assertion that they were entitled to recover for breach of warranty, apart from defendants contractual liability, was unpersuasive. Plaintiffs could derive no greater rights outside the contract than they could under its terms. This result was contemplated under both New York and Pennsylvania law by UCC 2-318. The non-signatory plaintiffs were not within the class of beneficiaries protected by 2-318. Neither New York nor Pennsylvania had adopted the third alternative version of 2-318 which would extend the benefits of the rule beyond injuries to the person. Defendant's motion in summary judgment granted in part and denied in part and plaintiffs' motions to amend granted. American Electric Power Company v. Westinghouse Electric Company, 418 F.Supp. 435, 440.

S.D.N.Y.1973. Subsec. (c) cit. in sup. The plaintiff, assignee of the defendant's promissory notes, sued to recover on such notes. The defendant had issued the notes in connection with the purchase of certain assets from a number of corporations. The purchase agreement contained a clause providing that all disputes would be settled by arbitration conducted in accordance with the rules of the International Chamber of Commerce. The purchase agreement also contained certain preconditions for arbitration in the event the defendant would fail to pay, including paying the sum due into escrow, which conditions were not met after the defendant failed to pay. It also gave the holder of a note the right to enforce it through legal proceedings if the holder gave the defendant the required notice, in which event the defendant would be deemed to waive arbitration. However, an "Umbrella Agreement" provided that the right to rescind it carried with it the right to rescind all other agreements, and that all disputes would be arbitrated. After the defendant refused to pay, the plaintiff refused the defendant's request for arbitration, relying on the purchase agreement's conditions, and brought this suit. The defendant moved to obtain a stay of the proceedings, arguing that whether it could rescind the purchase agreement was subject to arbitration under the "Umbrella Agreement." The court rejected this argument, holding that the purchase agreement's arbitration waiver provision was unambiguous and, therefore, could not be nullified by the "Umbrella Agreement," which was held to be applicable only to other potential issues which could be arbitrated; and that the defendant's failure to fulfill the conditions of the purchase agreement constituted a waiver of his right to arbitration. The court, therefore, ordered a stay of arbitration pending the outcome of this action. Netherlands Curacao Co., N. V. v. Kenton Corporation, 366 F.Supp. 744, 748.

S.D.N.Y.1970. Subsec. (a) cit. in ftn. in sup. The plaintiffs, owner, charterer, and mortgagee of scows insured by defendant, brought an action to recover for their loss. The insurance contract contained a provision requiring plaintiffs to give notice to defendant "as soon as possible" after an accident, so that defendant could have its surveyor present at any survey to determine extent of damage. Stating that a contract is the creature of the parties' intent and that the parties' manifested purpose controls the interpretation of contract provisions and that precedents are of little value, the court found that plaintiffs had satisfied the terms of the contract by giving defendant notice sufficient to allow defendant to have its surveyor present at any surveys. Rock Transport Properties Corp. v. Hartford Fire Ins. Co., 312 F.Supp. 341, 346, affirmed, 433 F.2d 152 (2d Cir. 1970).

S.D.N.Y.1969. Cit. subsec. (e) in sup. This was an action by a shipper against a carrier to recover damages for discoloration of cargo of styrene monomer supposedly while en route to destination. The court found that the discoloration occurred due to oxidation of the chemical during loading on the ship, which was done by shipper's employees despite a contrary contractual

provision. In holding for the carrier the court stated that in a situation of ambiguity the interpretation which the parties themselves place upon the contract is to be given considerable weight. Dow Chemical Co. (U.K.) v. S.S. Giovanella D'Amico, 297 F.Supp. 699, 706.

S.D.N.Y.1962. Cit. in sup. in ftn. In an action against a manufacturer, by a car dealer, for an alleged violation of the Automobile Dealer's Franchise Act, the circumstances in which words were used were relevant to determine their meaning. Hammond Ford, Inc. v. Ford Motor Co., 204 F.Supp. 772, 773.

S.D.N.Y.1953. Subsec. (c) cit. in ftn. in sup. and com. d. cit. in ftn. in sup. Plaintiffs who are seeking specific performance of an alleged contract of sale of stock, which could have been acquired over a six-month period at a loss of only $10 to $15 per share, are not entitled to specific performance in view of the facts that they could have been compensated with money damages, and had failed, during the pendency of the action, to apply for injunctive relief to prevent the defendant from selling such stock. Alleghany Corp. v. James Foundation of New York, Inc., 115 F.Supp. 282, 295, 297, affirmed, 214 F.2d 446 (2d Cir. 1954) certiorari denied, 348 U.S. 913, 75 S.Ct. 293, 99 L.Ed. 716 (1955).

M.D.N.C.

M.D.N.C.1940. Cit. in sup. The phrase "electric current" in a contract for the distribution of electricity, in accordance with the trade meaning of that term, does not include current generated for power purposes. High Point v. Duke Power Co., 34 F.Supp. 339, 342, affirmed, 120 F.2d 866 (4th Cir. 1941).

W.D.Okla.

W.D.Okla.1964. Cl. (b) cit. in sup. The word "toluene" in a covenant requiring the grantee in a quit-claim deed to pay to the United States an additional sum in the event that the facilities were used for extracting toluene from hydroformate meant a substance containing no less than 96% toluene, and the word "hydroformate" did not include "platformate" so that the use of the facilities for the extraction of an aviation blending compound containing only 80% to 85% toluene did not require payment of an additional sum. In reaching these conclusions, the court followed the rule of law that technical terms are given their technical meaning, unless the context or a usage which is applicable indicates a different meaning. United States v. Continental Oil Company, 237 F.Supp. 294, 298, affirmed, 364 F.2d 516 (10th Cir. 1966).

E.D.Pa.

E.D.Pa.2016. Subsec. (b) quot. in case quot. in sup. Tax-consulting firm sued client that operated a supermarket chain, alleging that defendant breached the parties' consulting agreement by failing to pay plaintiff a percentage of assessment reductions that plaintiff obtained on behalf of defendant in connection with a state audit. This court denied plaintiff's motion for summary judgment, holding that a question of fact remained as to whether plaintiff provided services under the agreement in connection with an "assessment," which could reasonably refer to either the narrower, technical definition of the term under Maryland's tax laws, or the broader, casual meaning of the term. The court cited Restatement of Contracts § 235 in noting that, under Pennsylvania law, technical terms and words of art were to be given their technical meaning unless the context or an applicable usage indicated a different meaning. Tax Matrix Technologies, LLC v. Wegmans Food Markets, Inc., 154 F.Supp.3d 157, 178.

E.D.Pa.1981. Subsec. (d) cit. in disc. The insurer of a retailer brought an action against the insurer of a franchisor to recover its contribution to a joint settlement reached in another suit with a customer who had purchased some chemically tainted ice cream from the retailer. Both parties filed a motion for summary judgment. The court noted that under the stipulated facts,

the common law of indemnity would entitle the retailer to recover from the franchisor. However, the franchisor's insurer contended, inter alia, that the usual result should be reversed in this case by virtue of certain provisions of the franchise agreement which required the retailer to indemnify the franchisor. The provision in question provided that the retailer hold the franchisor harmless from any liability resulting from the operation of the retailer's business. The franchisor argued that this provision, which was drafted by the franchisor, was a broad promise to indemnify. The court noted that a fundamental rule of contract interpretation is that where the language of a written contract is ambiguous, it will be construed against the party who chose the language. The court, therefore, concluded that the above described provision provided for indemnification only where the liability resulted from the operation of the retailer's business, and did not provide for indemnification where, as here, the harm was created by the franchisor's own conduct. Accordingly, the court held that the retailer's insurer was entitled to recoup from the franchisor's insurer its contribution to the settlement with the customer. Safeco Ins. Co. of Am. v. Great American Ins. Co., 523 F.Supp. 983, 985.

E.D.Pa.1971. Cit. in sup. Defendant Westinghouse employed third-party defendant Murphy to paint the machine tools in one of its plants. While the work was being done, an employee of Murphy, one Francis Magill, was killed by the machine he was painting, because the power had not been turned off to the machine. Plaintiff, administrator of Magill's estate, brought a wrongful death action alleging negligence on the part of Westinghouse in not providing Magill with a safe place to work, in that Westinghouse had not taken proper steps to assure that the power to the machines was turned off while they were painted and had not adequately warned the decedent of the danger that the machines presented. Westinghouse brought a third-party action against Murphy alleging, inter alia, that Murphy was obligated under the contract to indemnify Westinghouse for all losses sustained by Westinghouse in the suit by Magill's administrator because the accident was due, at least in part, to Murphy's breach of its contractual duty to supervise its own employees. Westinghouse contended that "supervise" as used in the contract included the duty to see that all power was cut off to a machine that was being painted. The court found against Westinghouse in both actions holding, inter alia, that, as there was no indication that the word "supervise" had a technical or trade meaning in the contract, it must be given its plain and ordinary meaning, and that the ordinary meaning of the word was to direct the activities of others and not to handle the controls of machine tools. Magill v. Westinghouse Electric Corporation, 327 F.Supp. 1097, 1107, affirmed in part, remanded in part, 464 F.2d 294 (3rd Cir. 1972).

E.D.Pa.1965. Cl. (1)(a) and com. a quot. in part in sup. A father and his two sons entered into a partnership agreement in Connecticut for the breeding and selling of cattle, which business was later conducted in Florida. The terms provided for profits and losses in designated percentages and that a deceased partner's interest would be paid into his estate. Upon the father's death the executrix brought an action claiming that the decedent's share should have been paid over to the estate whether or not the assets covered all the debts of the partnership. The court held that although the business activities were conducted in Florida, Connecticut law, the place of the agreement, would govern the distribution and require the survivors to hold decedent's interest as quasi-trustees and pay it over to the estate after the discharge of the debts. The survivors were entitled to contribution from the estate for losses sustained since the plain construction of the partnership agreement provided for losses to be borne in designated proportions. Fisher v. Fisher, 250 F.Supp. 677, 681.

W.D.Pa.

W.D.Pa.1977. Subsec. (c) cit. in sup. Plaintiff, a television channel applicant, brought an action against defendant applicant for the same channel for specific performance of a contract and for a preliminary injunction. As a result of their competition for the same channel, the parties executed an agreement whereby plaintiff relinquished its right to continue to apply for such channel so that defendant could obtain prompt acceptance. Defendant in turn promised to construct its station promptly with an option in plaintiff to acquire the construction permit if defendant did not substantially construct its station prior to a certain date. Defendant did not construct as of the set date and argued that the date could be extended indefinitely. Citing the Restatement, the court said that reference to the entire contract indicated defendant's intention to promptly construct the station. Held: Plaintiff's request for specific performance of the contract denied, inasmuch as granting it would alter the position of the parties without a final hearing on the merits. Preliminary injunction granted prohibiting defendant from selling, assigning, or transferring its construction permit. Commercial Radio Institute, Inc. v. Western Pa. Christian Broadcasting Co., 428 F.Supp. 1054, 1056.

W.D.Pa.1972. Subsec. (a) cit. in sup. The plaintiff, administratrix of a deceased bank officer, brought this action against defendant insurance company to recover benefits pursuant to a special hazards policy which insured the lives of employees and officers of the bank against certain risks in travel while on bank business. The court gave judgment for the plaintiff and held that deceased was killed while engaged in furthering the business of the bank; and defendant's exclusionary clause to bar coverage for accidents occurring in the course of everyday travel to work did not apply when deceased was required to deviate from his preferred route to work in order to pick up bank items at a branch bank and deliver them to the main bank, as per orders of the vice president of bank. Ligo v. Continental Casualty Company, 338 F.Supp. 519, 523.

W.D.Pa.1970. Subsec. (b), (e) and illus. cit. in dictum. This was a diversity ex contractu action seeking interpretation and application of a sales agreement and a letter agreement for a sale of the assets and business of a corporation. In calculating the total purchase price, the court recognized that, because both parties were highly knowledgeable of the operation and uses of the copper business and because the parties assented to the Sales Agreement, its terms were conclusive, even though with respect to "market value" letters passed between the parties following the closing date which might reflect the meaning of the agreement. The counter-defendant construed the letters as conduct of the parties conclusive of the meaning of the agreement, while the defendant argued that it is not permissible to consider the letters. The court decided that this dichotomy need not be resolved in view of its findings that the terms would be given the meaning of the reasonably intelligent person as dictated by customary practice. Emor, Inc. v. Cyprus Mines Corporation, 325 F.Supp. 931, 942, 943, vacated, 467 F.2d 770 (3rd Cir. 1972).

W.D.Pa.1966. Cl. (e) quot. in sup. The plaintiff-labor union sought damages for an alleged breach of a collective bargaining agreement with the defendant-company, their employer. In granting a judgment for the defendant-employer, the court found the employer relieved from the agreement since members of plaintiff's labor organization made performance of the contract impossible by striking to enforce their wage demand without exhausting all grievance procedures. Pittsburgh Die Sinkers Lodge No. 50 v. Pittsburgh Forgings Company, 255 F.Supp. 142, 146.

W.D.Pa.1959. Cit. in sup. In action brought to recover damages for alleged breach of contract to exchange trailers between two companies, the contract was read as a whole, and every part was interpreted with reference to the whole, so that a fire in the defendant's company which damaged the plaintiff's trailer made him liable for its damages. J. E. Faltin Motor Transp., Inc. v. Eazor Express, Inc., 172 F.Supp. 175, 178, affirmed, 273 F.2d 444 (3rd Cir. 1960).

W.D.Pa.1956. Cit. in sup. In contract action wherein plaintiff attempted to prove oral promise by defendant to give it assistance in selling used cars apart from a separate written agreement, plaintiff was precluded from using parol evidence to alter written agreement by proving existence of oral one. Hall Motor Sales, Inc. v. Studebaker-Packard Corp., 145 F.Supp. 430, 434.

W.D.Pa.1949. Sub. (e) cit. in sup. In action on collective bargaining agreements between railroad and unions, testimony of representatives of both parties thereto who took part in negotiation and execution of contracts was admissible to explain terms of the contract, where words used were not plain and unambiguous in railroad parlance. Shipley et al. v. Pittsburgh & L. E. R. Co., 83 F.Supp. 722, 743.

D.R.I.

D.R.I.1976. Subsec. (d) cit. in case quot. and subsec. (e) cit. A former nursing student brought a diversity suit against a college for alleged breach of contract. At issue was whether the college dean had breached the contract as to grade appeal procedure when she overruled the recommendation of a committee. The court held that the "plain meaning" rule was inapplicable to "recommendation" as used in the contract, and that the intent of the students and college in using "recommendation" regarding grade appeal was that it be binding on the dean. Lyons v. Salve Regina College, 422 F.Supp.

1354, 1361, reversed, 565 F.2d 200 (1st Cir. 1977).

W.D.Va.

W.D.Va.1979. Subsec. (c) cit. in sup. The plaintiff buyer sued a seller for an alleged breach of contract for the sale of an airplane. The defendant's agent flew to the plaintiff's place of business in Virginia to discuss the potential sale. Eventually the plaintiff signed a standard form and sent it to the defendant's corporate offices in Arizona for defendant's signature. At the same time the plaintiff and the defendant's agent in Virginia modified and added to the agreement by creating a document labeled a cover letter. The plaintiff paid a deposit to secure delivery of the plane. The plaintiff thereafter sent a mailgram to the defendant to cancel the order and request a refund of the deposit. The defendant refused to return the deposit and kept it as liquidated damages pursuant to the original agreement. The plaintiff argued that, pursuant to the terms of the cover letter, the defendant had to refund the deposit. The court found that the original agreement contained the essential terms of the agreement and that the cover letter did not, but only related to special conditions. Therefore the court held that the cover letter was not a new contract, but should be considered together with the agreement as part of the same transaction. In Virginia the nature, validity, and interpretation of a contract is governed by the law of the place of contracting. The agreement that this plaintiff sent to Arizona was not an executed contract until it was signed in Arizona. Therefore Arizona would be the place of contracting. In addition, the agreement contained a choice-of-law clause designating Arizona. This court found that a Virginia court would enforce this clause as long as there was a reasonable basis for the parties' choice. This court held that there was a substantial relationship between the parties and the state of Arizona; therefore the forum selection clause was valid and enforceable. The court transferred the case to an appropriate court in Arizona and denied the defendant's motion to dismiss. Wellmore Coal Corp. v. Gates Learjet Corp., 475 F.Supp. 1140, 1142.

D.V.I.

D.V.I.1968. Cit. in sup. In an action by architect and contractor against owner who was supposed to obtain a first mortgage commitment as contemplated by construction contract in order to create a fund for plaintiff's payment, owner did not so obtain and claims no liability to plaintiffs upon its termination of the contract. The court stated that the entire contract must be considered, and as between interpretations of ambiguous provisions, that will be chosen which will best accord with the sense of the remainder of the contract and held that here the owner was liable for raising the funds and not having done so was personally liable for plaintiffs' compensation. Pan American Realty Trust v. Twenty One Kings, Inc., 297 F.Supp. 143, 149, affirmed, 408 F.2d 937 (3rd Cir. 1969). See above case.

S.D.W.Va.

S.D.W.Va.1955. Cl. (d) and cl. (e) cit. in sup. The circumstances surrounding the making of a contract under which the plaintiff was to endeavor to get reductions in railroad shipping rates in return for one half the reductions showed that neither party intended there to be an implied promise by the shipper to continue to use the railroad for shipping. Pollock v. Ohio-Apex, Inc., 136 F.Supp. 712, 716.

Ala.

Ala.1973. Subsec. (c) cit. in sup. The plaintiff lessor brought a declaratory judgment proceeding against defendant lessee seeking to have several written instruments involving the lease of a gas station declared null and void. On lessor's appeal from an order denying relief, the court affirmed, and held that the leases would be read together as one contract, and the fact that the prime lease granted the lessee an option to terminate on 60-days' notice did not render the prime lease void for lack of mutuality, and therefore the provision in the sublease requiring the sublessee (the lessor in the prime lease) to purchase all of his gas and oil from the prime lessee was valid. Marcrum v. Embry, 291 Ala. 400, 282 So.2d 49, 51.

Alaska

Alaska, 1976. Com. (h) cit. in ftn. in disc. A selling party brought an action for an accounting of sums due under a contract for the purchase of insurance agency business. The lower court entered judgment awarding damages to defendants under their counterclaim based on plaintiff's breach of a noncompetition clause contained in the contract, and plaintiff appealed. Plaintiff's claim arose from the fact that the National Bank of Alaska (NBA), from the time of its merger with the Bank of Kodiak, had been writing credit life insurance through its Kodiak Branch under an experience rating agreement with Olympic National Life Insurance Company of Seattle. The Bank received commissions on these sales. The original agreement selling the business to defendant contained a covenant not to compete. Plaintiff asserted that it was error for the trial court not to have considered the circumstances and usage surrounding the formation of the contract. It contended that the covenant not to compete was ambiguous and therefore parol evidence relating to the parties' intent should have been used in the interpretation of the contract. The court cited the Restatement's objective standard in dealing with this question. It stated that the Restatement severs the objective standard into two distinct standards: the reasonable meanings attached to a manifestation by (1) one making the manifestation and (2) one receiving it. Because the agreement in question represented an integration, the parol evidence rule provided some assistance in determining the applicable standard. Where there has been an integration, the parol evidence rule, although a rule of law rather than a rule of interpretation, has barred the introduction of extrinsic evidence to add to or vary the terms of the written document. To what extent may extrinsic evidence be used as an aid in interpretation? The plaintiff suggested that evidence surrounding circumstances first be consulted to determine whether an ambiguity exists. If, in light of all the circumstances, the language of the contract appears to be incapable of a single meaning, the court would not need to go beyond the instrument in search for other possible constructions which either of the parties may have placed upon their agreement. If, however, in the light of its language and the circumstances surrounding the formation of the contract, any term appears capable of more than one meaning, those circumstances could be consulted to ascertain which meaning lies within the intent of the parties. The court noted that this approach was not inconsistent with views of secondary authorities, citing the Restatement. The court concluded that the plaintiff correctly stated the law and that the trial followed the procedure outlined by plaintiff. The court held that the trial court was correct in its interpretation. The court found also that while the parties' acts might normally be used to show subsequent modification, the evidentiary facts were not present to demonstrate a modification in this case. Appellant asked the court to infer a modification solely from the parties' conduct. No facts appeared to show the required consideration for modification. In the absence of some consideration for the alleged change, no modification had taken place. Judgment affirmed. National Bank of Alaska v. J. B. L. & K. of Alaska, Inc., 546 P.2d 579, 586.

Alaska, 1962. Cit. in ftn. in sup. Where, between original parties, note was part of integrated transaction, it could not be interpreted without reference to other relevant agreements, even where one of two related contracts was a mercantile specialty (negotiable instrument), and it was established that performance on note was intended as part of agreed exchange for performance by other contracting parties. Hartley v. Hollman, 376 P.2d 1005, 1007.

Ariz.

Ariz.2017. Subsec. (a) cit. in case quot. in diss. op. Seller of electric scooters sued buyer for breach of contract and negligent misrepresentation. After seller rejected buyer's statutory offer of judgment, the trial court entered judgment on a jury verdict for seller in an amount that was less favorable to seller than buyer's offer of judgment. The court of appeals affirmed. This court vacated in part and remanded, holding that, while seller was entitled to recover contractual attorney's fees incurred before buyer's offer, as the "prevailing party" up to that point, buyer was entitled to recover attorney's fees incurred after the date of the offer, as the "successful party" within the meaning of the statute. The dissent argued that seller was the "prevailing party" within the meaning of the parties' contract, noting that, although the parties did not define the term "prevailing party," under Arizona law and Restatement of Contracts § 235, the ordinary meaning of language had to be given to words where circumstances did not show that a different meaning was applicable. American Power Products, Inc. v. CSK Auto, Inc., 396 P.3d 600, 607.

Ariz.2017. Subsec. (a) cit. in case quot. in diss. op. (erron. cit. as § 235A). Seller of electric scooters sued buyer for breach of contract and negligent misrepresentation; buyer counterclaimed. After seller rejected buyer's offer of judgment, the trial court entered judgment on a jury verdict awarding seller a lesser amount than buyer's offer, awarded buyer contractual attorney's fees, and dismissed seller's counterclaims with prejudice. The court of appeals affirmed. This court reversed in part and remanded, holding that, under the state's offer-of-judgment statute, buyer could not recover attorney's fees incurred in the prosecution of its counterclaims, because it was not the prevailing party with respect to the counterclaims. The dissent argued that the majority's decision impermissibly altered the meaning of "the prevailing party" in the parties' contract, noting that, under Arizona law and Restatement of Contracts § 235, the ordinary meaning of language had to be given to words where circumstances did not show a different meaning was applicable, and that there was nothing ambiguous about the fee provision at issue. American Power Products, Inc. v. CSK Auto, Inc., 390 P.3d 804, 811.

Ariz.1969. Cit. subsec. (a) in sup. This was a suit by a beneficiary under a trust agreement to require the release of certain lands upon tender of money pursuant to the trust agreement. The lower court found that the beneficiary was entitled to the release of additional lands and the beneficiary appealed. The court in reversing the lower court held that the language in the trust that the beneficiary-purchaser "shall be entitled to the release of 40 acres of land in consideration of cash payment" meant that the beneficiary was entitled to the release of only 40 acres and did not entitle him to apply portions of the initial payment to portions of ten acre tracts and then tender an additional amount to obtain a release pursuant to payment of the amount for release as stipulated in the trust. Brady v. Black Mountain Investment Co., 105 Ariz. 87, 459 P.2d 712, 714.

Ariz.1953. Cl. (d) cit. in sup. There is no implied warranty of title where defendant who had a lease from lessor made a conditional sales contract with plaintiff after he had read the lease to plaintiff. Hamberlin v. Townsend, 76 Ariz. 191, 261 P.2d 1003, 1008.

Ariz.App.

Ariz.App.1971. Subsec. (e) cit. but not fol. Plaintiff developers sought a refund of the deposit which they were entitled to pay before the defendant utility would implement electrical service within their subdivision. At trial, the court denied plaintiffs' contention that the contract for electrical service indicated that defendant would supply service within the subdivision without requiring a deposit, holding that the contract merely stated that the defendant would construct a power line to the plaintiffs' subdivision. The plaintiffs appealed. The court affirmed, holding that the record indicated that the plaintiffs knew or should have known what the language in question meant, i.e. that the defendant was only obligated to construct the electric line to the boundary of the subdivision. Duhame v. Navopache Electric Cooperative, Inc., 15 Ariz.App. 248, 488 P.2d 184, 187, 188.

Ariz.App.1971. Subsec. (c) cit. in sup. in diss. op. Plaintiff sublessee brought an action against defendant sublessor to recover damages allegedly sustained by virtue of the termination of the sublease because of the termination of defendant's lease. The sublease recited that plaintiff paid defendant $3,500 upon execution of the sublease as consideration for entering into the sublease for a term of five years. Plaintiff alleged that this was simply an advance rental payment, even though there was a $200 per month payment also, and sought to recover a pro-rata share of the $3,500 as the sublease was terminated after only three months. The majority affirmed the granting of summary judgment for defendant, holding that the $3,500 payment was plainly not rent, but was consideration for execution of the sublease and therefore belonged completely to defendant. The dissent felt that the fact that the payment was consideration for a sublease of five years and that the sublease terminated after only three months could not be ignored, and that an issue of fact as to what the money was actually for was raised, and thus that summary judgment should not have been granted. Wilson v. Savon Stations, Incorporated, 15 Ariz.App. 136, 486 P.2d 816, 818.

Ark.

Ark.1981. Com. (a) cit. in disc. Action was brought by landlord against the tenant for damage to the leased premises caused by fire. The tenant relied on the following clause in the lease to exempt him from liability: "It is agreed that the Lessee shall not be liable to restore any damage caused by the fire, windstorm or other casualty beyond his control." The lower court found that the fire was caused by the negligence of the tenant's employees and awarded damages to the landlord. On appeal, the tenant argued that the lease was ambiguous and should have been construed by the trial court against the landlord, who allegedly prepared it. The court held that the interpretation of an ambiguous clause in the lease did not compel the trial court to resolve the uncertainty in favor of the tenant and against the landlord, who allegedly prepared the lease, but that the interpretation was a question of law and fact to be determined in light of the testimony at trial. Since the tenant failed to demonstrate that the trial court's decision was clearly erroneous, the trial court's judgment was affirmed. Welch v. Hood, 272 Ark. 137, 613 S.W.2d 88, 89.

Cal.

Cal.1972. Subsec. (c) cit. in sup. in diss. op. This was an action by the insurer of an oil company to recover from the insurer of a common carrier for the cost of settlement of a claim by an employee of the carrier who was injured on the oil company's premises as a result of the negligence of the oil company's employee. The trial court held that since both companies had "excess coverage" and other insurance clauses in the policies, the costs of settlement should be prorated according to the amount of coverage each policy offered. The oil company's insurer argued on appeal that a state public utility commission endorsement on all common carriers insurance policies providing that no conditions or clause in the policy would relieve the carrier's insurer from liability, vitiated the excess other insurance clause so that the carrier's insurer would have to pay the full amount covered. The court affirmed the lower court's ruling, holding that the public utility commission endorsement did not vitiate the excess other insurance clause in the carrier's policy since the purpose of the endorsement was to protect the public, not to decide which of two applicable policies should be primary. Therefore the cost of settlement should be prorated. The dissent argued that the endorsed policy of the carrier's insurer should be read as a contractual whole, and the plain language of the endorsement eliminated all conditions on the insurer's liability including the excess other insurance clause so that the carrier's insurance coverage should be primary. Argonaut Insurance Co. v. Transport Indemnity Co., 6 Cal.3d 496, 99 Cal.Rptr. 617, 492 P.2d 673, 682.

Cal.1968. Subsecs. (a) and (d) and coms. a and f cit. in sup. The plaintiff, owner of the dominant estate of a right-of-way easement, sought an injunction to prevent the defendant owner of the servient estate from interfering with the easement by building a wall along it. The defendant cross-claimed for similar relief. The plaintiff's introduction of extrinsic evidence to establish that the easement ran to all of his property, not just a small parcel mentioned in the contract granting the easement, was permitted, and a preliminary injunction was granted to it. The lower court considered the appropriate factors for determining the extent of an easement grant and concluded that the proffered extrinsic evidence, merely adding to the written, integrated easement agreement served the weighing of said factors. These findings the court here affirming adopted. Continental Baking Co. v. Katz, 68 Cal.2d 512, 67 Cal.Rptr. 761, 767, 439 P.2d 889, 895.

Cal.1964. Com. d cit. in sup. The plaintiff-bank made a loan to the defendant, and the defendant agreed on a separate instrument not to transfer or encumber a piece of land. The defendant has not denied that the plaintiff has attempted to use this land as a security interest, so even though there is no relationship to the loan on the face of the instrument, outside evidence will be admissible to connect the two transactions into one. Coast Bank v. Minderhout, 61 Cal.2d 311, 38 Cal.Rptr. 505, 507, 392 P.2d 265, 267.

Cal.1962. Cit. in sup. Although parol evidence is ordinarily admissible to explain the meaning of an agreement, it was not admissible to give an interpretation to a clause in a brokerage contract that would conflict with other clauses in the same instrument. Imbach v. Schultz, 58 Cal.2d 858, 27 Cal.Rptr. 160, 162, 377 P.2d 272, 274.

Cal.1950. Cit. in sup. Where parties to collective bargaining agreement executed formal agreement contemporaneously with letter, both letter and previous negotiations between parties were admissible to enable court to interpret meaning of contract

as contained in formal contract and letter. Mayers et al. v. Loew's Inc., 35 Cal.2d 822, 221 P.2d 26, 29.

Cal.1946. Com. d, e, cit. in sup. A written agreement stating that seller "hereby sells and conveys" to buyer all of eucalyptus wood on described property at $9.00 per cord and that buyer was to render statements each month and make payments ten days thereafter was not void for lack of mutuality of obligation or because of uncertainty, in view of evidence that buyer obligated himself to buy all of wood for $9.00 per cord. Woodbine v. Van Horn, 29 Cal.2d 95, 173 P.2d 17, 22.

Cal.1942. Cit. in sup. When two terms of contract are ambiguous, contract as a whole must be read in light of intention of parties as apparent from instrument. Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 761, 128 P.2d 665, 671.

Cal.1940. Clause (d) cit. in sup. In construing a supplemental agreement, the terms of the original agreement must be considered. Ghirardelli v. Peninsula Properties Co., 16 Cal.2d 494, 496, 107 P.2d 41, 43.

Cal.App.

Cal.App.1983. Subsec. (c) cit. in sup. An agricultural employer sought review of a final decision and order of California's Agricultural Labor Relations Board. This court indicated that a formal settlement agreement, approved by the Board, between the employer and a farmworkers' union incorporated a prior agreement of those parties. Interpreting the agreement as a whole, and determining the intent of the parties from their expressions in the agreement, the court held that the agreement did not preclude the amendment of a charge brought against the employer by the union to include a bad faith bargaining claim. The court stated that the agreement both generally waived the right to bring bad faith bargaining charges before the Board and specifically excluded from settlement charges related to the discharge of a specific employee; it held that the specific provision of the agreement would control. Having determined that the bad faith bargaining charge was properly considered by the Board, the court then upheld the entirety of the Board's order, except that it annulled the calculation of back pay that had been used in formulating the order and remanded for determination of a new method of computation of such backpay. Nish Noroian Farms v. Agric. Labor Rel. Bd., 141 Cal.App.3d 935, 190 Cal.Rptr. 661, 666, opinion vacated 35 Cal.3d 726, 201 Cal.Rptr. 1, 677 P.2d 1170 (1984).

Cal.App.1975. Subsec. (e) cit. in sup. in diss. op. The plaintiff landowner brought an action against the defendant irrigation district for declaratory relief based on an alleged contractual entitlement to one quarter of a miner's inch of water annually for each acre of land. In a 1922 resolution, adopted at the time that the defendant took over the operations of two private companies, the defendant had agreed to provide one miner's inch of water for each four acres of land which were owned by the customers of the water companies, but which lay outside of the irrigation district. The plaintiff argued that the term "present water user", as used in the resolution, referred to the water customers at the time of the takeover without differentiation between the developed and undeveloped portions of each customer's parcel, while the defendant argued that the plaintiff was entitled to water only for each acre owned and developed at the time of the takeover. The court adopted the plaintiff's interpretation, holding that the plaintiff was entitled to one quarter of a miner's inch of water for each acre that it owned at the time of the resolution. The dissent disagreed, stating that the plaintiff was entitled only to an allotment for the land actually developed and, therefore, supplied with water at the time of the takeover. The dissent pointed to the fact that the plaintiff had never used more than the allotment of water for the developed acres over a forty-year period, and had never asserted a right to receive water for the undeveloped acres until the time that this action was brought. Wyandotte Orchards, Inc. v. Oroville-Wyandotte Irrig. Dist., 49 Cal.App.3d 981, 123 Cal.Rptr. 135, 140, 141.

Cal.App.1968. Subsec. (d) cit. in sup. The plaintiff employee sued his employer for declaratory relief regarding the latter's alleged breach of a provision in the employment contract. The provision guaranteed the plaintiff a continuation of his salary for one year, if the defendant discontinued its plastics division of which the plaintiff was head. Subsequently, the plastics division was discontinued, but, as it transferred the plaintiff to another job, and it brought forth evidence of a memorandum

by its president that he understood the plaintiff to desire the provision only to protect him if he were employed, the defendant denied its liability under the provision. Admission of the memorandum was found erroneous and the judgment for the defendant was reversed, the court finding that, as the contract was a complete and final integrated one, parol evidence was not admissible to interpret the integration. Houghton v. Kerr Glass Mfg. Corp., 261 Cal.App.2d 530, 68 Cal.Rptr. 43, 48.

Cal.App.1966. Cl. (d) cit. in sup. The plaintiff sought to recover the balance allegedly due on a contract for the construction, designing, maintenance, and dismantling of the defendant's exhibit at the Seattle World's Fair of 1962. The court modified a judgment against the defendant based on past contracts for similar fair exhibitions being admissible as evidence but also held that the plaintiff was not acting as a contractor in California and, therefore, was not subject to the California Contractor's License Law. Conderback, Inc. v. Standard Oil Co. of California, Western Operations, Inc., 239 Cal.App.2d 664, 48 Cal.Rptr. 901, 915.

Cal.App.1963. Cit. in sup. The fact that both husband and wife, in good faith, questioned true meaning of words and phrases of property settlement agreement was some evidence that agreement was ambiguous, warranting admission of extrinsic evidence—the circumstances and conversations between the parties—to show their true intent. Jacobson v. Jacobson, 211 Cal.App.2d 580, 27 Cal.Rptr. 579, 582.

Cal.App.1963. Cit. in sup. The plaintiff's right to handle the foreign distribution of films was clearly stated in the contract so that parol contrary evidence was inadmissible. Waverly Productions, Inc. v. RKO General, Inc., 217 Cal.App.2d 721, 32 Cal.Rptr. 73, 77.

Cal.App.1959. Cit. in sup. Where independent attorneys were hired by firm on employer-employee basis, and subsequent developments required attorney to render greater service than anticipated, evidence sustained findings that joint venture had not been formed, but compensation for the additional service was warranted. Bunn v. Lucas, Pino & Lucas, 172 Cal.App.2d 450, 342 P.2d 508, 515.

Cal.App.1951. Sub. (a) cit. in sup. In action for alleged breach of contract wherein it was asserted that one of provisions of contract was uncertain and hence parol evidence would be admissible, court admitted parol evidence to make certain the one provision only and no other parol evidence was admissible. Achen et al. v. Pepsi Cola Bottling Co. of Los Angeles et al., 105 Cal.App.2d 113, 233 P.2d 74, 79.

Cal.App.1950. Cit. in sup. Where agreement between divorced husband and wife provided that husband pay 30 percent of his income for previous year to wife and income was defined to include gross receipts and agreement also provided that wife assign to husband all her interest in moneys received by husband by way of compromise of will contest, income received by husband from funds acquired under compromise of will contest were "Income", and thus distributable to wife to extent of 30 percent. Kohn v. Kohn et al., 95 Cal. App.2d 708, 214 P.2d 71, 74.

Cal.App.1947. Cl. (e) sup. Where lessors, who had leased restaurant to defendant at auto cabin camp under lease requiring restaurant to be kept open during all business hours, allowed defendants to run restaurant to suit themselves and to keep open for such hours as they found reasonable in view of food and help shortages and demand, such interpretation of "business hours" was not unreasonable and was the contemporaneous understanding of the parties and plaintiff assignee from lessors was bound by said interpretation and could not cancel lease for failure of defendants to keep open on Saturdays or during the evening. Doll v. Maravilas, 82 Cal. App.2d 943, 187 P.2d 885, 888.

Cal.App.1944. Clause (c) cit. in sup. Previous writings pursuant to terms of which contract was executed admissible as part of single contract. Body-Steffner Co. v. Flotill Products, Inc. 63 Cal.App.2d 555, 560, 147 P.2d 84, 87.

Colo.

Colo.1933. Clause (d) cit. in sup. A sheriff's bond which covers acts done by him within the state executed along with an agreement indemnifying the surety for expenses incurred causes both writings to be interpreted so as to exclude recovery by the surety for expenses incurred in defending the sheriff outside the state. Fidelity & Deposit Co. v. Hershey, 93 Colo. 215, 218, 25 P.2d 178, 179.

Conn.

Conn.1969. Subsec. (c) cit. in sup. A contract for the purchase of plaintiff's interest in a corporation provided that an escrow agent was to return one-third of each buyer's pledged stock certificates to him upon his payment of the first installment which stated no "contract price" and under which each defendant signed a separate promissory note for one-third of the purchase price. The court held that the obligations of the defendants under the contract were several and not joint. In considering the expressed intent of a contract evidenced by multiple writings, all of the writings should be considered and an endeavor made to ascertain the expressed intent of the contract as a whole. Schubert v. Ivey, 158 Conn. 583, 264 A.2d 562, 564.

Conn.1961. Cit. in sup. The arbitrability of questions arising under collective bargaining agreement was a matter of contract interpretation, to be determined from intention of the parties, from the language used, interpreted in light of circumstances surrounding making of the agreement. Connecticut Union of Tel.Wkrs. v. Southern New England Tel. Co., 148 Conn. 192, 169 A.2d 646, 650.

Conn.1935. Clause (e) cit. in sup. A contract between a car company and its employees that motormen, conductors and bus operators who took official positions would lose their seniority rights as car operators is not subject to modification by the isolated acts of the company in disregard of this provision. Boucher v. Godfrey, 119 Conn. 622, 628, 178 A. 655, 658.

Del.Ch.

Del.Ch.2005. Subsecs. (a) and (b) cit. in ftn. Power-plant operator brought action against indenture trustees, which represented plaintiff's noteholders, seeking a declaration that it could use the proceeds from the sale of its oil and gas assets, which had served as security for the notes, to buy natural gas for its present operations. This court held, inter alia, that, pursuant to the plain language of the agreement, as interpreted with respect to relevant industry customs, plaintiff's use of the proceeds from its previous sale for purchases of natural gas was impermissible, and the court prohibited plaintiff from making further purchases of this kind. Calpine Corp. v. Bank of New York, 895 A.2d 880, 892.

D.C.App.

D.C.App.1975. Cit. in sup. in ftn. The plaintiff, owner of a cooperative apartment, brought this action against the defendant association to recover damages based on the defendant's failure to repair plumbing in her apartment. The plaintiff claimed that the defendant was obligated to repair the plumbing under the mutual ownership contract, while the defendant argued that the repair was an "interior repair" for which the plaintiff was responsible. The trial court had granted summary judgment to the plaintiff on the issue of liability. Construing the provisions of the contract against the drafter, the court interpreted the phrase "interior repairs" not to include repairs to pipes feeding into an apartment. The trial court held that the award of summary judgment was improperly granted, since the contract was reasonably open to varying interpretations. The issue of liability was remanded to the trial court where a reasonable person standard was to be applied. Then, if no result could be reached, the jury was to apply the rule that ambiguities in a contract are construed strongly against the drafter as a rebuttable

presumption. 1901 Wyoming Ave. Cooperative Asso. v. Lee, 345 A.2d 456, 463.

D.C.App.1948. Sub. (d) cit. in sup. in ftn. Where agreement of sale of real estate had settlement date within 30 days or as soon thereafter as report on title could be had and vendor changed contract by inserting "settlement to be made in 25 days", question as to whether settlement had to be within 25 days or whether time should be extended if title report was not ready was for jury with both parties being able to submit evidence as to what the alteration meant. Soldano v. Holmes, 60 A.2d 535, 537.

D.C.App.1945. Cit. in sup. A contract guaranteeing musician 18 weeks' employment with orchestra association, which provided that in event the contract was the first contract between the parties the musician should be regarded as being engaged for a trial period of four weeks of playing under the permanent conductor, and that he could be discharged if his services were unsatisfactory during the trial period, would not in the light of the ordinary meaning of the words used and adopting the interpretation most favorable to the plaintiff, give association right to discharge musician during first four weeks of the contract, since musician had completed service under prior contract for six week period, even though he had not during that period continually played under the permanent conductor. National Symphony Orchestra Ass'n v. Konevsky, 44 A.2d 694, 695.

Fla.App.

Fla.App.1973. Subsec. (c) quot. in part and fol. The plaintiff sought damages for the defendant's alleged failure to complete contractual work on time. One count of the complaint sought liquidated damages under a clause in the contract fixing damage rates for delays in completing various aspects of the project. The other count sought actual damages, based on payments the plaintiff had to make to subcontractors because of the defendant's failure to timely complete work which had to be compatibly scheduled with other work, under another clause in the contract. The trial judge held that these two clauses in the contract were inconsistent, and he thus denied recovery under both; the appellate court reversed, holding that the liquidated damages clause compensated only for delays and that the other clause allowed recoveries only for additional costs, and that, as so construed, the clauses were not inconsistent. Hillsborough Cty. Aviation A. v. Cone Bros. Contr. Co., 285 So.2d 619, 621.

Hawaii

Hawaii, 1992. Subsec. (c) quot. in case quot. in sup. Lessee failed to obtain easement from lot owner when it built sewer beneath lot. When lessee sold its leasehold interest, lessee promised to obtain verification of sewer easement pursuant to indemnity agreement with purchaser. Lessee never obtained easement but procured false verification stating that easement existed. Purchaser later sought to sell its interest but faced difficulties upon discovering that no easement existed. Lessee sought declaration that it had satisfied its obligations to purchaser under indemnity agreement. The trial court granted defendant partial summary judgment, ruling that plaintiff had breached the agreement. Affirming that ruling, this court held that the verification did not meet defendant's reasonable satisfaction, a requirement of the contract. The court determined that the parties did not intend for a false verification to satisfy plaintiff's obligations; moreover, to construe "verification" to mean "false verification" would negate other express contract terms. Amfac v. Waikiki Beachcomber Inv., 74 Hawaii 85, 839 P.2d 10, 24.

Hawaii, 1968. Cit. subd. (c) in sup. This was an action against an electric utility to recover an amount claimed as refund of a consumer's advance for the construction of a pole line and for the refund of an amount paid by the telephone company to the electric utility for use of the pole line. The court held that where the electric utility, in response to an inquiry by the consumer as to steps necessary to have a telephone installed on poles which the utility would erect to serve the consumer's residence, replied that it would refund to the consumer the amount paid by the telephone company under the joint pole agreement, the consumer was not entitled to a refund of the entire amount paid by the telephone company but only to a refund of the

payment made for the use of poles erected to extend the preexisting line to the consumer's residence. Anthony v. Hilo Elec. Light Co., 50 Hawaii 453, 442 P.2d 64, 66.

Hawaii, 1963. Cit. in sup. An agreement between milk producers and a distributor created an agency, not a sales, relationship for tax purposes, so that the income from the milk delivered to the distributor was not taxable, even though the recitals and the body of the contract used the term sale, since the intention of the parties should be gathered from all the surrounding facts, not simply a word or phrase. In re Taxes, 46 Hawaii 292, 380 P.2d 156, 163.

Idaho

Idaho, 1972. Cit. in ftn. in sup. Plaintiff sought to recover against insurer under a products liability clause of their insurance agreement. Claims were made against plaintiff by his customers for losses incurred when plaintiff mistakenly sold them an overly-powerful weedkiller which destroyed their crops. The court held that the customers' losses were the results of accidents and were thus exempted from coverage under the insurance policy which, read in its entirety, indicated the intent of the parties was to exclude coverage if the accident occurred away from the insured's premises as in the instant case. Parma Seed, Inc. v. General Insurance Co. of Amer., 94 Idaho 658, 496 P.2d 281, 285.

Ill.

Ill.1962. Cl. (e) quot. in sup. Contract of employment between drainage district and attorney which did not state clearly duties to be performed was interpreted as permitting payment of fees in addition to specified retainer where subsequent events required attorney to do considerably more work than had been anticipated. Wood River Drainage and L. Dist. v. Alton Box Board Co., 26 Ill.2d 53, 186 N.E.2d 49, 53.

Ill.1937. Cit. in sup. A request by a purchaser that a machine be guaranteed to evaporate water over a 24 hours period to which the seller replied that the machine is designed to evaporate 100 gallons of water per hour constituted an express warranty that the machine would run continuously. MacAndrews & Forbes Co. v. Mechanical Mfg. Co., 367 Ill. 288, 300, 11 N.E.2d 382, 388, writ of certiorari denied in, 303 U.S. 655, 58 S.Ct. 759, 82 L.Ed. 1115 (1938).

Ill.App.

Ill.App.1972. Subsec. (c) cit. and quot. in sup. Plaintiffs executed a written lease of real estate with defendant. Lessee agreed to secure the necessary licenses and permits for commercial development. In an action for past rent due, the court held that the provisions in the lease should be read as a whole, and thus the fact that the lease did not expressly state when payments were to begin was not fatal; a reasonable time would be implied for the securing of licenses and permits before any rent would accrue, for the contract would be void if its performance were left entirely to lessee's discretion. Here three months was found to be a reasonable time, since lessee had an option to terminate the lease after that time. Dasenbrock v. Interstate Restaurant Corporation, 7 Ill.App.3d 295, 287 N.E.2d 151, 154.

Ind.

Ind.1942. Com. b quot. in part in sup. Contract which states purchaser of stock can have purchase price returned "at any time" will not be construed to mean within reasonable time. Haworth v. Hubbard, 220 Ind. 611, 613, 44 N.E.2d 967, 969, 144 A.L.R. 887.

Iowa

Iowa, 1942. Clause (c) quot. in sup. When contract of conditional sale of automobile and note therefor are construed, both instruments must be interpreted together. Interstate Finance Corp. v. Brink, 232 Iowa 733, 735, 6 N.W.2d 120, 121, 143 A.L.R. 587, citing sec. 233 but obviously intending sec. 235.

Iowa, 1941. Iowa annotations and clause (c) cit. in sup. In construing contract for sale of land to state, evidence may be introduced showing state intended to change location of highway but project was later abandoned. State v. Butka, 230 Iowa 928, 933, 935, 299 N.W. 420, 422, 423.

Iowa, 1939. Cit. in dictum in sup. Iowa annot. cit. in sup. A contract for the interchange of properties which details the manner in which the commission is to be paid the broker will be read in its entirety and oral evidence is admissible to interpret an apparent ambiguity. Mealey v. Kanealy, 226 Iowa 1266, 1278, 286 N.W. 500, 507, 131 A.L.R. 945.

Kan.

Kan.1935. Clause (e) quot. in sup. A contract whereby gas producers agree to sell and gas distributors to buy all the gas the distributors need includes the distributor's requirements in subsequently acquired territory when the distributor acquires new outlets which he services with the producer's gas. Southwest Kansas Oil & Gas Co. v. Argus Pipe Line Co., 141 Kan. 287, 292, 39 P.2d 906, 909.

Ky.

Ky.1948. Cit. in sup. Lease of motion picture theatre providing for certain percentage of gross receipts to be paid as rent did not include therein receipts received from confectioner's stand in lobby of theatre, where such stand was not in existence at time lease was executed. Taylor v. Rosenthal, 308 Ky. 4, 213 S.W.2d 435, 437.

Ky.1944. Subsec. (a) cit. in sup. A railroad company's purchasing agent, writing and signing railroad's contract with another corporation for dismantling of freight cars to be transported to dismantling points at railroad company's risk, must be presumed to have known and intended legal meaning of word "transport" which includes switching and spotting of cars, and word must be considered in such meaning in absence of showing that it was used in different sense. Louisville & N. R. Co. v. David J. Joseph Co., 298 Ky. 711, 714, 183 S.W.2d 953, 955.

Ky.1934. Cit. in sup. A contract whereby the promisor undertakes to provide the promisee with certain millwork is not excused by the destruction of the promisor's mill. Kentucky Lumber & Millwork Co. v. George H. Rommell Co., 257 Ky. 371, 377, 78 S.W.2d 52, 55.

La.App.

La.App.1962. Cit. in sup. Insured mechanic, whose negligence in starting truck engine while in gear caused injury to fellow employee, was engaged in "maintenance" within coverage of liability policy and was not "using" the truck within the exclusion provision. Wall v. Windmann, 142 So.2d 537, 539.

Md.

Md.1969. Cit. in sup. This was an action by insured building owner against insurer and manufacturer and erector of building. The plaintiff had executed to insurer, for a $10,000 consideration, a release under seal which discharged the insurer and other persons, firms and corporations, etc., from personal injury and property damage claims as the result of the collapse of the building on specified dates. The court, in affirming the lower court's summary judgment for defendants, held that plaintiff was thereafter barred from proceeding against defendants for damages on the theory of negligent construction and the use of faulty materials. Pemrock, Inc. v. Essco Co., 212 Md. 374, 249 A.2d 711, 715.

Md.1966. Cl. (d) and coms. e, f, and g, cit. in sup. An employee, having been injured in the course of employment, agreed with his employer that he be advanced $100 per week to be repaid at the successful termination of his suit against the third party tortfeasor who caused the injury. The employee won a verdict against the tortfeasor for more than the total money advanced, but he refused to reimburse the employer on the grounds that the amount recovered in court did not exceed the total losses suffered by the employee. The employer was entitled to reimbursement on the grounds that merely winning the tort suit was, in ordinary language, equivalent to a successful termination. Keyworth v. Industrial Sales Co., 241 Md. 453, 217 A.2d 253, 255, 256.

Md.1966. Cl. (d) and com. e cit. in sup. Plaintiff's wife was insured by defendant insurance company for automobile accident liability. The policy covered all relatives of plaintiff's wife living at plaintiff's residence, a fact unknown to plaintiff, and also required immediate notification of any accident. Plaintiff was involved in an accident but did not notify defendant immediately because he did not know that he was covered. The court held that plaintiff's failure to notify defendant immediately was not conclusive by itself but was to be weighed in light of plaintiff's knowledge or lack of it. State Farm Mutual Automobile Insurance Co. v. Hearn, 242 Md. 575, 219, A.2d 820, 824, 825.

Md.1963. Cit. in sup. In a proceeding involving the interpretation of a lease of a shopping center and a modification thereof, where the contract was ambiguous, the conduct of the parties was available as a practical construction of its meaning. Walker v. Associated Dry Goods Corp., 231 Md. 168, 189 A.2d 91, 97.

Md.1956. Quot. in sup. In salesman's action for commissions allegedly due him under oral agreement, employer could introduce its records to show that it previously paid commissions to salesman only after it had received purchase price. Service Realty Company v. Luntz, 210 Md. 228, 123 A.2d 201, 205.

Md.1954. Cit. in sup. Condition imposed by Maritime Administration that there should be no transfer of stock in Panamanian corporation which purchased vessels, was beyond meaning of clause whereby purchaser assented to conditions with regard to future use and disposition of the vessels, and operated to discharge purchaser from its obligation to purchase. Compania de Astral S. A. v. Boston Metals Co., 205 M.2d 237, 107 A.2d 357, 371, 49 A.L.R.2d 646, certiorari denied, 348 U.S. 943, 75 S.Ct. 365, 99 L.Ed. 738 (1955).

Md.1954. Com. c cit. in sup. Where plaintiff petitioned for an accounting by defendant of the proceeds of mortgage, plaintiff was entitled to recover proceeds with simple interest thereon from date of decedent's death, and contract was interpreted in light of other documents which were held to be a part of it. Lednum v. Barnes, 204 Md. 230, 103 A.2d 865, 870.

Md.1952. Com. c cit. in sup. Experienced contractor could not avoid performance of contract because of his alleged unilateral mistake in price. Ray v. W. G. Eurice & Bros., 201 Md. 115, 93 A.2d 272, 279.

Md.1950. Sub. (e) com. h quot. in sup. Building contract requiring owner to pay contractor designated sum for performance thereof was unambiguous and would therefore not be construed with view to conduct of parties or earlier cost plus percentage contract. Levin v. Stratford Plaza, Inc. et al., 196 Md. 293, 76 A.2d 558, 564.

Md.1950. Sub. (e) and com. h quot. in sup. & ill. 12 cit. in sup. Provision in profit sharing contract in connection with publication of annual alumni bulletin sponsored by defendants which stated that after deduction of expenses net profits should be equally divided, division to be 50 per cent of net proceeds from sale of advertising, to be computed by subtracting total cost and expense of printing and publishing, was not so ambiguous that it would not be considered in interpreting contract, with result that alleged course of dealing between parties to contract as to payment was not controlling. United States Naval Academy Alumni Ass'n et al., v. American Pub. Co., 195 Md. 150, 72 A.2d 735, 738.

Md.1939. Subsec. (e) cit. in sup. A general contractor who builds houses and then personally guarantees the second mortgage by depositing collateral under a separate agreement for each house which provides that when the mortgagor has paid 80% of the mortgage he might withdraw his collateral, is entitled to withdraw his collateral when the stipulated per cent has been paid, even though he still retains a considerable contingent liability with respect to the other houses. Mattingly Lumber Co. v. Equitable Bldg. & Savings Ass'n, 176 Md. 403, 409, 5 A.2d 458, 460.

Md.1935. Clause (e) cit. in sup. The acts of preferred shareholders in permitting the directors to give the common stock as 6% dividends after the preferred are paid their guaranteed 6% under by-laws which do not govern the situation, warrant the court in interpreting the by-laws so as to permit the directors to continue this manner of distributing profits. James F. Powers Foundry Co. v. Miller, 166 Md. 590, 599, 171 A. 842, 847.

Md.1933. Clause (c) cit. in sup. A written agreement modified by a letter from one of the parties before that person signs, which agreement is acted upon by the other party as modified, is interpreted as an integrated contract consisting of the letter and the agreement. Duplex Envelope Co. v. Baltimore Post Co., 163 Md. 596, 606, 163 A. 688, 692.

Md.1933. Cit. in sup. A clause in a contract between a railroad and a shipper, to whose plant the railroad had extended a spur of track, which released the railroad from liability for loss by fire caused in the use of this track did not govern the situation when the fire resulted from the tortious use of the siding for a purpose disconnected with the shipper's business. William Danzer & Co. v. Western Md. Ry., 164 Md. 448, 461, 165 A. 463, 468.

Mass.

Mass.1970. Subsec. (c) cit. in sup. The plaintiff insurance company sought a declaration of its rights under an "excess motor truck cargo reinsurance policy" by which defendant agreed to reinsure plaintiff. Defendant agreed to pay plaintiff for "each and every loss" in excess of $75,000, to the extent the loss exceeded $75,000. The "basic cargo policy" which defendant reinsured was issued by plaintiff to a motor carrier. Under this policy, the motor carrier agreed to indemnify plaintiff for all losses that the ICC forced plaintiff to insure. The motor carrier filed a petition in bankruptcy, so that plaintiff had to pay several small claims whose total was greater that $75,000. Stating that the interrelation among the basic cargo policy, the indemnity clause, and the reinsurance policy dictated that they be read together, the court held that the phrase "each and every loss" in the reinsurance policy referred to individual cargo losses and not to an aggregate financial loss. Boston Insurance Company v. Fawcett, 357 Mass. 535, 258 N.E.2d 771, 776.

Mass.1964. Cit. in sup. The Commonwealth entered into a lease of airport buildings with the petitioner which provided for an annual rent in an amount equal to payments amortizing the cost of the buildings, including interest at a rate equal to the interest borne by the obligations issued by the Commonwealth to finance the construction, plus five cents per square foot of floor area. The Commonwealth never issued any bonds to finance the construction. Interpreting the bond interest clause in the light of the lease as a whole and the authorizing statute behind its execution, the court held that the petitioner should be liable for the interest component of the rent at a rate equal to the rate in fact paid by the Commonwealth on its most nearly comparable bonds. East Coast Aviation Corp. v. Massachusetts Port Auth., 346 Mass. 699, 195 N.E.2d 545, 548.

Mass.1962. Cit. in sup. Five-year-purchase option that required lessor to sell land if lessee gave notice of intent to buy two months before tender of purchase price did not force lessor to sell where parties' conduct indicated they treated lessee's notice as creating a two month contract which lessee must fulfill by tender of purchase price, and where lessee did not tender payment by end of two month period. C. & W. Dyeing & Cleaning Co. v. De Quattro, 344 Mass. 739, 184 N.E.2d 61, 64.

Mass.1951. Com. e cit. in sup. Under contract with state which provided that all piles driven should be of safe working load capacity of 20 tons and that safe value of pile should be determined according to certain formula and under construction placed upon contract by parties themselves, contractor did not have absolute duty to make piles comply with 20 tons capacity; and where contractor complied with formula, contractor was deemed to have fulfilled contract. New England Foundation Co. v. Commonwealth, 327 Mass. 587, 100 N.E.2d 6, 10.

Mass.1945. Sub. (c) cit. in sup. Where a printed contract for the sale of daily lease wire news reports contained typewritten provisions that both the agreement was to continue for five years from October 1, 1942, and the contract was to become effective thirty days after notice at any time prior to October 1, 1942, reasonable effect must be given to all of the provisions and the contract was effective thirty days after notice, in no event later than October 1, 1942. King Features Syndicate, Inc. v. Cape Cod Broadcasting Co., Inc., 317 Mass. 652, 59 N.E.2d 481, 483.

Mass.1939. Com. d cit. in sup. Evidence is admissible to make clear that an apparent discrepancy in two instruments of the name of the title holder of an automobile is in reality the same legal entity. Assoc. Discount Corp. v. Haynes Garage, 304 Mass. 526, 529, 24 N.E.2d 685, 687.

Mass.1938. Com. d cit. in sup. A license agreement exempting the licensee from any license fee on sales of radio tubes to "other licensees of the licensors" is construed, because of the context of the agreement, to mean other licensees of the licensors licensed to make and sell similar tubes. Radio Corp. of America v. Raytheon Mfg. Co., 300 mass. 113, 117, 14 N.E.2d 141, 143.

Mass.1936. Clause (c) cit. in sup. Evidence that the majority stockholder of a printing company did not sign an agreement of consolidation of his company with another until he received a letter from the controlling shareholder of the other company assuring him he would be manager of the consolidated firm warranted a construction of the letter and agreement together. Mansfield v. Lang, 293 Mass. 386, 390, 200 N.E. 110, 112.

Mass.App.

Mass.App.1980. Subsec. (c) cit. in sup. In 1972 plaintiffs and defendant entered into a "License Agreement" that, in consideration of payment by defendant of specified monthly fees, gave defendant certain parking privileges additional to those to which it was entitled as assignee of an earlier 1964 agreement. The 1972 agreement was to continue for the duration of the 1964 agreement, unless earlier terminated in accordance with its specific provisions, and it provided that it would automatically terminate in the event of termination of the 1964 agreement. Plaintiffs brought an action for amounts due under the 1972 agreement. The lower court entered judgment for plaintiffs, and defendant appealed, claiming the 1964 agreement was a license revocable or terminable at will and had been terminated by defendant's assignor in 1977, resulting in automatic termination of the 1972 agreement. The judgment of the lower court was affirmed. The appeals court found that the 1964 parking agreement was an integral part of a commercial transaction that involved a simultaneously executed lease of a building, and that the two instruments should be construed together. Part of the consideration bargained for by the tenant in the lease included the right to park. The plaintiffs could not, in the absence of certain conditions, have revoked the parking "license" and could have been forced specifically to make parking available. The 1964 agreement was, therefore, not a license, but an agreement that, together with the lease, gave the tenant certain enforceable rights. While defendant could have

waived and thus terminated its parking rights under the contract, such a waiver would not have constituted a termination of the 1964 agreement within the meaning of the 1972 agreement so as to automatically terminate the 1972 agreement. Beal v. Eastern Air Devices, Inc., 9 Mass.App. 910, 403 N.E.2d 438, 439.

Mass.App.1979. Subsec. (c) quot. in sup., subsec. (d) cit. in sup. A professional sport organization brought an action, seeking declaration of a lease provision under which play dates at a sport stadium could be restricted. For some time, a corporation was the owner of a large tract of land on part of which was a racetrack used by the owner to conduct its business of harness horse racing. A professional sports team selected the area as a desirable site for a stadium in which they could play their home athletic games. The parties came to an agreement whereby the owner would lease a 15-acre portion of its land to a developer for a term of 50 years. The developer would build a stadium facility which, in turn, it would sublease to the sports team. The stadium lease contained a restrictive covenant whereby the developer covenanted that it would not permit any public event to be held in the stadium when the "landlord first named here" was conducting its harness racing business on the retained portion of the land. By deed dated November 30, 1976 the owner conveyed the racetrack to another, also named as defendant, and since that time the original owner did not engage in the business of harness racing at the racetrack. On March 18, 1978, the developer entered into a sublease with the plaintiff. When the plaintiff announced its 1979 athletic schedule, all but one of the 15 dates selected for home games conflicted with the racetrack's hours of operation. The new racetrack owner notified the plaintiff of its intention to prevent the holding of public events within the stadium without its written approval during those hours of operation of the racetrack. In its complaint the plaintiff sought a declaratory judgment that the new racetrack owners had no rights under the stadium lease between the original owner and the developer. The trial court entered a summary judgment in favor of the owner, and the plaintiff appealed. In its interpretation of the words "landlord first named here" as used in the stadium lease, the court noted that a writing is to be interpreted as a whole, and all writings forming part of the same transaction are interpreted together. In affirming the trial court's judgment for the defendant, the court held that the covenant was enforceable by the defendant as the original owner's successor since the word "landlord" was generally used as referring to the owner of the stadium land, and descriptive language was used where necessary to restrict its application to a particular interest. Lipton Professional Soccer Inc. v. Bay State Harness Horse Racing, Inc., 8 Mass.App. 458, 395 N.E.2d 470, 473.

Mich.

Mich.1958. Quot. in sup. Where mother conveyed to her son, in trust, certain realty, and deed provided that condition of deed was that trustee use profits therefrom properly to support his mother, and that if trustee deemed it advisable, he might sell the lands and use the proceeds thereof for her support, power of sale of the property was not deeded to her son and therefore title to such realty passed pursuant to provisions of will of mother rather than under such deed. Kimmel v. Hammond, 352 Mich. 625, 90 N.W.2d 681, 683.

Mich.1945. Com. d cit. in sup. Under indemnity agreement whereby indemnitors agreed to make good to surety company all amounts which company was required to pay on account of execution for 1941 of bond filed by wholesale gasoline distributor with Secretary of State, which bond authorized surety company to alter, amend or extend it, bonds issued for 1942 and 1943 by surety company could not, under a reasonable interpretation of the contract, be regarded as renewals or extensions of the 1941 bond for which indemnitors could be held liable. Seaboard Surety Co. v. Bachinger, 313 Mich. 174, 20 N.W.2d 854, 856.

Minn.

Minn.1972. Cit. and fol. Plaintiff attempted to prepay the full balance due on a contract for deed but defendant refused to deliver a deed. Plaintiff sued for specific performance. Defendant claimed that the earnest money contract contained no prepayment provision, and that the contract for deed must be read in the light of the prior contract. The court held that the contract for deed contained language giving plaintiff the unqualified right to prepayment, and the terms of the agreement were merged in the contract for deed. Under the doctrine of integration, the language of the contract for deed governed.

Peters v. Fenner, 294 Minn. 488, 199 N.W.2d 795, 796.

Minn.1954. Coms. a, b, c, and d quot. in sup. Where defendant was given a lease to work iron ore deposits in a lake bed, and he was obligated to pay royalties to the state if certain minimum amounts were not removed, the court felt the contract language to be clear and unambiguous and no room for construction existed. State v. Lake Mining Co., 243 Minn. 205, 67 N.W.2d 669, 672.

Minn.1947. Subsec. (e) and Minn. annot. cit. in sup. in ftn. Where a contract is ambiguous, the practical interpretation of the parties will be applied, unless inconsistent with a reasonable interpretation of the language itself; so, where an employment contract provided for a commission percentage on sales volume per annum, and six months after its execution the parties had an accounting for such period, when employee was inducted into military service, court properly determined the commission due him for the one-third of a year since the last accounting by apportioning the sales quota to that part of the year. Wallace v. Joseph Dixon Crucible Co., 223 Minn. 162, 25 N.W.2d 465, 467.

Minn.1937. Clause (e) cit. in sup. A clause in a contract that the "highest rate permitted under the laws of this state by contract" may be charged after maturity will be interpreted to give the contract a legal rather than a usurious meaning when the legal rate had always been paid. Investors Syndicate v. Baskerville Bros., 200 Minn. 461, 469, 274 N.W. 627, 631.

Minn.1935. Clause (e) and Minn. Annot. cit. in sup. Employer's and union's joint submission to arbitration of controversy over employee's dismissal, reasonably believed to come within the terms of the union agreement, was a construction of the contract which barred the employer from claiming the dispute did not come within the arbitration clause. Mueller v. Chicago & N. W. Ry., 194 Minn. 83, 86, 259 N.W. 798, 800.

Minn.1935. Cit. in sup. The action of an insurance company in crediting its resident agent with renewal commissions on policies sold by the home office will not cause an unambiguous statement in the agency contract which does not grant to the agent these commissions to be construed as if it did. Wicker v. Modern Life Ins. Co., 194 Minn. 447, 450, 261 N.W. 441, 442.

Minn.1934. Clauses (a) and (c) cit. in dictum. It is a jury question when three trustees of a business trust execute a lease, and only two of the trustees execute the guaranty portion of the lease, whether the third trustee intended to become a guarantor. Wm. Lindeke Land Co. v. Kalman, 190 Minn. 601, 607, 252 N.W. 650, 653, 93 A.L.R. 1393, 1399.

Minn.App.

Minn.App.1989. Subsec. (c) cit. in sup. As part of a sales agreement to purchase a bankrupt business, the buyers promised to assume the seller's liabilities and to pay the purchase price through promissory notes. A closing agreement executed the same day provided for these notes to be held in escrow pending approval of the sale by the bankruptcy court and arrangement of financing for the sale. The trustee in bankruptcy subsequently sued the buyers to collect on the promissory notes. The buyers asserted that the closing agreement modified the sales agreement by making the receipt of outside financing a condition precedent to enforcement of the promissory notes. The trial court held that the sales agreement was the complete and final expression of agreement, based on a clause stated therein, and found the defendants liable for the value of the notes. Reversing, this court held that both agreements had to be construed together because they were executed simultaneously and were part of the same sales transaction. Farrell v. Johnson, 442 N.W.2d 805, 807.

Miss.

Miss.1969. Quot. in part in sup. Action against assignee of oil and gas leases and others by assignor for specific performance of a formout letter providing for royalty interests in all extensions and renewal leases. The formout letter recited that holders of oil and gas leases would assign the leases in consideration of the assignee's drilling test wells. These wells had not been drilled at the time the assignment, which recited receipt of entire consideration, had been delivered. The assignee had paid delayed rentals as required in the formout letter. The chancery court held that the letter was merged into and superseded by the assignment, and dismissed the complaint. In reversing and remanding the case, the court held that the letter and the assignment together constituted the contract between the parties, and the letter, which received royalties on renewals, was not merged into the assignment, which was silent as to renewals. Phillips Petroleum Company v. Stack, 231 So.2d 475, 482, appeal after remand, 246 So.2d 546 (1971).

Miss.1966. Quot. in sup. An exclusive franchise dealer allowed an equipment buyer credit for equipment traded in to be used as he bought new equipment; later the dealer sold the business, assuming the responsibility for such credit. In an action by the dealer against the tractor company for the balance due on a note, the court held that the agreement indemnified the purchaser for any amounts which it had to allow the equipment buyer on the purchase of new items and as a substitute the purchaser could set off such amounts on the balance due on the note to the dealer. Gilchrist Tractor Company v. Stribling, 192 So.2d 409, 418.

Miss.1939. Quot. in part in sup. A conveyance of timber land which, in one paragraph, gives the grantee the right to cut timber so long as he pays taxes on the land, and in another paragraph limits his right to ten years from the date of the instrument and "so long thereafter as the taxes are paid on said land," is interpreted as a conveyance of timber for an unlimited time in consideration for the payment of taxes thereon. Williams v. Batson, 186 Miss. 248, 260, 187 So. 236, 238, 128 A.L.R. 1138.

Miss.1937. Cit. in sup. Death of the insured due to poison administered by another is covered by the clause in the double indemnity provision of a life insurance policy which excludes from double indemnity death resulting from poison whether "voluntary or otherwise." Kennedy v. New York Life Ins. Co., 178 Miss. 258, 269, 172 So. 743, 745.

Miss.1936. Com. h cit. in sup. Evidence that the principal, a petroleum company, did not actually control its employees is inadmissible if the contract clearly establishes sufficient right to control to make the relationship one of master and servant. Texas Co. v. Jackson, 174 Miss. 737, 752, 165 So. 546, 551.

Mo.

Mo.1964. Cls. (c), (d), (e), com. a cit. in sup., com. e quot. in sup. The plaintiff-contractor sought recovery against the defendant-city for rock excavation. The court held that the trial court's summary judgment for the defendant was improper, although it was undisputed that the contractor had not given notice as required by contract provisions relating to changes and extras, where, although the contract provided a lump sum price, there was provision for rock excavations. Therefore, the construction of the contract was required to determine whether the rock excavation was an extra, in light of surrounding circumstances, any applicable customs and usages, the parties' own interpretation of the contract, and any other evidence. Cure v. City of Jefferson, 380 S.W.2d 305, 310.

Mo.App.

Mo.App.2008. Quot. in case quot. in sup. Water company sued subdivision developers, seeking specific performance of three agreements in which developers agreed to convey to water company property on which a sewage facility was built to benefit subdivision. After a bench trial, the trial court found in favor of plaintiff. Affirming the trial court's finding that the agreements were not abandoned or modified by a subsequent lease requiring plaintiff to pay rent to defendant for use of the

property, this court held, inter alia, that the trial court could reasonably have found that the lease, which was signed as part of a settlement of a lawsuit between plaintiff and the Department of Natural Resources, was a method of enabling plaintiff to continue providing service to its customers, and not a concession that plaintiff did not have a claim to the legal and equitable title of the property. Osage Water Co. v. Golden Glade Land Owners Ass'n, Inc., 270 S.W.3d 459, 463.

Mo.App.1981. Cit. in sup. Mortgage bond holders brought an action against the bond issuer and mortgage trustee for injunctive and declaratory relief to prohibit a special redemption plan proposed by the bond issue, or in the alternative for a declaration that the indenture violated statutes by not disclosing redemption rights in the prospectus. The trial court granted the bond holders' motion for summary judgment and denied the bond issuer's summary judgment motion. On appeal, the court noted that both parties contended that the bond contract was unambiguous, with the bond issuer asserting that it clearly meant one thing, while the bond holders insisted that it meant another. The court stated that mere disagreement over the meaning of a contract does not signal an ambiguity; whether or not the language is ambiguous is a question of law for the court, which will analyze whether there is more than one reasonable interpretation which can be gleaned from the contract language. The trial court concluded after considering the surrounding circumstances that there was only one reasonable interpretation of the contract. The appellate court held, inter alia, that given the guidelines set forth in ss 230 and 235 of the Restatement of Contracts for construing an integrated agreement, the trial court did not err because it went beyond the words of the instruments and considered the surrounding circumstances. The court stated, however, that the authorities make it apparent that it is error to use parol evidence to vary, contradict, modify, enlarge, or curtail the terms of an agreement that on its face is free from ambiguity. The court held that the trial court's decree reflected this error. The judgment of the trial court was reversed, and the case was remanded with directions. Harris v. Union Elec. Co., 622 S.W.2d 239, 247, appeal after remand 685 S.W.2d 607 (1985).

Mo.App.1980. Subsecs. (c), (d) and (e), and com. on subsec. (d) quot. in sup. Electrical contractor executed a contract with owner to perform electrical work in connection with a building being erected on the owner's property. The agreement, executed on July 20, 1973, called for a lump sum payment to contractor and contained a clause, "Labor escalation after April 1, 1974 to be negotiated." The contractor's labor costs were determined by an annual industry-wide labor negotiation between an association of electrical contractors and the labor union representing the contractor's employees. On March 14, 1975, the contractor filed a statutory lien against the property, adding to the amount still owing under the contract invoices reflecting the increase in direct labor costs and all fringe benefits on all labor on the project after April 1, 1974. The owner contested the amount of the lien, arguing that the labor escalation clause in the contract was only a clear and unambiguous "agreement to agree." The contractor claimed that the provision was ambiguous and, when properly construed, meant that labor prices after April 1, 1974 were to be based upon the negotiated industry-wide contract wage rates in effect on that date. The trial court gave judgment for the contractor. On appeal, the lower court judgment was affirmed. The appeals court found that the contractor was entitled to labor escalation charges in the amount found by the trial court. The court held that two precontract documents which provided "Prices are to be good to April 1, 1974 with percent labor escalation thereafter," were properly received in evidence. In construction contracts, the term "labor escalation" is a word of art referring generally to the increase in labor costs occasioned by renegotiation of industry-wide labor rates beyond the immediate control of the parties. The contract was executed in July 1973; the labor escalation was to be effective after April 1, 1974. The language "to be negotiated" could be construed in referral to labor negotiations between those two dates, the results of which could not have been known to the parties at the time the agreement was signed. It was anticipated when the contract was executed that the construction would be completed by April 1974, and the contractor gave the owner a firm price to that date. The owner agreed that the risk of increased labor cost after the projected completion date would rest with the owner. Foley Co. v. Walnut Associates, 597 S.W.2d 685, 688.

Mo.App.1973. Subsec. (d) cit. in sup. Plaintiff contractor brought this action to recover the contract price for building a garage. At trial, judgment was given for plaintiff. This was affirmed on appeal, the court holding that the contract was performed, notwithstanding that the writing called for the garage to be built in St. Louis County when it was in fact built, as the parties intended, in Warren County. The court emphasized that the contract should be read in accord with the parties' intent, in spite of a clerical error which would refute their intent; and deemed the written contract to have been reformed by reason of the parties' original oral agreement and defendant's conduct in knowingly receiving the value of plaintiff's labor. Bullock Company, Inc. v. Allen, 493 S.W.2d 5, 7.

Mo.App.1969. Quot. com. on cl. (d) in sup. (section number of Restatement omitted in opinion). Action by executrix against an insurance company to recover benefits under an insurance policy alleged to be due deceased's estate for hospital, medical, and surgical services rendered deceased. The issue before the court was whether under the terms of the policy, the plaintiff was entitled to recover from the insurance company the amount of the charge made by the hospital for services rendered deceased, which amount was paid the hospital under medicare. The policy provided that benefits would not be payable for treatment for which no charge is made that insured is required to pay. In reversing a judgment for plaintiff, the court held benefits were not payable for amounts the insured paid the hospital where the amounts had been refunded under a medicare agreement that hospital would release money incorrectly collected. Steffen v. Pacific Mutual Life Insurance Company, 442 S.W.2d 142, 145.

Mo.App.1965. Cl. (d), coms. e, f quot. in sup. In an action to recover under an insurance policy for loss caused by a safe burglary on the business premises of the insured, rare coins, although kept on premises as collector's items, could be used in conduct of business. Therefore, they are insured at face value under the "money and securities" clause, and not at market value under the "other property" clause of the contract. In construing a contract, couched in general terms, it is permissible to look at the surrounding circumstances to determine the intent of the parties. However, the operative effect of evidence of surrounding circumstances depends on how far words used in the contract will stretch and how alien from the ordinary meaning of the words is the intent they are asked to include. Cornblath v. Fireman's Fund Insurance Co., 392 S.W.2d 648, 650, 651.

Mo.App.1963. Quot. in sup. Contract permitting reduction of defendant's share of insurance commissions if defendant brought in a third party to handle insurance claims was not a contract of judgment, and parol evidence could be used to show defendant did not call in a third party and supervised claims satisfactorily. J. K. Seear (U.S.A.) Ltd. v. C. O. Jones & Son Ins. Agency, 364 S.W.2d 640, 642.

Mo.App.1959. Cit. in sup. The terms of an electric company's agreement with direct current consumer awarding refund if conversion of equipment on named premises to alternating current was made within five years, showed that it did not allow consumer to recover refund where it moved its business to adjacent alternating current building within five years, but had not converted original building from direct current. Katz Drug Co. v. Kansas City Power & L. Co., 303 S.W.2d 672, 680, 682.

Mo.App.1955. Com. d cit. in ftn. Where owners refused to join their employees' union in compliance to amended union constitution and union demanded return of shop cards from owners as agreed upon, this was lawful although owners' right to contract in the future might be impaired. Kerkemeyer v. Midkiff, 281 S.W.2d 516, 526, reversed, 299 S.W.2d 409 (1957).

Mo.App.1955. Cit. in sup. Where employer and employee agreed that employee upon leaving employment would not complete with employer, the fact that contract terms were ambiguous was remedied by applying the meanings as used in the trade which both parties knew and understood. National Corp. v. Allan, 280 S.W.2d 428, 432.

Mo.App.1951. Cit. in sup. Where contract recited that plaintiff agreed to sell to defendants clay and dirt to be hauled away from plaintiff's land and defendants agreed to bring land to specified grades, but contract was silent as to price to be paid, contract was sufficiently ambiguous so as to admit plaintiff's testimony that defendants promised orally, before contract was signed, that defendants would pay reasonable value for dirt. Dimick et al. v. J. K. Noonan et al., 242 S.W.2d 599, 602.

Mo.App.1951. Com. d. cit. in sup. Under agreement for construction and purchase of bungalow which was to be in all respects "like" bungalow already built and under circumstances surrounding execution of agreement, proposed bungalow was to be in all respects counterpart or copy of existing bungalow as to plan thereof and materials used and not merely a

bungalow of same or nearly same appearance, quality and characteristics of such bungalow. Whaley et al. v. Milton Const. & Supply Co., 241 S.W.2d 23, 27.

Mo.App.1950. Cit. in sup. Where lessor delivered machine to lessee under lease which provided that machine was to be returned in same condition as received, ordinary wear and tear excepted, and thereafter subsequent lease was entered into containing same provisions as to return of machine to lessor and lessor relied on subsequent agreement only as basis for cause of action arising out of lessee's alleged changes in machine but all alleged changes were shown to have been made between original and subsequent agreements, lessor had no cause of action. Brocket v. Natural Set-Up Sales Corp., 227 S.W.2d 514, 519.

Mo.App.1948. Cit. in sup. Oral evidence was admissible to establish fact that agreement between plaintiff and defendant which provided that plaintiff's services were to be compensated for on a contingent basis was changed to the effect that plaintiff was to be paid for reasonable value of work done, with result that plaintiff was entitled to judgment for value of such work even though plaintiff never secured the refund of taxes upon which the contingent agreement was originally based. Avellone v. John Weisert Tabacco Co., 213 S.W.2d 222, 230.

Mo.App.1945. Com. x e on cl. d. quot. in sup. Where insured, under policy insuring against loss of a ring and containing provision that other insurance made policy voidable, obtained other insurance containing like provisions believing that first policy had expired, and upon demand for payment of loss, second insurer agreed to loan insured a sum of money for an assignment of insured's claim against first insurer, insured's liability to repay loan being limited to amount recovered from first insurer, such agreement (upon consideration of the situation of the parties and the circumstances at the time of the execution of the contract) was a loan and not payment of liability under the policy and did not release first insurer of liability. Kossmehl v. Millers Nat. Ins. Co., Chicago, Ill., 238 Mo.App. 671, 185 S.W.2d 293, 295.

Mo.App.1944. Sec. cit. and com. on clause (d) quot. in sup. In construction of contract, court follows interpretation which parties themselves placed on it by their actions. Velvet Freeze v. Milk Wagon Drivers', etc., 177 S.W.2d 644, 646.

Neb.

Neb.1972. Cit. subsec. (c) in sup. Plaintiff, an experienced building contractor, sought to recover the extra cost of excavating and moving material for a highway embankment because defendant allegedly fraudulently or negligently misrepresented the quality and quantity of the available deposits in the contract. The court held that there was ambiguity in the contract as to the quantity available at the nearby sites, but that the subsequent written agreements between the parties indicated the true intent of the parties. In those writings, plaintiff expressly agreed to pay all additional costs of excavating and transporting the material from the new locations, and, therefore, plaintiff was not entitled to the extra costs incurred. Knight Bros., Inc. v. State, 189 Neb. 64, 199 N.W.2d 720, 728.

Neb.1942. Clause (c) quot. in sup. In determining coverage under contractor's public liability policy, entire insurance contract must be considered. Smith v. U. S. F. & G. Co. 142 Neb. 321, 326, 6 N.W.2d 81, 84.

Neb.1936. Clauses (a) and (e) quot. in sup. A group insurance policy insuing an employee against total disability is to be read in connection with the application therefor and the certificate issued the employee, granting to the word "disability" the same meaning each time it is used in a single sentence. Hemmer v. Metropolitan Life Ins. Co., 131 Neb. 14, 18, 267 N.W. 153, 155.

N.H.

N.H.1974. Subsecs. (d) and (e) cit. in disc. Plaintiff landlord had instituted action for eviction on grounds that defendant tenant violated an agreement. By the terms of the agreement the defendant was to operate the food and beverage operation on the landlord's hotel premises and pay rent therefor. Defendant brought exceptions to the master's findings below that the basement area was not included in this agreement, but that its use was governed by a separate agreement by which defendant was to pay to plaintiff a certain percentage of income derived from use of the basement. The court overruled defendant's exceptions, holding that the master acted properly in admitting extrinsic evidence regarding the action of the parties in his interpretation of the agreement, and that such extrinsic evidence substantiated the master's findings that a separate agreement had been made with respect to the use of the basement area. Spectrum Enterprises, Inc. v. Helm Corp., 114 N.H. 773, 329 A.2d 144, 147.

N.H.1955. Cit. in sup. Where sublease declared sublessee was to occupy front half of first floor of a building, subsequent conduct of parties in carrying on their businesses indicated they considered front half to mean all of large front room of two room ground floor. Bogosian v. Fine, 99 N.H. 340, 111 A.2d 190, 192.

N.J.

N.J.1936. Cit. in sup. A contract between a trade union and its members is construed in accordance with the circumstances under which it was made and the objects for which the union strives. Cameron v. Internat. Alliance etc., 119 N.J.Eq. 577, 581, 183 A. 157, 160, writ of certiorari denied in, 298 U.S. 659, 56 S.Ct. 681, 80 L.Ed. 1385 (1936).

N.J.1934. Cit. in sup. An accommodation indorsement of a six month note, in response to a letter agreeing to extend the note for two years if the recipient will become an accommodation party, entitles the payee to a judgment against the accommodation party even though he refused to indorse the renewal note upon which the action was brought. Corn Exchange Nat. Bk. & Tr. Co. v Taubel, 113 N.J.L. 605, 610, 612, 175 A. 55, 58, 59.

N.J.Super.

N.J.Super.1960. Cit. in sup. Meaning of "tentative approval" of local zoning board in vendor's warranty to purchaser of land was a jury question, and could not be held, as a matter of law, to have referred to a statute which employed the phrase as a technical term. Deerhurst Estates v. Meadow Homes, Inc., 64 N.J.Super. 134, 165 A.2d 543, 551, on remand, 71 N.J.Super 255, 165 A.2d 555 (1961).

N.J.Super.1956. Cl. (c) cit. in sup. In action on judgment note where there were separate writings, then if these writings were all part of same transaction, they were to be interpreted together, though they did not refer to each other, and the chattel mortgage, bond and warrant read together did not provide for confession of judgment on an unmatured claim. Friendly Consumer Discount Co. v. Foell, 39 N.J.Super. 410, 121 A.2d 434, 437.

N.J.Super.1953. Com. h cit. in sup. Amendment to certificate of incorporation which effected a profit sharing plan was unambiguous and guaranteed that accumulated profits of original share holders would not be diminished by this amendment. Hungerford & Terry, Inc. v. Geschwindt, 24 N.J.Super. 385, 94 A.2d 540, 546, affirmed, 27 N.J.Super. 515, 99 A.2d 666 (1953).

N.J.Super.1952. Cit. in sup. Security clause of collective bargaining agreement did not entitle employees to two weeks' pay when employer terminated business and paid severance pay provided for in the agreement, even though the employer

violated agreement by not giving requisite two weeks' notice before going out of business. Hudson County Newspaper Guild v. Jersey Pub. Co., 23 N.J.Super. 419, 426, 93 A.2d 183, 187.

N.J.Super.1950. Com. e cit. in sup. Where lease gave tenant option to purchase and lease was to continue from month to month after expiration of term unless terminated on 30 days' notice by either party and after expiration of term lessee stayed in possession and paid rent and charge for option, option continued to remain in tenant after expiration of original term and was exercisable by him. Balsham v. Koffler et ux., 8 N.J.Super. 48, 73 A.2d 272, 274.

N.J.Super.1950. Sub. (d) cit. in sup. Where meaning of modification of option for renewal of lease was ambiguous, but tenant and purchaser of premises gave it particular construction and interpretation, such construction and interpretation was adopted by court. Mayer v. Sulzberger et al., 6 N.J.Super. 327, 71 A.2d 233, 236.

N.J.E. & A.

N.J.E. & A.1944. Com. f quot. in part in sup. Where, by clear and explicit terms of writing, plaintiff covenanted to pay $29,000 for building materials set forth in schedule, plaintiff's undertaking could not be enlarged by parol evidence of a different agreement with regard to method of calculating price. New York Sash & Door Co. Inc. v. National House & Farms Ass'n., Inc., 131 N.J.L. 466, 36 A.2d 891, 894.

N.M.

N.M.1967. Subsec. (c) cit. in sup. The plaintiff, a purchaser of thirty-two lots, sought to recover from the defendant vendors the water assessments made by the city above the agreed cost of $216.84, which was the extent of the purchaser's assumption in the purchase agreement. This court upheld a judgment for the purchaser and held the defendant vendors liable for the amount exceeding the agreed limitation, even though the purchaser's obligation for water and sewer assessments was omitted from the real estate contract itself. Leigh v. Hertzmark, 77 N.M. 789, 427 P.2d 668, 671.

N.M.1961. Cit. in sup. Where lease agreement and two letters were all executed at the same time and as part of the same transaction, they were to be read and construed together. Harp v. Gourley, 68 N.M. 162, 359 P.2d 942, 947.

N.Y.

N.Y.1971. Subsec. (c) cit. in diss. op. in sup. In an action for payment of a commission, brought against a manufacturer of window products by its exclusive sales representative, the dissent argued that the court's award to the plaintiff of an additional 5% commission in accordance with a written contract providing "Commissions will be paid on the basis of 10% base commission, distributed one-half for specification," on the theory that the reference to a "specification" only fixed the time payment was to be made was error because there was another provision in the agreement setting the time of payment; and since the rules of construction require giving meaning to every provision of an agreement, the term "specification" should not be interpreted as referring to time of payment, but rather to persuading the architect to include a product in his plans without the necessity of modification of the product, and since the plaintiff failed to comply with that reading, he should not recover his commission. Schroeder v. Sitelines, Inc., 29 N.Y.2d 229, 325 N.Y.S.2d 940, 947, 275 N.E.2d 590.

N.Y.1970. Subsec. (c) cit. in diss. in sup. The plaintiff employer sought an order staying arbitration of an employment contract. The employment contract contained an arbitration clause to resolve "any controversy concerning a question of fact arising under this agreement," and the employment contract contained reference to a separate stock option agreement

executed on the same day, which agreement had no separate arbitration clause. The court held that the two agreements could not be read as one to find the requisite intent to arbitrate disputes arising under the stock option agreement. The dissent contended that the agreements must be read together to determine the intent of the parties. In the Matter of ITT Avis Inc. v. Robert N. Tuttle, 27 N.Y.2d 571, 313 N.Y.S.2d 394, 261 N.E.2d 395, 398.

N.Y.1956. Cit. in sup. Modification of rental agreement which gave lessee title to equipment, but continued license payments, did not permit lessee to terminate license payments on authority of termination clause in original agreement, since it acknowledged its obligation to pay by making payments for a number of years after execution of modification agreement. Muzak Corp. v. Hotel Taft Corp., 1 N.Y.2d 42, 150 N.Y.S.2d 171, 133 N.E.2d 688, 690.

N.Y.1955. Cit. in sup. Where contract for lease of trucks provided that three-year period of hire was to begin on date that trucks were delivered to lessee, it was intended that term was to be for three years and not for a longer period, depending on timeliness of lessor's delivery of trucks, so lessee's termination of contract on a certain date was a breach only as to trucks which had not been used for three full years. Rentways, Inc. v. O'Neill Milk & Cream Co., 308 N.Y. 342, 126 N.E.2d 271, 273.

N.Y.1941. Clause (c) and (b) in sup. In suit for breach of contract for use of patents on turnstiles in which reference to contract between defendant and city for installation of turnstiles is mentioned, all writings must be considered to aid in proper interpretation. Nau v. Vulcan Rail & Constr. Co., 286 N.Y. 188, 197, 198, 36 N.E.2d 106, 110, 111, appeal denied, 261 App.Div. 85, 25 N.Y.S.2d 794 (1941), motion denied, 287 N.Y. 630, 39 N.E.2d 267 (1941).

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.1966. Cl. (c) cit. in sup. Plaintiff and defendant were parties to certain real estate ventures and under an agreement between them each had the option to dissolve the venture with a right to set property values, all disputes being submitted to arbitration. The parties also executed a supplementary agreement which provided for appointment of a listed real estate appraiser. Plaintiff contested defendant's attempt to submit the appraiser's estimates to arbitration and the court held that the supplementary agreement, as part of the transaction, is to be considered as part of the basic agreement including the arbitration clause and the issue involving the scope of defendant's right to reject appraisals is to be decided by the arbitrators. Dimson v. Elghanayan, 26 A.D.2d 442, 275 N.Y.S.2d 178, 180, reversed, 19 N.Y.2d 316, 280 N.Y.S.2d 97, 227 N.E.2d 10 (1967).

N.Y.Sup.Ct.App.Div.1966. Com. e. cit. in sup. The plaintiff, the successor by merger of an advertising agency, sought damages for an alleged breach of advertising services contract with the defendant paint manufacturer. The court affirmed the fact of the defendant's breach and awarded to the advertising agency the commission it would have earned under the contract: 15% less the cost savings made by the agency and the allowance for a phasing-in period. West, Weir, and Bartel, Inc. v. Mary Carter Paint Company, 25 A.D.2d 81, 267 N.Y.S.2d 29, 33, motion to dismiss appeal denied, 18 N.Y.2d 686, 273 N.Y.S.2d 436, 219 N.E.2d 882, appeal dismissed, 19 N.Y.2d 812, 279 N.Y.S.2d 971, 226 N.E.2d 704 (1967).

N.Y.Sup.Ct.App.Div.1964. Cl. (c) cit. in sup. Defendant entered into a usurious loan agreement with the plaintiff-borrower where a loan of $30,000 was disguised as a sale by plaintiff to defendant of 10,000 shares of stock. Plaintiff was required to repurchase the stock some 15 months later at a price of $5.40 per share, with a total of $6000 in dividends going to the defendant. This resulted in an interest rate of 80% per annum. Simultaneously, the parties executed a separate arbitration agreement. Denial of defendant's motion to arbitrate was affirmed on the grounds that illegality of the principal transaction rendered all subsidiary agreements invalid and the preliminary question of the illegality is a question for the court and not the arbitrator. Durst v. Abrash, 22 A.D.2d 39, 253 N.Y.S.2d 351, 355, affirmed, 17 N.Y.2d 445, 266 N.Y.S.2d 806, 213 N.E.2d 887 (1965).

N.Y.Sup.Ct.App.Div.1964. Cls. (c) and (d) cit. in sup. The plaintiff suffered a loss of $48,000 in the theft of jewelry from a hotel room. The defendant insurer, in short order, advanced the insured $48,000 to cover the loss and gave a "loan receipt" to the effect that the insured "borrowed" the insurance proceeds as a loan, without interest, repayable out of any net recovery the insured might make from a third party. Interest was awarded on a judgment against the third party hotel and both the insured and the insurer claimed to be entitled to recover it under the loan receipt. Holding for the insurer the court reasoned that since the language was at least ambiguous, and since the loan receipt was a fictional device to pay the insured all to which it was entitled and yet permit the insurer to sue in the name of the insured, the instrument could be construed according to the real transaction involved and the reasonable intentions and expectations of the parties rather than with talismanic literalism. Herbert Rosenthal J. Corp. v. St. Paul F. & M. Ins. Co., 21 A.D.2d 160, 249 N.Y.S.2d 208, 215, affirmed, 17 N.Y.2d 857, 271 N.Y.S.2d 287, 218 N.E.2d 327 (1966).

N.Y.Sup.Ct.App.Div.1960. Cit. in diss. op. Clause in real estate broker's agreement providing for payment of commission to named broker if vendor sold to any buyer whose name was given him by the broker during a three month listing period, or within six months after termination of the listing period, required vendor to pay commission to broker who brought eventual buyer to him two months after listing period expired. Vanderschoot v. Christiana, 10 A.D.2d 188, 198 N.Y.S.2d 768, 774.

N.Y.Sup.Ct.App.Div.1959. Cit. in sup. Clauses in collective bargaining contract allowing company to operate, with union's permission, part of its plant during vacation period, and providing employees with less than 35 pay periods in vacation year shall not be forced to take vacations were reconciled to allow employer to shut down plant during vacation period, and so employees not working during vacation period were ineligible for unemployment compensation. In re Irwin's Claim, 9 A.D.2d 352, 193 N.Y.S.2d 978, 981.

N.Y.Sup.Ct.App.Div.1958. Com. to cl. (c) cit. in sup. In action by purchasers to recover a deposit paid on a contract to purchase realty, the contract was construed strictly against vendor whose attorney drew it. Foelsch v. Eaton, 7 A.D.2d 730, 180 N.Y.S.2d 757, 759.

N.Y.Sup.Ct.App.Div.1957. Cl. (c) cit. in sup. Where one clause in a contract to manage a building provided for brokerage commissions for leases executed after the termination of the agreement as long as the negotiations were begun during its term, while another clause required that the negotiations be pending at the time of the termination, the agent was not entitled to recover commissions on a lease which only met the requirement of the first clause and not the second. Douglas Real Estate Management Corp. v. Montgomery Ward & Co., 3 A.D.2d 146, 159 N.Y.S.2d 81, 84, settled, 161 N.Y.S.2d 597, resettled, 3 App.Div.2d 959, 163 N.Y.S.2d 384, affirmed, 4 N.Y.2d 33, 171 N.Y.S.2d 852, 148 N.E.2d 903 (1958).

N.Y.Sup.Ct.App.Div.1957. Com. c. cit. in dictum. In contract action where it was alleged that defendant hired plaintiff for a ten-year period, she worked for several months and had not been able to work since, court held that she was entitled to salary yearly as per term of contract regardless of whether she worked or not. Jones v. Crawford, 3 A.D.2d 479, 162 N.Y.S.2d 41, 44, reargument and appeal denied, 4 A.D.2d 826, 164 N.Y.S.2d 988 (1957).

N.Y.Sup.Ct.App.Div.1943. Com. a cit. in sup. Where contract whereby corporation employed partnership to make investigations in connection with pending case of former, limited commissions to be received by latter to percentage of refunds on reliquidation of entries of dogskins "made" since a certain date, usual meaning of "made" indicated commissions were confined to refunds prior to date of contract in suit. Halpern et al. v. Amtorg Trading Corp. (two cases), 265 App.Div. 540, 543, 39 N.Y.S.2d 907, 910.

N.Y.Sup.Ct.App.Div.1936. Com. e cit. in sup. In an action by former stockholders of a corporation against a bank which sold their stock under an agreement which read as though the bank had an option to purchase the stock the stockholders may

introduce evidence of circumstances surrounding the signing of the instrument which shows it to be one of agency. Shultz v. Manufacturers & Traders Tr. Co., 249 App.Div. 88, 93, 291 N.Y.S. 117, 121.

N.Y.Sup.Ct.

N.Y.Sup.Ct.1959. Cit. in sup. Where there is an issue of fact as to construction of letter written concerning an agreement prohibiting trade, because issue may rest on construction of written instruments, it does not necessarily follow that no other evidence may be received. Burnham and Company v. Indian Head Mills, Inc., 18 Misc.2d 976, 191 N.Y.S.2d 74, 75.

N.Y.Sup.Ct.1952. Sub. (c) and com. d cit. in sup. Where agreement for financing permanent mortgage on building under construction did not expressly state that time was of the essence and complaint did not allege that plaintiff served notice upon defendant fixing reasonable time in which to perform, question of whether defendant was in default at time of action was for trier of fact. Green Point Sav. Bank v. Central Gardens Unit No. 1, Inc., 279 App.Div. 1078, 112 N.Y.S.2d 371, 373.

N.Y.Sup.Ct.1946. Cit. in sup. Widow of insured who died as a result of crash of airplane in which he was a fare paying passenger was entitled to recover double indemnity under policy which limited double indemnity to death caused by violent, external and accidental means not resulting from "engaging or participating as a passenger or otherwise in aerial navigation or submarine operations," since language of policy was ambiguous, was to be construed against the Insurance company which drafted it, and could be reasonably understood by an insured to exclude the double indemnity provisions only if the insured engaged in the navigation or operation of the plane as an occupation and not as a fare paying passenger of a regular air line. Lee v. Guardian Life Ins. Co. of America, 187 Misc. 221, 224, 46 N.Y.S.2d 241, 245, affirmed, 267 App.Div. 985, 48 N.Y.S.2d 800, appeal denied, 268 App.Div. 849, 50 N.Y.S.2d 674 (1944).

N.Y.Sup.Ct.1944. Cit. in sup. Insured who was killed in airplane accident while he was paying passenger was not "engaging or participating" in aerial navigation under terms of insurance policy and his beneficiary was entitled to double indemnity. Lee v. Guardian Life Ins. Co., 187 Misc. 221, 46 N.Y.S.2d 241, 245, affirmed, 267 App.Div. 985, 48 N.Y.S.2d 800, appeal denied, 268 App.Div. 849, 50 N.Y.S.2d 674 (1944), citing as Vol. 1, p. 319.

N.Y.Sup.Ct.1943. Clause (c) cit. in definition. Pawn tickets are not securities or printed evidences of indebtedness under meaning of statute, but business of pawnbroker must be transacted at one address only. Modell Pawnbrokers v. Moss, 182 Misc. 581, 582, 45 N.Y.S.2d 598, 599.

N.Y.Sup.Ct.1940. Cit. in sup. A clause in a lease that the lessee is to pay, as rent, a certain monthly sum to be applied to a loan advanced by the lessor to build a theatre, is not applicable after the loan is repaid. Pangburn v. Stanley Mark Strand Corp., 24 N.Y.S.2d 97, 99.

N.Y.Sup.Ct.1935. Clause (a) cit. and clause e quot. in sup. A trust indenture which permits a trustee to invest in preferred stock of railroads or "in such other personal securities" authorized investments in the common stock of corporations. Irving Tr. Co. v. Natica, Lady Lister-Kaye, 157 Misc. 32, 37, 38, 284 N.Y.S. 343, 349, 350. Although clause c was cited it is probable clause a was intended.

N.Y.Surr.

N.Y.Surr.1955. Coms. c, d, e cit. in sup. Where assignor stated in agreement that she was assigning all of her interest in estate and agreement went on to describe the interest specifically as a 1/108th interest in testamentary trust fund and the

assignee accepted the agreement, the specific provision controlled the general provision with the result that the 1/108th interest was assigned. In re Danziger's Estate, 208 Misc. 1024, 145 N.Y.S.2d 381, 385.

N.Y.Surr.1947. Cit. in sup. Where executors included certain property in decedent's estate, but husband of decedent objected on ground decedent and husband held the property in charitable trust, acts and conduct of decedent and her husband, communicated to the donor of the property prior to the donor's making additional gifts, were relevant to show whether the property was held absolutely by decedent and her husband or impressed with a charitable trust. Cushman's Estate, 76 N.Y.S.2d 275, 278.

N.Y.Surr.1938. Clause (c) cit. in quotation in sup. Where testatrix, in her will, uses the word "securities" as meaning legal and nonlegal investments, the court will so construe its meaning. In re Loose's Will, 167 Misc. 764, 766, 4 N.Y.S.2d 611, 614.

N.Y.Ct.Cl.

N.Y.Ct.Cl.1956. Cit. in sup. Where plans and specifications for highway construction prepared by State Thruway Authority stated that grade elevations, as shown, were before clearing was done and were given to aid contractor in estimating amount of excavation necessary to attain ultimate grade elevations, and there were no symbols on maps of site showing trees to be removed, there was a representation by the Authority that someone other than the contractor was to remove trees in order to prepare site for excavation, and when contractor did same, under protest, there was a breach of contract entitling contractor to extra compensation for such work. Harnett Co. v. New York State Thruway Auth., 3 Misc.2d 257, 155 N.Y.S.2d 100, 105.

N.C.

N.C.1985. Subsecs. (a), (d) and coms. (a), (b) cit. in case quot. in sup. A radio station owner sued a city housing authority for inverse condemnation. The housing authority had built a housing project in violation of a lease provision not to interfere with the plaintiff's underground wires. The trial court granted the plaintiff's motion for summary judgment on the issue of liability and reserved the damages issue for trial. It found a per se taking because the plaintiff could not reach the wires under the buildings. The housing authority appealed. The intermediate appellate court affirmed. On further appeal, the housing authority contended that the lease did not create an easement appurtenant, as argued by the plaintiff. This court reversed. It held that the lease instrument was sufficiently ambiguous to create a material issue of fact precluding summary judgment. Century Communications, Inc. v. Housing Authority, 313 N.C. 143, 326 S.E.2d 261, 264.

N.C.1969. Cit. subsec. (c) in sup. This was an action by a holder of a note against its indorsers. The indorsee's attorney prepared the alleged indorsement on the back of the note which merely recited that for valuable consideration the indorsers transferred the note and a deed of trust to the indorsee. A separate assignment and transfer which had been prepared simultaneously by the indorsee's attorney merely contained warranties by the indorsers as to the existing liens and defects. The court in reversing the lower judgment for indorsee held that the indorsers who were paid approximately 50% of face value of the notes did not undertake the obligations of a "general indorser." Yates v. Brown, 275 N.C. 634, 170 S.E.2d 477, 482.

N.C.1946. Subs. (e) cit. in sup. Evidence that decedent, a machinist who ordinarily worked as an employee for wages, but who had never before worked for employer, was engaged in off-the-premises construction of conveyor to be used in employer's plant, but who was to be paid by the hour and was to use materials furnished or paid for by employer, and that parties themselves treated contract as one of employment, authorized finding that decedent at time he received fatal injuries was an employee rather than an independent contractor. Smith v. Southern Waste Paper Co., 226 N.C. 47, 51, 36 S.E.2d 730, 733.

N.D.

N.D.1986. Cit. in sup. Lessors executed "top leases" with a lessee for certain mineral rights if then-existing, or "bottom," leases expired without timely drilling or production. The parties also executed two contemporaneous drafts that provided for immediate partial payment and payment of the balance if the bottom leases expired without development. When the bottom leases expired, the lessee refused to pay the second draft, and the lessors brought suit. The supreme court affirmed a trial court judgment for the lessors, rejecting the lessee's arguments that the second draft was merely an option, and that the top leases violated the rule against perpetuities because the possibility of production under the bottom leases would extend the option for the top leases indefinitely. As the top leases and the accompanying drafts were executed contemporaneously, the trial court properly construed these documents together to determine that the second draft was part of the agreement. Nantt v. Puckett Energy Co., 382 N.W.2d 655, 658.

Ohio App.

Ohio App.1975. Cit. in sup. Suit was brought against a contractor to require it to make payments to the plaintiff construction advancement program trust fund. The trust was established pursuant to a collective bargaining agreement between two local unions and the state contractors' association, requiring each employer to contribute three cents per man hour worked by members of the two locals. Defendant was not a member of the state association and did not sign the agreement. It did employ members of the locals pursuant to its contracts with their international organization. These contracts required defendant to observe the hours, wages, fringe benefits, and working conditions established by the locals. The plaintiff contended that the terms "working conditions" and "fringe benefits" encompassed payments to the trust fund which was established to promote the local construction industry and develop programs to improve labor-management relations. The trial court held for defendant, and this court affirmed. The court held that the trial court, in view of the ambiguity of the terms used, properly admitted evidence to show the sense in which the term "fringe benefit" was intended by the defendant and the international unions, and that it was not intended that the term include payments to the plaintiff trust fund, and that "working condition" did not embrace such an obligation. The court noted that while the plaintiff claimed that it was a third party beneficiary of the contract, it could not have any rights not intended by the parties to the contract. Construction Advancement Program v. A. Bentley & Sons Co., 45 Ohio App.2d 13, 340 N.E.2d 849, 853, 74 O.O.2d 60.

Ohio App.1972. Subsecs. (a) and (b) cit. in ftn. but dist. The mother of the insured's legitimate child brought this action against insured's illegitimate daughter for a judgment declaring that insured's legitimate daughter was the only person entitled to insurance proceeds. The court held that where the policy provided for payment to "employee's surviving children," the word "children" must be construed to mean all offspring regardless of legitimacy, despite the fact that "children" may not have a "plain meaning" in light of the historical usage in the context of legal documents; the court held that a rule requiring "children" to mean only legitimate children would be irrational and unjust in this instance. Butcher v. Pollard, 32 Ohio App.2d 1, 288 N.E.2d 204, 210, 61 O.O.2d 1.

Or.

Or.1979. Subsec. (d) and com. (e) quot. in sup. A real estate developer sued a lender for breach of an agreement to advance funds in connection with the development of a tract of land. The defendant's motion for a directed verdict was denied and the jury returned a verdict for the plaintiff. The appellate court affirmed and held that the trial court had correctly denied the defendant's motion because the contract was sufficiently ambiguous to permit the introduction of evidence as to its intended meaning. Welch v. U.S. Bancorp. Realty & Mortg., 286 Or. 673, 596 P.2d 947, 956.

Or.1962. Cl. (d) and com. e quot. in sup. Evidence that two former business partners had disagreed and that the minority

partner had resigned without selling his shares in the business was admissible to show that an option executed by both partners before they disagreed, to the effect that either partner could buy the stock of the other if the other died, was no longer valid, because these circumstances merely interpreted the existing option, and did not vary it. Card v. Stirnweis, 232 Or. 123, 374 P.2d 472, 475.

Or.1952. Com. c and d cit. in sup. Insured, who was injured in car accident, could not recover medical and hospital expenses under her contract with insurer, where contract provided that benefits under it did not apply when insured was injured because of another's negligence except that insurer would supply benefits that could not be reasonably recovered from tortfeasor and insured previously had received payment under compromise agreement with car driver's insurer in excess of medical and hospital expenses she incurred. Barmeier v. Oregon Physicians' Service, 194 Or. 659, 243 P.2d 1053, 1059.

Or.1948. Sub. (b) quot. in sup. Operation of busses other than plaintiff's by defendant between two cities with intervening stop at army camp was not "an operation of busses other than plaintiff's on local schedules between one of such cities and army camp" which was prohibited by contract; and even if a violation of contract, such was permissible, as defendant had to agree to use busses other than plaintiff's in order to come into army camp at all. Dorsey v. Oregon Motor Stages, 183 Or. 494, 194 P.2d 967, 974.

Or.1948. Cit. in sup. In proceeding to revoke permit of "any-where-for-hire-carrier" for operating as "fixed-termini carrier" without permit therefor, receipt of evidence as to meaning of statutory terms "any-where-for-hire" and "fixed-termini" was not prejudicial. Horger v. Flagg et al., 185 Or. 109, 201 P.2d 515, 521, rehearing denied, 185 Or. 109, 202 P.2d 526 (1949).

Or.App.

Or.App.1979. Subsec. (e) cit. in ftn. in disc. A buyer of a plywood business brought suit for a declaration of rights under a contract of sale. Specifically, the plaintiff sought a declaration of those provisions concerning indemnity for liability for defective products produced by the business. The sales agreement provided that the purchaser would indemnify the seller with respect to product liability relating to products sold during a seven-month period from the effective date of the contract of purchase to the date of settlement. The defendant had paid a substantial amount of money for product liability claims, including a certain amount involving products sold after the effective date of the contract. The trial court construed the contract in the plaintiff's favor. Reversing in part, this court held that the plaintiff was obligated under the sales contract to indemnify defendant for those claims regarding products sold during the period from the effective date of the contract of purchase until settlement. The fact that the defendant had paid certain claims without seeking immediate indemnification from the plaintiff was nothing more than mistaken performance by the defendant. The court stated that the conduct of the parties may fix a meaning to words of doubtful import, but that it may not change the terms of a contract. Thus, the court concluded that the provisions of the contract of sale as to the right of indemnification were not ambiguous, and that the trial court had erred in its conclusion that the conduct of the parties constituted a practical construction of the contract. S. W. Forest Industries, Inc. v. Vanply, Inc., 43 Or.App. 347, 602 P.2d 1113, 1119.

Pa.

Pa.1978. Subsec. (a) cit. in diss. op. in sup. An action was brought to recover for a breach of a covenant not to compete, after the defendant engaged in activities in connection with the ownership, management, operation, or control of a competitor in direct violation of the express language in the contract. Judgment was entered for plaintiff, and defendant appealed. This court affirmed the decree insofar as it found a breach of the covenant, but vacated the award insofar as it fixed the amount of damages, and remanded the case for a recalculation of damages. This court found that the trial court erred in determining the percentage of lost sales arising out of defendant's breach that would have constituted profit to plaintiff, since the profit margin claimed by plaintiff failed to take into account costs normally incurred before arriving at a valid profit figure. Furthermore, an award to plaintiff constituting the salary paid to the defendant during the period of competition was

unnecessary since plaintiff had already been made whole through the award of damages for lost profits. Two dissenting justices supported reversal on the ground that the noncompetition covenant was not breached, where one maintained that the words of the covenant were not accorded their common and ordinary meaning or narrowly construed as is demanded in a contract in restraint of trade, and the other asserted that where defendant took no financial interest or return in the competitor so as to associate his reputation, name, or services with it, but merely made gifts of money, rent, and supplies, he could not be said to have breached a covenant not to compete, which is valid only when related to a contract for the sale of goodwill or to a contract for employment. Aiken Indus., Inc. v. Estate of Wilson, 477 Pa. 34, 383 A.2d 808, 814, 815, certiorari denied 439 U.S. 877, 99 S.Ct. 216, 58 L.Ed.2d 191 (1978).

Pa.1971. Subsec. (c) cit. in sup. in diss. op. Plaintiffs, an infant and her parents, brought an action against defendants, a taxicab company and an automobile driver, for the infant's birth defects and related expenses allegedly caused by injuries sustained by the pregnant mother in an automobile-taxicab collision while riding in defendant company's taxicab. Defendants admitted concurrent negligence, but pleaded as a defense to the parents' claim for medical and other expenses incurred by them in connection with the condition of their daughter, the release signed by the parents in the settlement of another action, arising out of the same events, that the parents brought to recover for the injuries to the wife and related expenses. This issue was tried separately and a verdict was returned for the defendants. The majority did not consider this issue in its opinion, but the dissent felt that the trial court erred in not considering both the release and the check issued by defendant company in return for the release as two, integral parts of the same transaction. The dissent felt that taken together the two documents showed clearly that the release was meant to cover only the parents' action because the check specifically mentioned that action as being the subject of the release. Price v. Yellow Cab Company of Philadelphia, 443 Pa. 56, 278 A.2d 161, 170.

Pa.1963. Cl. (e) quot. in sup. Where school district agreement provided that site for school to be built by three school districts should be near geographical center of jointure or in proximity thereto, board did not abuse its discretion by approving a site 1.5 miles from the geographical center. School District of Amity v. Daniel Boone Joint School System, 411 Pa. 188, 191 A.2d 817, 819.

Pa.1958. Cit. in sup. Partners, who agreed that the survivor of a partnership would inherit the whole partnership if the partnership bought life insurance, payable to their families, out of the assets of the partnership, did not intend the partnership to pass to the survivor if the insurance was not bought even though a separate clause in the partnership agreement reaffirmed the desire of the partners that the partnership should pass to the survivor, because this clause had to be read in conjunction with the whole agreement, which indicated that the purchase of life insurance was a condition precedent to the passage of the partnership to the survivor. Cerceo v. De Marco, 391 Pa. 157, 137 A.2d 296, 298.

Pa.1956. Cl. (d) cit. in sup. Where testator stated in a letter to his son-in-law that he intended to be legally bound by his promise to leave his daughter a specific portion of his estate, parol evidence of surrounding circumstances leading up to execution of the agreement was admissible to explain terms or clear up ambiguity. In re Goldstein's Estate, 384 Pa. 1, 119 A.2d 278, 287, citing sec. 235 but cl. d probably intended.

Pa.1956. Cl. (e) cit. in sup. In a minority shareholder's suit against officers and directors of corporation to recover, on behalf of corporation, funds paid to defendants under an agreement with corporation, as being excessive and unconscionable, the interpretation of the agreement lay between the makers themselves, and the court would enforce the one they intended. Maguire v. Osborne, 384 Pa. 430, 121 A.2d 147, 152.

Pa.1953. Cit. in dis. A life insurance provision making double indemnity provision inapplicable if insured's death resulted from military service in time of war or work in connection with actual warfare or police duties is inapplicable where insured has been killed in action in Korea while with the United States Army. Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 261, 95, A.2d 202, 208.

Pa.1953. Cl. (c) cit. in sup. Where purchase money mortgage by its terms was made subordinate to advance-money mortgages, advances in excess of those required by agreements are voluntary and are not entitled to priority over lien of purchase money mortgagee. Housing Mortgage Corp. v. Allied Const., 97 A.2d 802, 805, 374 Pa. 312.

Pa.1952. Sub. (c) cit. in sup. In determining whether balance of money paid by deceased and remaining as unpaid premiums on life policy on deceased's infant son should be paid over to deceased's estate or should be used to pay premiums on policy taken out by deceased for his son, the intent of deceased as evidenced by the policy and the prepaid premium agreement pursuant to which deceased had paid such money would be determinative. Fidelity-Phila. Trust Co. v. Bankers' Life Ins. Co., 370 Pa. 513, 88 A.2d 710, 711.

Pa.1950. Sub. (b) and (d) quot. in sup. Fact that defendant was entitled to a refund as a result of operation of "carryback" provision in Internal Revenue Code was within terms of contract under which defendant was to transfer to plaintiff all refunds on his income tax by reason of overpayment during certain years. Fischer & Porter Co. v. Porter, 364 Pa. 495, 72 A.2d 98, 101.

Pa.1948. Sub. (e) cit. in sup. Where purchaser accepted vendor's offer to sell slaughter house on condition that vendor assure the issuance of a federal permit to purchaser with construction costs to purchaser not to exceed $5,000, vendor's promise to assume liability for all costs in excess of $5,000 was not a fulfillment of condition specified in acceptance. Hollander et al. v. Friedman, 360 Pa. 20, 59 A.2d 892, 894.

Pa.1946. Subsec. (e) cit. in sup. Where defendant receivers of insolvent subsidiary bank assigned life insurance policies to plaintiff parent, paid premiums on such insurance, and employed counsel to collect the proceeds after the death of the insured, counsel fees as a necessary cost of administration and the premiums paid by the receivers were to be first deducted from the proceeds before payment of the proceeds to the plaintiff, in accordance with the contract of assignment as construed by the actions of the parties themselves. U.S. Nat. Bank in Johnstown v. Campbell, 354 Pa. 483, 47 A.2d 697, 701.

Pa.1943. Subsec. (c) quot. in sup. Where pledgor's wife was beneficiary of policy on his life and parties agreed any balance remaining after payment of debt to pledgee should be paid to party entitled to insurance proceeds in absence of pledge, wife had "inchoate right" in policy so when husband died proceeds of policy were not asset of his estate. Landreth v. First Nat. Bank of Philadelphia, 346 Pa. 551, 553, 31 A.2d 161, 163.

Pa.1941. Com. b cit. in sup. Defendant must return sum collected for tax under agreement it would be returned if tax was declared unconstitutional which occurred. Strassburger v. Joseph S. Finch & Co., 343 Pa. 259, 261, 22 A.2d 641, 642.

Pa.1937. Clause (e) cit. in sup. A contract which the parties interpret as not requiring the payment to the resident agent of a foreign insurance company of special commissions for countersigning home office policies will be so interpreted by the courts. Birdsall-Friedman Co. v. Globe & Rutgers Ins. Co., 326 Pa. 404, 409, 190 A. 924, 927.

Pa.1936. Clause (a) cit. in sup. The word "maintain" as used in a liability policy covers accidents in the course of acts of repair. Morris v. American Liab. & Sur. Co., 322 Pa. 91, 95, 185 A. 201, 202.

Pa.1935. Clause (e) cit. in sup. A trust agreement is construed as containing a promise by the trustee to repay in cash the original sum placed in trust in view of the subsequent agreement of the parties that this amount was owing to the beneficiary. Kefover v. Potter Tit. & Tr. Co., 320 Pa. 51, 52, 181 A. 771, 773.

Pa.1934. Clause (a) cit. in sup. Insured's death while traveling as passenger in an airplane in regular passenger service was not caused while "engaging in aeronautic expedition." Provident Tr. Co. v. Equitable Life Assur. Soc., 316 Pa. 121, 124, 172 A. 701, 702.

Pa.Super.

Pa.Super.1997. Subsec. (e) cit. in diss. op. A university sued a hospital and a research foundation, after the hospital terminated its affiliation and sublease agreements with the university following the university's failure to pay monthly rental purportedly due under the sublease agreement. The trial court granted plaintiff's petition for a temporary restraining order and a preliminary injunction and directed defendants to rescind their termination of the agreements. Reversing and remanding, this court held that the provisions of the affiliation agreement were not ambiguous and that the trial court erred in admitting extrinsic evidence to ascertain the parties' intent. The dissent argued that the terms "net payment" and "net amount" were ambiguous and that consideration of extrinsic evidence was justified to determine what those terms encompassed. Temple Univ. v. Allegheny Health Found., 456 Pa.Super. 314, 690 A.2d 712, 719.

Pa.Super.1982. Cit. in sup. The union, respondents herein, had petitioned the lower court to vacate consent decrees limiting picketing that were issued during a strike. The lower court did not vacate the decrees, but amended them so that they would be dissolved if the employer continued to use nonstriking persons to replace the strikers. The lower court believed that this action by the employer constituted an unwarranted intimidation of the union in violation of the consent decrees. The employer appealed, and the court reversed, ordering that the condition be stricken and the decrees reinstated. The court noted that interpreting an agreement involved reading the words in context and reading the agreement as a whole. The court held that the employer was not intimidating the union because it was merely exercising its federally protected right to continue business operations during a labor dispute. Westinghouse Air Brake Div. v. United Elec., 294 Pa.Super. 407, 440 A.2d 529, 533.

Pa.Super.1981. Com. (c) cit. in disc. The appellees were commercial developers who built and sold a shopping center to the appellants, a group of investors. In negotiating the agreement, the appellants saw themselves as the eventual owners of the property and landlords of the store that was to be built. The appellants' return on investment was 10.4% and calculated on an estimated yearly real estate tax assessment. In order to finalize the negotiations the appellees agreed to guarantee the appellants a 10.4% return by paying any real estate taxes greater than the estimated amount. The term "real estate taxes" was not defined in the agreement. The eventual tax assessment was much greater than the estimate and included special charges for electrical, water, and sewer use. The appellees refused to pay the special charges and the appellants filed suit. The trial court agreed with the appellees that the term "real estate taxes" did not include the special charges. Furthermore, the trial court rescinded the agreement on the basis of mutual mistake and lack of mutual assent even though the appellees acknowledged their liability for the tax increase. The investors appealed. This court held that the lower court had erred by rescinding the agreement because evidence of mutual mistake had not been presented. The parties had agreed to the tax stipulation because of the possibility of a tax increase. The court stated that the term "real estate taxes" did not have a common ordinary meaning and cautioned against interpreting words in a particular technical sense. The court stated that an examination of the context in which the words were used was in order. The court held that the intention of the parties was afforded great weight in interpreting the language of contracts. The court found that the appellees' words and conduct during the negotiations was an indication that the special charges were included in the tax stipulation. The appellee attempted to produce testimony of an undisclosed intention that the special charges were not contemplated, but the court held that undisclosed intentions were irrelevant. However, the court decided to grant a new trial rather than order a judgment n.o.v. Spatz v. Nascone, 283 Pa.Super. 517, 424 A.2d 929, 938.

Pa.Super.1975. Subsec. (e) cit. in sup. Plaintiff brought suit to recover a "finder's fee" which it alleged was due for services rendered under an oral contract. From a verdict for plaintiff, defendant appealed. The court affirmed. Initially it was determined that the jury could reasonably have found that plaintiff was engaged as a finder of prospective businesses for

purchase by defendant and was not obligated to act as an agent for defendant. The remaining questions went to the extent of services required to be performed by a finder before he is entitled to his fee and whether plaintiff performed such services. The court found that one who merely introduces the parties and supplies information is a finder. There must be, however, a causal connection between the activities of the finder and the resultant acquisition or merger. The court concluded that the evidence was sufficient for the jury to reasonably conclude that plaintiff had performed those services which directly resulted in a business acquisition to defendant. Amerofina, Inc. v. U.S. Industries, Inc., 232 Pa.Super. 394, 335 A.2d 448, 452.

Pa.Super.1961. Cit. in sup. The trial court erred in not receiving evidence of the circumstances surrounding a conveyance of land because, since the conveyance did not expressly mention the conveyance of an alley which bounded it, if these circumstances showed that it was the intention of the grantor to reserve the use of the alley, so that an injunction against the grantee's blocking the alley might be proper. Taylor v. Gross, 195 Pa.Super. 225, 171 A.2d 613, 618.

Pa.Super.1953. Subsec. (e) cit. in sup. Evidence sufficient to establish that plaintiff had enforceable option to buy interest of decedent in realty and option was not invalid for inadequacy of consideration. In re Romig's Estate, 172 Pa.Super. 334, 338, 93 A.2d 884, 886.

Pa.Super.1952. Sec. and com. d and e quot. in part in sup. Covenant by grantor to supply heat from center storeroom to grantee as long as building remained required grantor to supply heat or arrange for tenant of center storeroom to supply heat. Markides v. Soffer, 172 Pa.Super. 215, 218, 93 A.2d 99, 101.

Pa.Super.1949. Quot. in sup. Contract giving broker right to commission in the event defendant sold or exchanged his business regardless of who effected the sale was construed against the broker who supplied the contract, so that it did not entitle broker to commissions when defendant transferred business to partnership of which defendant and another were sole members. McElhinney v. Belsky, 165 Pa.Super. 546, 69 A.2d 178, 180.

Pa.Super.1947. Subsec. (a) and (c) cit. in sup. In construing a lease, the writing must be interpreted as a whole and the words given their ordinary, reasonable meaning so that where provision of an original lease for dispossession of tenant only on sale of property was abrogated in a subsequent renewal agreement by provision for cancellation at any time at option of either, the provision in the original lease for reimbursing tenant for amounts spent in repairing premises in event of dispossession through sale fell with the provision requiring sale of premises order to dispossess tenant. Paull v. Pivar, 161 Pa.Super. 233, 53 A.2d 826, 828.

Pa.Super.1943. Subsec. (a) quot. in sup. Where contract provided for extra payment if in excavating, "rock be found which would require removal by blasting," plaintiff was not entitled to recover extra compensation for rock removed by a jack hammer. Sgarlat v. Griffith, 152 Pa.Super. 233, 234, 31 A.2d 555, 556, reversed in, 349 Pa. 42, 36 A.2d 330 (1944) (ct. as sec. 235).

Pa.Super.1939. Clause (d) cit. in sup. The obvious purpose of an arrangement abrogating a written contract may be considered in arriving at the intention of the parties in sending mutual letters suspending the contract. Rothstein v. Jefferson Ice Mfg. Co., 137 Pa.Super. 298, 306, 9 A.2d 149, 153.

Pa.Northampt.C.P.

Pa.Northampt.C.P.1943. Clause (a) quot. in sup. A letter written within the period of limitations regretting inability to pay for slate sold and stating payment would be made as soon as the company was able was insufficient to toll statute of limitations, since ordinary meaning of such language was not a promise to pay. The Chapman Slate Company v. Pembroke,

Inc., 29 North. Co. Rep. 62, 67.

Pa. Erie C.P.

Pa. Erie C.P.1941. Cit. in sup. All clauses in contract relating to payment of commissions after termination of employment must be read together. Cremer v. Modern Woodmen of America, 42 Pa.D.&C. 686, 688.

Pa.Phila.M.C.

Pa.Phila.M.C.1941. Clause (e) cit. in sup. When bank required joined signature of husband and wife on loan secured by joint life insurance policy, it cannot thereafter assert it was unnecessary for wife to sign assignment of policy. Kensington Nat. Bk. v. Sampson, 42 Pa.D.&C. 406, 410, affirmed, 149 Pa.Sup. 43, 26 A.2d 115 (1942).

Pa.D. & C.

Pa.D. & C.1937. Clause (c) cit. in sup. A testator who authorizes his trustees to invest in "sound and substantial securities" thereby permits them to invest in common stocks. Donovan's Est., 28 Pa.D.&C. 93, 103, reversed and dismissed, 327 Pa. 496, 194 A. 746 (1937).

R.I.

R.I.1969. Cit. subsec. (d) in sup. This was a proceeding on a petition by a permanent receiver of a corporation for instructions. The agreement provided that an attorney would be paid for legal services on the basis of one half of the difference between the sale price of certain realty and $22,000, and that in the event that the property was leased the fee was to be one half the difference between the appraised value of the lease and $22,000 but in no event less than $4,000. The court held that the attorney was entitled to a fee based upon the sale of the property even though the sale did not occur within one year and even though the agreement contained a provision as to the fee to be paid in the event that the property was not sold within one year. Hill v. M. S. Alper & Son, Inc., 106 R.I. 38, 256 A.2d 10, 15.

S.D.

S.D.1955. Cl. (e) cit. in sup. Where parties entered into a contract of sale for farm equipment, the ambiguous description in the contract was subject to explanation by reference to inventory prepared during negotiation prior to agreement. Huffman v. Shevlin, 76 S.D. 84, 72 N.W.2d 852, 855, citing sec. 235 but cl. e probably intended.

Tenn.

Tenn.1983. Quot. in sup., subsec. (d) quot. in disc., com. (e) quot. in disc. When the city-operated high school that county students attended became overcrowded, the county promised to fund construction of a new school. As the contract provided, the city determined which school county students would attend, and the county paid their tuition. The county then filed suit seeking control of the new school. The trial court refused to admit evidence of the parties' intent, and held that the school's operation should be shared. The appellate court affirmed. This court reversed and remanded, stating that the cardinal rule of contract interpretation was to determine the intention of the parties. Here the parties' intentions, manifested by their conduct for a period of ten years, showed that they expected the city to administer the school. Additionally, language in the contract

implied that the parties intended that the city administer the school. Hamblen County v. City of Morristown, 656 S.W.2d 331, 334, 335.

Tenn.1978. Subsec. (c) cit. in sup. Plaintiff sought to recover taxes paid under protest, as a surety, to the state revenue commissioner. The surety paid under a bond required by statute to be posted by applicants for licenses to sell liquor by the drink. The commissioner asserted liability of the surety on taxes incurred by the taxpayer, not only in connection with operation of the lounge, but also in connection with its other business activities. The surety argued that its liability was limited to taxes incurred in the sale of alcoholic beverages on the premises. The chancery court found for the commissioner. Held: reversed and remanded. The whole contract must be considered in determining the meaning of any or all of its parts. Here the parties' purpose in entering into the contract was nothing more or less than compliance with the statute. Although, if one subparagraph of the statute authorizing sale of mixed drinks were lifted totally out of context, the bond could be construed as requiring payment of all taxes of whatever nature, the obvious purpose of the statute and the intent of the legislature was to require a bond whose obligation was limited to payment of taxes incurred in connection with the sale of alcoholic beverages for on-premises consumption. Aetna Cas. & Ins. Co. v. Woods, 565 S.W.2d 861, 864.

Tenn.App.

Tenn.App.2000. Subsec. (e) quot. in case quot. in disc. Landlord sued guarantors of a commercial lease, alleging that tenant was in default of its lease obligations, and that guarantors were liable for the unpaid rent. Trial court dismissed, holding that the guaranty lacked consideration, and that landlord had failed to offer proof regarding handwritten portions of the lease addressing the commencement date of the lease. This court reversed and remanded for a determination of the amount actually owed by tenant as of October 18, 1998, under the lease terms. The court determined that the parties interpreted the lease term as beginning on October 18, 1995; therefore, defendants' obligation as guarantors for the first three years of the lease term continued through October 18, 1998. Galleria Associates, L.P. v. Mogk, 34 S.W.3d 874, 877.

Tenn.App.1986. Quot. in disc., subsec. (d) cit. in disc., com. (e) quot. in disc. A general partnership organized a limited partnership to buy land and offered for sale to prospective limited partners shares in a piece of property, for which they received promissory notes secured by a trust deed. The limited partners brought a deficiency judgment action against the general partnership when the property was foreclosed upon. The trial court awarded the limited partners summary judgment. Reversing and remanding, this court held that the limited partners were liable for a pro rata contribution toward the principal, since it was within the contemplation of the parties when they signed the partnership agreement. Appling v. Ellendale 122 Property, 718 S.W.2d 261, 267, 268.

Tex.Civ.App.

Tex.Civ.App.1973. Subsec. (e) cit. in sup. The plaintiff contractor brought this action against defendant bank for the amount due on a parking lot and bank construction contract, and the bank brought a cross-action against plaintiff and plaintiff's surety for plaintiff's breach of contract warranties as to the parking lot, asking for replacement costs of the parking lot plus interest. On plaintiff's appeal from a judgment for defendant on the cross-action, the court affirmed, and held that the letter agreement calling for correction of defects in the parking lot did not modify the original contract which contained a one-year warranty, in view of the express provision in the agreement that the bank did not waive any of its rights under the contract or the performance and payment bonds. The court also held that the construction placed on the letter agreement by the parties themselves supported this conclusion. Lebco, Inc. v. MacGregor Park Nat. Bank of Houston, 500 S.W.2d 698, 703, refused no reversible error.

Tex.Civ.App.1934. Cit. as inapplicable. A written contract providing a commission shall be paid the manager of a cotton farm "on every bushel of seed sold" includes every sale made by the employers, and is not restricted to sales to the general public. Birk v. Jackson, 75 S.W.2d 918, 921, error dismissed.

Utah

Utah, 1980. Cit. in case cit. in ftn. in sup. The plaintiff and her seven adult children executed an agreement whereby the plaintiff agreed to convey certain property to three of her sons, as trustees of a revocable trust, for her use and benefit during her lifetime and for distribution to the children upon termination. Subsequently, the plaintiff revoked the trust agreement. One son, the defendant herein, filed a notice of claim of interest in the property, and the plaintiff brought this suit. The agreement had provided for remuneration to the defendant son for his custodianship and for improvements he had made to the property. The plaintiff argued that her revocation of the trust had the effect of revoking the agreement. The lower court found that the agreement was valid. This court stated that when construing and giving effect to written documents, the first source of inquiry is within the documents themselves, which must be looked at in their entirety, in accordance with their purposes, and all parts of the documents should be given effect insofar as that is possible. The revocable trust document expressly recited that it could be revoked at the will of the settlor, whereas the agreement did not so provide. The major purpose of the agreement was to see that the mother would have recourse to the property to provide for her during her life. The finding of the trial court, recognizing the claim of the defendant son as set forth in the agreement, was affirmed. Larrabee v. Royal Dairy Products Co., 614 P.2d 160, 163.

Utah, 1977. Cit. in ftn. in sup. Plaintiff sued the defendant school board for damages which resulted when the board construed plaintiff's resignation from coaching duties as a termination of plaintiff's employment contract. The court held, in deciding whether the parties intended the contract to be severable as to teaching and coaching duties, that although payment for these duties was apportioned as to each within the contract, other evidence regarding plaintiff's duties, representations on an employment application, and the contracts the parties had signed, established that the parties did not intend the contract to be severable. Brown v. Bd. of Ed. of Morgan County School Dist., 560 P.2d 1129, 1131.

Utah, 1977. Subsec. (d) cit. in ftn. in disc. A bank, which had made loans to a corporation, which was unable to meet its obligations and filed petition in bankruptcy, brought an action against the guarantor, who had been an officer and principal owner of the corporation when the bank began to make advances on the loan. Judgment was entered in favor of the bank, and the guarantor appealed, arguing that he should not be bound since, when he signed the agreement, he was agreeing only to become a guarantor in the future and his liability was contingent on the bank's notification to him that monies were being advanced and his acceptance of those advancements. The court affirmed, rejecting appellant's arguments. Looking to the language of the agreement and the circumstances surrounding it, the court found evidence that the parties intended a present and binding guarantee of the loan when the agreement was signed. Zions First Nat. Bank v. Hurst, 570 P.2d 1031, 1033.

Utah, 1973. Cit. in ftn. in sup. The plaintiff, lessor of a gravel pit, brought an action to have the lease declared invalid, to restrain the removal of gravel, and for damages. On plaintiff's intermediate appeal of a recall of an order granting a temporary injunction, the court affirmed interlocutory findings of fact, conclusions of law and judgment which declared the lease agreement to be voidable. The court held that the evidence supported a finding that the lease as proposed by defendant lessee was unacceptable, and that the option whereby the lessor was permitted to purchase lessee's equipment was agreed to as part of a one single package transaction, and that the written lease was invalid. Furthermore, the trial judge acted within his prerogative in ruling that the implied lease should be regarded as one from year to year. The case was remanded for further trial and final determination of the remaining issues. Thomas J. Peck & Sons, Inc. v. Lee Rock Products Inc., 30 Utah 2d 187, 515 P.2d 446, 448.

Wash.

Wash.1966. Cl. (c) quot. in sup. Where an insured sued an insurer for compensation for mental sickness requiring regular psychiatric care and attention, and the insurer disclaimed liability because of clause in the insurance policy excluding payment for "treatment of mental derangement or sickness requiring rest care," the insured was entitled to be reimbursed.

Other clauses in the policy dealt with single separate subjects and so the clause in question was interpreted as only dealing with a single subject, and a reasonable interpretation was preferred over one giving the policy little or no effect. Hunt v. Occidental Life Insurance Company of Cal., 68 Wash.2d 394, 413 P.2d 349, 351.

Wash.1965. Cl. (b) cit. in sup. The defendant signed 2 notes as "guarantor" and as "guarantor only." The holder of the notes brought this action without bringing an action against the maker of the notes. The court held the signature constituted an absolute guarantee where the words showed no other condition than default of the maker of the notes and that statutes concerning persons bound as sureties did not apply to a guarantor of payment, therefore, he was liable. Amick v. Baugh, 66 Wash.2d 298, 402 P.2d 342, 346.

Wash.1954. Cl. (c) quot. in sup. Where subcontractor initiated action against general contractor to recover difference in cost between metal lathe which subcontractor was required to use and the gypsum lathe which contractor permitted him to use, action was dismissed because work to be done in such manner was not additional work required under subcontract. Brown v. Poston, 44 Wash.2d 717, 269 P.2d 967, 969.

Wash.1949. Sub. (a) quot. in sup. In action for $500 per month damages as called for by contract which defendant allegedly breached by engaging in business within area prohibited by contract, trial court's determinations that 500 feet as used in contract referred to walking route rather than straight line and that clause setting damages at $500 per month was a penalty rather than a valid attempt to determine damages in advance were erroneous. Mead et al. v. Anton et al., 33 Wash.2d 741, 207 P.2d 227, 232, 10 A.L.R.2d 588.

Wash.1948. Quot. in sup. in diss. op. A specific provision of local labor union's constitution that no amount should be drawn from union treasury without consent of majority of union members at meeting thereof controlled general powers, given to president of international union by constitution thereof, to supervise local union's affairs, so that local union had right to fix its officers' salaries without international union's approval or consent. Washington Local Lodge No. 104 v. International Brotherhood, etc., 28 Wash.2d 536, 189 P.2d 648, 662, 663.

Wash.1942. Clause (c) cit. in dissent in sup. In considering nature of contract as to whether it is guaranty or indemnity, all writings should be considered. Sherman v. Western Const. Co., 14 Wash.2d 252, 260, 127 P.2d 673, 677.

Wash.1940. Clause (c) cit. in sup. A clause in a promissory note detailing how the interest is to be computed must be read as part of the note. Sibbald v. Chehalis S. & L. Ass., 6 Wash.2d 203, 206, 107 P.2d 333, 334.

Wash.App.

Wash.App.1976. Subsec. (c) cit. in sup. In this action brought by the lessor's trustee for specific performance of a lease, the appellate court affirmed the trial court's denial of specific performance and award of damages, holding that the adequacy of the legal remedy in damages precluded action in equity for specific performance. The court also held that the trial court had properly measured plaintiff's damages as the difference between the present value of the property with the lease and the present value of the property without the lease, and that the fact that the lease was subject to a permit for remodeling did not create a condition precedent which would permit cancellation of the lease where the lessee made no attempt to obtain said permit. Washington Trust Bank v. Circle K Corp., 15 Wash.App. 89, 546 P.2d 1249, 1252.

Wash.App.1975. Subsec. (c) cit. in sup. in ftn. The plaintiff vendors brought an action against the defendant purchasers and builders to enforce the terms of a contract. The vendors and the purchasers had entered into a conditional sales agreement in 1965. The contract provided for the release of individual deeds to each lot upon payment of installments with interest, with

the condition precedent that streets, sewers, and other improvements be completed. The contract also provided that if the purchasers failed to make any of the payments or perform any of the covenants, the plaintiff could elect to sue for damages or forfeit the purchasers out of the contract. In 1969 the parties to the 1965 agreement entered into a contract with the defendant builders, and the purchasers and builders agreed to provide a performance bond for the installation of streets, sewers, and water. The 1969 contract provided that the 1965 agreement was to remain in "full force and effect except as modified herein." The purchasers defaulted on the 1965 contract and vacated the property. The vendors then made a demand on the surety and the builders to comply with the 1969 contract. The trial court held that the defendants were entitled to a dismissal of the action, as a matter of law, since the purchasers' forfeiture was equivalent to a performance, and the vendors were entitled to only one performance. The appellate court affirmed, holding that the 1965 and 1969 contracts, as well as the performance bond, were to be construed together as a whole. The court held that the vendors' forfeiture of the purchasers' interest was equivalent to performance, and operated to discharge the builders as well as the purchasers. The discharge of the builders and purchasers, as principals, in turn discharged the surety on the performance bond. The court went on to hold that the provision in the 1965 agreement, that the prevailing party would be awarded reasonable attorney's fees if any action were brought to enforce the agreement, was incorporated by reference into the 1969 agreement and was binding upon all of the parties. Turner v. Wexler, 14 Wash.App. 143, 538 P.2d 877, 880, 881.

Wash.App.1969. Cit. subsecs. (c)(d)(e) in sup. The plaintiff-tenant sued his landlord for cancelling the tenant's lease under a "recapture clause." The clause had been modified by another agreement. The landlord, however, could have rescinded the modification agreement at any time while the plaintiff made large improvements in the premises, but remained silent until the project was completed. The court held that the landlord had waived his right to rescind by his silence. Prager's Inc. v. Bullitt Company, 1 Wash.App. 575, 463 P.2d 217, 221.

W.Va.

W.Va.1939. Clauses (a) and (c) cit. in sup. A contract which states that a natural gas development company shall drill wells radiating successively from a certain point so as to bring about a methodical development of the gas properties will not be construed so as to permit the development company to sink a well almost eight miles away. Henderson Development Co. v. United Fuel Gas Co., 121 W. Va. 284, 289 3 S.E.2d 217, 219.

Wis.

Wis.1967. Subsec. (c) cit. in ftn. in sup. The plaintiff assignee of a bond and mortgage given to secure the bond brought an action against the defendant mortgagor to foreclose the mortgage. The bond contained no language stating it was assignable, but the mortgage did. Finding that two instruments executed by the same parties concerning the same transaction should be construed together, the court held that the provision making the mortgage assignable made the bond also assignable, and a dismissal was reversed. Wipfli v. Bever, 37 Wis.2d 324, 155 N.W.2d 71, 73.

Wyo.

Wyo.1955. Cl. (c) cit. in sup. Chattel mortgage, which auto dealer gave to bank under "floor plan" arrangement, and subsequently executed instrument called "trust receipt and judgment note," wherein dealership promised to keep property as property of bank, would be deemed contemporaneously executed instruments and considered together, since lien under mortgage would not attach until acquisition of vehicle. General Credit Corp. v. First National Bank of Cody, 74 Wyo. 1, 283 P.2d 1009, 1021.

Wyo.1941. Clause (c) cit. in dictum. In interpreting instrument which was part of transaction, it should be read in connection with all other instruments pertaining to transaction. Houghton v. Thompson, 57 Wyo. 196, 208, 115 P.2d 654, 657.

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