MODEL, INTENTION, FAULT

THREE CANONS FOR INTERPRETATION OF CONTRACTS

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> . . . "the modern law of contract is essentially the creation of the nineteenth-century lawyers, and it is this law which their successors have to apply" . . . Cheshire and Fifoot, *The Law of Contract*.

By interpretation of contracts I mean the process of ascertaining, in a legal context, the meaning to be assigned to the words and other symbols forming the contract.[1]

[1] The American Restatement of Contracts gives the following definition: "The interpretation of words or other manifestations of intention forming an agreement, or having reference to the formation of an agreement, is the ascertainment of the meaning to be given to such words and manifestations." The definition of the present writer differs on several points.

In my definition interpretation is not, as in the Restatement, said to concern "manifestations of intention". The entering into an agreement may be compared to the handling of a machine. The parties A and B press various buttons and use several gears. The effect of this handling can be calculated with the help of a number of rules, one of the fundamental rules being that the design of the parties shall decide the operation of the machine. In a litigation the court has to examine how the parties have acted and to apply to their acts the rules concerned. The words and symbols which form the agreement will be a manifestation of the intention of the parties when both of them have had the same aim and have handled the machine properly. However, it is not permissible to presume that this must be the case. The rule that the design of the parties shall decide the operation is only one of several rules applicable, and the machine will sometimes operate even when the parties have handled it wrongly and give effect to words and other symbols irrespective of the intention.

Interpretation of contracts is here described as an activity in a legal context in order to make it clear that its practical purpose is to achieve the basis for the determination of the effect of the contract. The task of the lawyer is different from that of the historian or the social scientist. I cannot, therefore, share the approach of the Italian scholar Emilio Betti, who seeks to construct a general theory of interpretation common to all sciences. See Betti, "Zur Grundlegung einer allgemeinen Auslegungslehre" in *Festschrift für Ernst Rabel*, Vol. 2 1954, pp. 79 ff. Cf. his paper "Jurisprudenz und Rechtsgeschichte vor dem Problem der Auslegung", *Archiv für Rechts- und Sozialphilosophie* 40 (1952/53), pp. 354 ff.

It should also be mentioned that the term "interpretation" is here used in a rather broad sense. It covers, at least partly, what by many is called "construction of contract". In his admirable work *On Contracts* Corbin makes the following distinction (Vol. 3 1951, § 534): "By 'interpretation of language' we determine what ideas that language induces to other persons. By 'construction of the contract' . . . we determine its legal operation—its effect upon the action of courts and administrative officials." This distinction, realistic as such, has not been useful for my study. In the whole process of ascertaining the meaning of a contract legal standards are so closely involved that there seems to be no reason to cut out for special treatment what is merely "interpretation of language". Cf. Corbin, *op. cit.*, § 535 *in fine*. Indeed, the object of legal research is to study the legal rules and not the problems of semantics.

In the civil-law countries interpretation of contracts is considered—or at least was so in earlier days—a subject closely related to the question of what makes a contract legally binding. Interpretation of contracts and general principles concerning the formation and voidance of contracts should therefore be studied as a whole.

The uniform Scandinavian Contracts Acts which were enacted in the years 1915–1918 in Sweden, Denmark and Norway and later in Finland and Iceland are based upon the following theoretical scheme. A makes a promise which he gives as an offer to B, who accepts by making a corresponding promise to A. There are two promises, the offer and the acceptance, each of them binding the promisor unless he withdraws his promise through a message delivered to the other party before or at the same time as the promise was brought to his actual notice. It is an implied prerequisite that the parties to the contract shall have acted freely and not under compulsion. Consequently, the exchange of two promises creates the contract, provided that they cover one another and manifest the free will of the promisor.

Logically, one would expect that in the absence of any of these requirements there would be no contract. However, this is not always the case. Chapter 3 of the Scandinavian Contracts Acts deals with promises which are void or voidable. Only grave infringements such as duress involving the infliction of bodily harm or threat thereof give the promisor the option to rescind the contract on all occasions. In case of duress of a less serious kind, fraud, undue influence or mistake, the injured party must prove that the other party was guilty of the infringement or that he knew or should know about it. Promises by minors or persons under guardianship and by insane persons are dealt with in other statutory provisions. Here the knowledge of the other party as to the status of the promisor is in principle of no concern. However, as a general rule such contracts are voidable only, and the guardian has the power to approve contracts made by the person under his guardianship. On a point of great importance in this connection Scandinavian law is not quite clear. Probably the court would hold that a party who wants to rescind the contract because of mistake must prove that his mistake was fundamental, or in other words that he would have refused to enter into the contract on its present terms if he had been aware of the true facts.

Because of these bars on the right of rescission our ideal picture

of the contract has no counterpart in real life. On the contrary, it occurs every day that contracts are enforced in spite of the fact that they do not comply with the basic requirement of two promises covering one another and manifesting the free will of the parties. In all countries we meet the same phenomena that certain restrictions are laid upon claims of rescission. Generally the differences concern such details as what infringements upon the free will make the contract voidable or the requirement that the defect shall be known to the other party.

The existence of an enforceable contract is meant to be implied in the definition of interpretation which was given at the beginning of this study. As we now have seen, we shall have to deal both with contracts where the ideal prerequisites exist and with contracts which are enforceable in spite of a defect of one kind or another.

2. During the later part of the 19th and the earlier part of the 20th century German law and German legal thinking exercised a strong influence on Scandinavian law. Almost every Swedish professor of law had in his youth studied a year or so at a German university and the great German scholars of the 19th century were highly regarded in the Scandinavian countries. In the period before 1900, the year when the law was codified in the *Bürgerliches Gesetzbuch,* the German law was a derivate from classical Roman law known under the name of *Gemeines Recht.* According to the dominating opinion among the jurists the law of contracts of the *Gemeines Recht* was based upon the doctrine of intention, *Willenstheorie.* The promisor was held to be bound in so far as his promise was the true expression of his intention. Several critics, however, held that a promise should be considered enforceable by a *bona fide* promisee even though it was not carried by the intention of the promisor. Windscheid defended the prevailing doctrine in his famous paper "Wille und Willenserklärung", published in 1880.[2] A study of the Roman sources of law did not support the proposition that a *bona fide* promisee had the right to base a claim on a promise which did not represent the true intention of the promisor. The critics had urged the importance of strengthening good faith in exchange and

[2] Windscheid, "Wille und Willenserklärung", *Archiv für die civilistische Praxis,* Vol. 63 (1880), pp. 72 ff. This study was reprinted in *Gesammelte Reden und Abhandlungen,* 1904. The references in what follows relate to the reprint.

commerce. However, the point that weight should be attached to the reliance of the promisee was a double-edged weapon. One party was favoured at the expense of the other. Suppose that the needs of commerce in fact required the protection of the *bona fide* promisee. This was no argument for a change in the law, as a social need as such was not a source of law. Windscheid, however, made one concession to his opponents. According to Roman law a promisor might be bound by a promise without any intention of being so, but in this case it was further required that the promisor had caused the misunderstanding of the other party by his own fault.[3] Windscheid goes on to deal with the quality of the fault of the promisor. The contract is enforceable in case of wrongful intent *(dolus);* gross negligence should be considered equal to intent. Thus a person who signs a written document will not be permitted to use as a defence the argument that he did not read the document. In this case a promisor is obliged to perform a promise which he has never made.

In case of negligence other than gross *(culpa levis),* according to Windscheid, his opponents had crossed the boundaries of the *lex lata.* One could very well imagine that a legislator might prefer a provision that the promisor should be bound by his act, but certainly there were good reasons for other solutions, too. Be that as it may, the rules concerning indemnity for *das negative Vertragsinteresse,* a quasi-delictual institution, offered the only remedy at law.

Opinions differed sharply on the degree to which the law should be lenient to the promisee acting in good faith. In the last the more conservative group held the field. According to the *Bürgerliches Gesetzbuch,* sec. 119, a promise is voidable at the option of the promisor in case of a mistake even when the promisor has displayed gross negligence.

In the Scandinavian countries the same issue was being debated. The Norwegian scholar Platou,[4] who was the most prominent among the Scandinavian advocates of the doctrine of intention,

[3] Windscheid's study of the Roman texts ends in the following conclusion: "Der Umstand allein, dass der Empfänger einer Willenserklärung, welcher der wirkliche Wille nicht entspricht, in gutem Glauben angenommen hat, dass sie der Ausdruck des wirklichen Willens sei, reicht nicht hin, um ihm das Recht zu geben, die Willenserklärung als gültig zu behandeln; es muss hinzukommen, dass den Urheber der Willenserklärung eine Schuld treffe." *Op. cit.,* p. 362.

[4] *Forelæsninger over udvalgte Emner af Privatrettens almindelige Del,* Kristiania 1912–1914. See in particular pp. 175 ff., 213 ff.

took another view. The promisor should be bound by the contract in case of negligence, whether gross or slight. Only the "excusable mistake" affected the validity of the contract.

Most advocates of the classical doctrine of intention assumed as a logical implication that the same doctrine that explained the binding force of the contract should apply to *interpretation* of contracts, too. In his textbook *Lehrbuch des Pandektenrechts*[5] Windscheid declares that effect of the promises were determined "durch den Inhalt des in ihnen erklärten Willen" (by the content of the intention manifested in the promises), and adds: "Es ist die Aufgabe der Auslegung, diesen Willen festzustellen"[5a] (It is the aim of interpretation to establish that intention). It is important to note that Platou seeks to apply to interpretation his principle that only an excusable mistake is admissible as a defence against a *bona fide* promisee.[6]

3. As has already been hinted, there was a counter-proposal. This was that the meaning attached to the contract by the other party should decide its effect. This rule was considered a matter of social necessity because of the need for security in exchange and commerce. The Danish scholar Lassen expounds the matter with great intensity in his study *Vilje og Erklæring,* published in 1905. In Germany the doctrines mentioned had many names. Lassen coined the phrase "doctrine of reliance".

During his lifetime Lassen achieved the great success of having the doctrine of reliance which bore his hall-mark endorsed by the legislator in Denmark and Sweden, and later in Finland. The uniform Contracts Acts of those countries each contain in sec. 32, subsec. 1, the following provision:

[5] Windscheid, *Lehrbuch des Pandektenrechts* Vol. I § 84. The quotations are from the 4th ed., 1875.

[5a] The following illustrates Windscheid's way of reasoning with the aid of logic. In the earlier editions of *Lehrbuch des Pandektenrechts* he repeats a statement of Ihering that in contractual relations the promisee should be entitled to a claim based upon his contention of the promise. "Jeder Kontrahent hat ein Recht auf die Erklärung des anderen Kontrahenten in demjenigen Sinne, in welchem er sie auffassen musste." Having been criticized for making a concession to his opponents, Windscheid explicitly corrects himself in his study "Wille und Willenserklärung". He says that the statement quoted is correct in so far as the promisee's contention of the promise will decide his engagement. "Seine Auffassung des Sinnes der gegnerischen Erklärung entscheidet darüber, worauf *er,* aber nicht darüber, worauf *der Gegner* gebunden sei." See "Wille und Willenserklärung", p. 369. Windscheid makes the same correction in the later editions of his *Lehrbuch.*

[6] Platou, *op. cit.,* pp. 175, 321.

> A party who has made a promise which due to miswriting or other mistake has obtained a content other than that intended is not bound by its content, if the promisee knew or had reason to know of the mistake.

As the legislative history clearly indicates, this provision was supposed to justify a conclusion *e contrario*. A mistake is as a rule no excuse when the other party does not know, nor has reason to know of the mistake.[7]

Lassen and other advocates of the doctrine of reliance emphasized that the distinction between their doctrine and the older doctrine of intention was a fundamental one. However, this supposition is hardly correct. Both doctrines rely upon the same principle, i.e. that the will of the promisor has a creative force. For this reason the new doctrine should properly be considered a complement to rather than a substitute for the doctrine of intention. On the face of it the new doctrine deals solely with the special situation that a promise due to a mistake does not manifest the true intention of the promisor. It should further be observed that its supporters had in mind only sales, debts, and other commercial transactions or, broadly speaking, cases where a bargaining is involved. In the Scandinavian countries it has never been argued that the doctrine of reliance should apply to gifts or gratuitous agreements.

4. Lassen, with the majority of the supporters of the doctrine of reliance, uncritically followed Windscheid's line of thought that the principle deciding the effect of the contract should also apply to the determination of its meaning. But starting as they did from another point of departure they reached a conclusion different from that of Windscheid. The passages of Windscheid quoted earlier should be compared with the following passage from Lassen's *Haandbog i Obligationsretten. Almindelig Del,* of 1892:

> The object of interpretation of promises is to find out what the promisee has reasonably taken as being intended by the promisor on the basis of the promise and in view of the circumstances under which the promise was made. (P. 245.)

In Sweden it is sometimes held that the doctrine of reliance

[7] A reservation should be made on this point. Although the Norwegian Contracts Act has the same provision as the Contracts Acts of the other Scandinavian countries, it was not the intention to endorse the doctrine of reliance.

should apply to interpretation of onerous agreements within the fields of property and of commercial law. Here special weight should be attached to the meaning which a reasonable promisee gives to the promise. In its report on the law of wills the Swedish Law Revision Committee has supported this opinion with all its authority. In comparing wills with transactions *inter vivos* the Committee[8] makes the following statement:

> The latter (transactions *inter vivos*) form a part of the daily exchange of commodities and for the preservation of faith and of the feeling of security in exchange and commerce it is necessary when determining the effect of the promise to pay attention to the meaning which the other party has with good reason read into it. To a great extent the task is not to find out what the promisor truly intended but to determine how its meaning reasonably might be understood.

5. A new idea was launched: that the objective character of the promise should be decisive. Some scholars held that this *doctrine of objectivism* should be part of the general theory of the law of contracts, others focussed their attention on the field of interpretation. In Germany events took the following turn. The doctrine of intention was left uninfringed as a theory on the creative force of the promise but had to yield to the doctrine of objectivism in matters of interpretation of contracts.[9] In the Scandinavian countries, on the other hand, interpretation has not, as in Germany, been emancipated from the general theory of the enforcement of contracts.

Danz is the best known of the German scholars who have dealt with the problem of interpretation in this period. His study *Die Auslegung der Rechtsgeschäfte* (1st edition 1897, 3rd edition 1911)

[8] "Lagberedningens förslag till lag om testamente", *S.O.U.* 1929: 22, p. 204. See also Björling and Malmström, *Lärobok i civilrätt,* 15th ed. 1958, p. 179. In the earlier editions of this textbook, first published in 1910, and used by the first-year students since that time, there was no clear statement that the doctrine of reliance should apply to interpretation of contracts. To Björling, the original author, this was most likely a matter of course. For the latest expression of the same opinion see Conradi in *Sv.J.T.* 1959, pp. 33 f.

[9] Interpretation is dealt with in two sections of the Bürgerliches Gesetzbuch; sec. 133 contains a provision on promises in general and sec. 157 one on contracts. According to prevailing opinion these rules do not endorse any particular doctrine. The two sections run as follows:

Sec. 133. "Bei der Auslegung einer Willenserklärung is der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks zu haften."

Sec. 157. "Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern."

is frequently quoted even today. According to Danz the doctrine of intention as a theory on the effect of the contract has no counterpart in real life. It often happens that a contract is enforced in spite of the fact that it does not express the intention of the promisor for the simple reason that the party does not make use of his option to discharge the contract *(Anfechtung)*.[1] The contract gains its binding force not by the intention of the parties but by its own content determined according to objective norms. When the parties disagree as to its content the court should not try to delve beneath the surface of the facts in order to unveil the "inner will" of the promisor. In the third edition of his study Danz says that instead of this the court should substitute two reasonable men for the parties and ask what meaning they would give to the acts which formed the contract, and what they would have performed in a similar case ("sondern er [der Richter] setzt anstelle der Parteien zwei verständige Menschen und fragt, wie diese das Verhalten, welches die Willenserklärung bildet, aufgefasst, gedeutet hätten; was diese im gleichen Fall geleistet hätten").[2]

The supporters of the doctrine of objectivism attached much weight to sociological considerations. For them, too, security in exchange and commerce was the central issue. The German lawyer F. Leonhard[3] makes the following point. According to the doctrine of reliance *(die Eindruckstheorie)* the promise is looked upon from the aspect of the promisee. However, this is as narrow an approach as that of the doctrine of intention that regard should be paid solely to the interest of the promisor. In between these two there is only one proper line, the line in the middle, that the promise as such shall decide. ("Zwischen beiden kann nur die Mittelansicht, dass die Erklärung selbst entscheidet, die richtige Grenze bilden.")

The best known of the Scandinavian advocates of the doctrine of objectivism, Stang,[4] returns again and again to the question of the effect of mistake. He was well aware of the differences between his doctrine and the doctrine of reliance, but at the beginning he smoothed them over. In both camps all agreed

[1] Danz, *Die Auslegung der Rechtsgeschäfte*, 3rd ed., pp. 24 f.
[2] Danz, *op. cit.*, pp. 78 f.
[3] Leonhard, "Die Auslegung der Rechtsgeschäfte", *Archiv für die civilistische Praxis*, Vol. 120 (1922), pp. 100 f.
[4] See in particular Stang, *Om Vildfarelse*, 1897, "Viljesdogmet" in *T.f.R.* 1905 (reprinted in *Fra spredte retsfelter* [I], 1916), "Ord og hensigt" in *N.Rt.* 1911, pp. 657 ff., *Norsk formueret* 1911, 3rd ed. under the title *Innledning til formueretten* in 1935.

upon essential points. On his side the Danish scholar Lassen treated Stang as an ally. But in the third edition of his *Innledning til formueretten,* 1935, Stang made a clean sweep. The doctrine of reliance, he says, had been useful in the battle against the dogma of the creative force of the will of the promisor, but now it had served its purpose and should be abolished.[5] In the interest of the promisor the promise should not be given another meaning than the promisor had intended. On the other hand, one had to consider the interest of the promisee that regard should be paid to his expectation. Stang repeats Leonhard's argument. The law ought to balance in its scales the interests of the contending parties. Disputes should be settled in favour neither of one nor of the other. The promise as such offered the point of departure. The Norwegian Knoph[6] and the Dane Fr. Vinding Kruse[7] should be mentioned among other Scandinavian writers thinking along these lines.[8]

The same statement applies to the doctrine of objectivism as to the doctrine of reliance. It is a complement to rather than a substitute for the doctrine of intention. The advocates of the doctrine of objectivism recognize, too, the principle *falsa demonstratio non nocet.* Provided both parties have had a common intention, this should prevail even if they have used the words in a meaning different from the usual one. Danz concentrates his study wholly upon the situation where each party has had his separate intention, which he claims should decide the meaning

[5] Stang, *Innledning til formueretten,* 3rd ed. 1935, p. 256.

[6] Knoph, *Norsk arverett,* 1st ed. 1930, pp. 172 f.

[7] See particularly Fr. Vinding Kruse, *Retslæren,* Vol. I, 1st ed. 1943, pp. 250 ff.

[8] The Danish scholar Ussing has written a well-known textbook on contracts *Aftaler,* 1st ed. 1931. Ussing's opinion is hard to grasp. Certainly he rejects the doctrine of intention both as a theory on the binding force of the promise and as a description of Danish law. He states, too, that interpretation should be objective. See *Aftaler,* 1st ed., p. 11. But in the second edition of his *Aftaler* Ussing makes in another connection a statement which seems to indicate his adherence to the doctrine of intention. He presumes that the intention of the promisor should prevail: "What is promised depends upon the content of the promise made. And its content is probably just what a reasonable man would put into it when it was made." In the third edition we find the same statement.

The Norwegian writer Arnholm has declared that he is in favour of the principle of objective interpretation. However, Arnholm should not be classed as a supporter of the doctrine of objectivism. His methods are not to be compared with those of Stang and other writers of the old school. The author of the present paper acknowledges his debt to Arnholm, for several of the critical remarks made below have already been put forward by Arnholm or are implied in his exposition. See Arnholm, *Alminnelig avtalerett,* Oslo 1949, particularly pp. 52 ff.

of the contract. However, the doctrine of objectivism is not to be compared with the doctrine of reliance on the point that it should concern only promises not manifesting the true intention of the promisor. The idea is rather that the search for the true intention should be pushed into the background and that the court should rely upon the concrete facts.

Among the Scandinavian writers Stang has delved deepest. On making a closer examination of his writing it will be found that the doctrine of objectivism contains the following items. Every word has an objective meaning of its own. For language is "a recognized system of symbols where each symbol has a definite meaning to everybody who commands the language. It is this common stock which makes a language. The individual deviations from what is generally recognized are not parts of the language—they will become this if they are recognized by a great number of people."[9] Stang also has in mind different legal norms, on the one hand, general standards of interpretation, some of them originating from Roman law, and on the other, principles and evaluations applicable to special categories of contracts. The principle that interpretation should be against the party choosing the words of the contract furnishes an example of the first group of rules. According to Stang this principle implies that in case of doubt a contract drawn up by one party should be interpreted against him.

6. I am now going to confront the various doctrines with the legal rules they aim at describing or explaining. I propose to make this confrontation in two steps, taking first situations where a "meeting of minds" exists or is supposed to exist, and secondly situations where this is not the case, or with the words of the Swedish Contracts Act, sec. 32, situations where the promise "due to miswriting or other mistake has obtained a content other than that intended". But even at this stage it should be mentioned that for the second category of situations the question will be reformulated in order to correspond more closely to real life than the picture presented in legal writing and in the text of the statute.

The first type of situations seems to offer no complications, since all agree upon one very essential point: that what both parties have intended should decide the content of the agree-

[9] See particularly Stang, *Innledning til formueretten*, 3rd ed. 1935, pp. 250 f., 445 ff.

ment. However, we will look at these situations more closely. The scheme of the Scandinavian Contracts Acts implies that in adjudicating a case concerning the interpretation of a contract the court must examine the promise of each party. The court follows first one line then another, ending up with a statement that both lines coincide or that they diverge. The method applied to interpretation of such a unilateral act as a will should therefore apply even to interpretation of contracts as long as we are concerned with the first step of our confrontation. As stated by the Swedish Law Revision Committee[1] the interpretation of wills is the search for "the meaning given to the words of the will by the testator himself". Let us examine two hypothetical wills.

I. I declare as my last will that at my death my property shall pass to my wife.

II. I declare as my last will that at my death my property shall pass to my wife for her life.

On the face of it, the only distinction between the two wills are the words "for her life" added to will No. II.

Suppose that nothing is known of the intention of the testator except what can be found out from the language of his will.

A study of the text of the Swedish Code of Succession upon Death, which incorporates the earlier statute of wills, further of the legislative material and the practice of the courts before and after the enactment of the statutory provisions concerned, demonstrates that generally the position of a testator's heir is classified under one of the following heads: (*a*) full ownership, (*b*) free possession of the estate, (*c*) *fideicommissum* for life, (*d*) lease, and (*e*) right of a beneficiary of revenues. In case (*a*) the heir has the right to dispose of the estate for life or at death without any restrictions. At the decease of the testator's heir the estate will pass to the latter's heirs as will the rest of his property. Consequently, the family of the testator has no claims. In case (*b*) the testator's heir has the right to dispose of the estate for life, but not at death. He has therefore the power to sell both chattels and real property and to consume the revenues, but he is not entitled to dispose of the estate in his will. The state of law corresponds to the situation described in the Code of Succession upon Death, Chap. 3, concerning the right of the surviving spouse. In case of intestacy she takes, if the marriage is childless, the whole estate with freedom to make all dispositions *inter vivos*. However, at the

[1] S.O.U. 1929: 22, p. 205.

death of the surviving spouse the heirs of the first deceased will take a share of the estate. In cases (*c*), (*d*) and (*e*) further restrictions are laid upon the heir's capacity to dispose of the estate.

A Swedish judge seeks to classify the will which is being tried under one of the above-mentioned five categories. A phrase or an expression in the will before him will be read in the same way as the same or a similar phrase was read in earlier cases. Of the two hypothetical wills the first one will probably be classified under the heading full ownership [category (*a*)], the second under the heading free possession of the estate [category (*b*)].

A number of decisions by the Supreme Court will furnish the best arguments in favour of the suggested classification of will No. I. In 1936 N.J.A. 201, 1939 N.J.A. 270, 1951 N.J.A. 705[2] the Swedish Supreme Court has held that the surviving spouse should be the full owner of the estate. In the will the testator had declared that the spouse should "have as an owner" all the property of the spouses, that she should "possess and dispose of the common property of the spouses", or that she should "with unlimited right of disposal have and possess" the estate without any provision in the will as to how the estate should be disposed of at the death of the surviving spouse. It is open to doubt whether the words "shall pass" in our hypothetical will correspond to the words "have as an owner" etc. in the cases cited. The courts in their opinions have attached special weight to the fact that the wills were lacking in provisions on the succession upon the death of the surviving spouse. On this essential point our hypothetical will No. I corresponds completely to the wills earlier tried by the courts.

Arguing in favour of the proposition that our hypothetical will No. II should be classified under the category free possession [category (*b*)], I quote another set of Supreme Court decisions, 1897 N.J.A. 267, 1901 N.J.A. 329, 1910 N.J.A. 115, 1933 N.J.A. 289. In these cases the courts had to try wills providing that the surviving spouse should have "unlimited right of disposal", be "the full owner" of the estate "during her lifetime" ("for life"). Evidently the theory has been that a provision in favour of the testator's heirs-at-law at the death of the surviving spouse is implied when according to the will the estate is to belong to the other spouse only during her lifetime.

[2] Cf. 1930 N.J.A. 197, 1949 N.J.A. 176.

The process of interpretation of a legal instrument is comparable with the sorting of the harvest in an orchard. The sorter has to determine the kind and grade of each fruit and he thereby takes as models a number of categories recognized earlier.

We have chosen two simple cases to demonstrate what actually happens. It was presumed that nothing was known about the intention of the testator except for the information transferred by the language of his will. However, the classification of a certain instrument does not only require a comparison of its language with the language of other similar instruments tried by the courts earlier. If a transaction is embodied in a written document, it is true that the document is the primary source of information. This rule demands special observation when it is required by statute that the transaction should be in writing. However, we have in Sweden no direct counterpart to the Anglo-American parol evidence rule. The surrounding circumstances may serve as aids to interpretation although they should be graded as second-hand information. Probably it is correct to say that in Swedish law the burden of proof lies on the party who claims that the testator gave another meaning to his will than that regularly attached to its language.

The number of models and the shape of each model are not fixed once and for all. In course of time new models are created and old ones reshaped. One of the members of the Swedish Supreme Court, Mr. Justice Beckman, has dissented in a number of decisions concerning wills granting "full ownership" [category (*a*)]. He has also expressed his view in writing on several occasions.[3] As indicated before, a testator's heir who has been granted "full ownership" has the right to dispose of the estate without any restrictions for life and for death. Mr. Justice Beckman agrees with the majority of the Swedish bench that a surviving spouse, as testator's heir, should have the power to provide for the estate in her will. In case of intestacy, however, the heirs of the surviving spouse should not, as the majority hold, be the sole heirs. According to Beckman the heirs of the first deceased and the heirs of the surviving spouse should each take their share, as is the case when the surviving spouse holds the property as "free possessor" of the estate [category (*b*)].

One could very well imagine that the divergence of opinion about this matter would end with the splitting up of category

[3] See especially Beckman, *Svensk familjerättspraxis*, 1954, pp. 169 ff.

(*a*) in two sub-categories, $(a)_1$ and $(a)_2$. To category $(a)_1$ the ruling of the majority would still apply. The heirs of the first deceased should be excluded from the estate of the surviving spouse, but to category $(a)_2$ one should apply the solution, suggested by Mr. Justice Beckman, that in case of intestacy the heirs of the first deceased should take their share. In Sweden it very often occurs that two spouses make a joint will, each providing that the other shall be his heir. One could refer wills made by the deceased alone to category $(a)_1$ and joint wills to $(a)_2$. It might be said that a spouse is willing to turn over his estate to the heirs of his spouse at her death if he has made a will in her favour without demanding a similar privilege in return and that, on the other hand, a spouse who is a party to a joint will is less inclined to exclude his own heirs from a proper share at the death of his spouse.[4]

It would be easy to produce a number of other examples of how new models have been created. Every lawyer can recall from his own field of experience examples where a clause in a contract, which at first was considered particular to the circumstances of the case, has later served as a model for the classification of other contracts. Indeed, the freedom of contract implies that the parties shall have the power to design their obligations as they like. It is only in fields such as the law of bills of exchange and cheques that we find a different picture. Originally these models were created by private parties. However, today those instruments are standardized and the statute book presents a list of models which is in principle complete.

7. Suppose that the court, working along these lines, comes to the conclusion that the parties, when they entered into the contract, assigned different meanings to its terms or that they never made up their minds about what should happen in the actual situation under dispute. Here the second phase of the process of interpretation will start. However, there is no sharp line of demarcation. The evaluation of the proof is a matter involved in the first phase. As mentioned before, according to the law of wills the burden of proof lies on the party claiming that the testator gave another meaning to his will than that regularly attached to its wording. This rule applies to other transactions as well. It is

[4] It should be mentioned that the present writer is not expressing any opinion of his own, or trying to forecast the future. He is merely seeking to indicate a possible turn of events.

presumed that the transaction should be classified in the same way as similar transactions tried before. When one statement stands contrary to the other there are two ways out. The court may choose to believe that one of the parties has told the truth and that the statement of the other is a lie, or anyhow is less credible. The alternative is to admit frankly that, although the disputed point was considered by the parties during the bargaining, there was no "meeting of minds" or that the parties did not contemplate the situation in the case.

It is easy to understand that the court might prefer to find the meaning of the contract with the help of the method applicable to the first phase of the interpretative process. It is safer to make a halt before the line demarcating the second phase. Once the line has been crossed the ground will crumble beneath the judge's feet. The scholars disagree and present various solutions which to all appearances are incompatible with one another. Indeed, the situation of the judge is even worse than one might expect. As will be demonstrated later on, in some situations the doctrines simply cannot be brought to function. Consequently, a judge will find no relief by joining one of the opposing camps.

It sometimes happens that a "meeting of minds" is presumed even when the judge is aware of the fact that the parties assigned different meanings to their contract or that they did not contemplate the situation under dispute. Such a fiction may disguise the fact that the judge has acted upon his discretion. There is the possibility, too, that he has applied some standard of interpretation. Whichever may be the case it is unfortunate that the process should be kept in the dark. The parties should have the right to know the reasons behind the decision of the court.

8. In what follows the author will examine how the doctrine of intention and the doctrine of reliance function in case of *dissension,* i.e. the situation where each of the parties gives his own meaning to the contract. In Continental legal writing the question is put as follows: What is the impact of the fact that one of the parties to the contract, A, has made a promise which does not reflect his true intention? One has in mind a case where A has stated something plainly and clearly enough but has meant something else—for example, in a letter he has written 10 crowns when he intended to write 11 crowns. In a unilateral act single words or expressions have been used incorrectly. The individualistic approach is to be observed. You have before your eyes only one

of the two promises required for the formation of the contract. The reason for this one-sidedness is probably that in origin both the doctrine of intention and the doctrine of reliance apply to the discharge of void or voidable contracts. What makes a contract void is a defect in the consent of one of the parties because of duress, fraud, undue influence, mistake, or other reasons of that kind. The following point should be noted, too. It is taken for granted that the promise as such (the words and the other symbols forming the promise) have a definite meaning which can be stated objectively by an unbiased observer. Consequently this was the situation considered: A meant to say *p*, but he happened to say *x*. *p* and *x* are different entities.

However, in disputes on the interpretation of contracts regularly one will meet another situation. The parties, A and B, have entered into an agreement which they have made in writing. Both parties have used the same words, and each of them considers that the language used by him manifests his true intention. An instructive example is furnished by a case tried by the Swedish Labour Court, 1934 No. 7. In the collective agreement there was an additional price for "interior cleaning of boilers, containers etc." The employer was willing to pay the price when the operator had to enter into the boiler and perform his work from the interior. The union claimed the price for cleaning of interior parts even if the work could be performed by a man outside the boiler.

The situation is this:

A and B have said *x*.

A meant *p*, B meant *q*.

The author wishes to draw the reader's attention to the fact that the significance of the symbol *x* is not given beforehand. The legal equation will be solved when we find the answer to the question whether *x* is equal to *p*, or to *q* (or possibly to some other entity).

The content of the doctrine of intention must be fixed as to one point before it is applied to our example. According to Windscheid and Platou[5] the promisor will be bound by a promise which does not manifest his intention in case the promisor has been at fault. However, the two scholars disagree upon the quality of the fault. I prefer to follow Platou, who holds that even negligence less than gross is sufficient to deprive the promisor of the excuse that he has made a mistake.

[5] See *supra*, pp. 182 f.

Confrontation. Case No. 1

One of the parties, A, has acted as a reasonable man, the other party, B, has behaved negligently.

THE DOCTRINE OF INTENTION. Our eyes are fixed upon the person who has made the promise.

A intended that *x* should signify *p*. He had no reason to believe that B intended that *x* should signify *q*.

It is true that B intended that *x* should signify *q*, but B had reason to believe that A meant *x* to signify *p*. In this case B is negligent when he uses *x* to signify *q*, and his mistake is no excuse.

Outcome. *p* will be the meaning given to the contract.

Translation. B's fault has the effect that A's version holds good.

THE DOCTRINE OF RELIANCE. The point is what meaning the person to whom the promise is addressed would reasonably give to it. In other words we hold the manifestation of the promisor before the eyes of the promisee. If the observations of the promisee are those of a reasonable man they will decide the effect of the contract. If this is not the case, one has the doctrine of intention in the reserve.

A was of the opinion that B intended that *x* should signify *p*. A had no reason to believe that B meant *q*. A, too, intended that *x* should signify *p*.

It is true that B intended that *x* should signify *q*, but B had reason to believe that *x* meant *p* in the eyes of A. Consequently B had not acted as a reasonable man. Therefore he is not entitled to claim the application of the doctrine of reliance.

Outcome. *p* will be the meaning given to the contract.

Translation. B's fault has the effect that A's version holds good.

Conclusion. If one of the parties has acted as a reasonable man, but the other has behaved negligently, both the doctrine of intention and the doctrine of reliance indicate that the dispute should be settled in favour of the former and that his intention should decide the meaning of the contract.

Case No. 2

Both parties, A and B, have acted as reasonable men.

THE DOCTRINE OF INTENTION. A intended that *x* should signify *p*. He had no reason to believe that B intended that *x* should signify *q*.

B intended that *x* should signify *q*. He had no reason to believe that A meant *p*.

A will be bound by the promise he expected to make, and B by the promise he expected to make.

Outcome. If you look at A's promise the meaning of the contract will be *p*, but if you look at B's promise its meaning will be *q*. There is no answer to the question which of the two versions holds good.

THE DOCTRINE OF RELIANCE. A was of the opinion that B intended *p*. A had no reason to believe that B meant *q*. A, too, intended that *x* should signify *p*.

B was of the opinion that A intended *q*. B had no reason to believe that A meant *p*. B, too, intended that *x* should signify *q*.

Outcome. A may base his claim upon the fact that he relied upon B's promise as meaning *p*. B may claim in his turn that he relied upon A's promise as meaning *q*. There is no answer to the question which of these two versions holds good.

Conclusion. Both the doctrine of intention and the doctrine of reliance refuse to function.

Case No. 3

Each of the parties, A and B, has behaved negligently.

THE DOCTRINE OF INTENTION. It is true that A intended that *x* should signify *p* but he had reason to believe that B meant *q*.

It is true that B intended that *x* should signify *q*, but he had reason to believe that A meant *p*.

Outcome. Most probably A would be considered bound by the meaning he intended to give to the contract. Correspondingly B should be bound by his meaning. In this case, too, it is an open question which version will hold good.

THE DOCTRINE OF RELIANCE. Neither of the parties has acted reasonably, neither is allowed to claim the application of the doctrine of reliance.

Conclusion. Both the doctrine of intention and the doctrine of reliance refuse to function.

The author expects the objection that he is fighting with phantoms, as in cases Nos. 2 and 3 there will be no contract. His answer is to refer to the introduction of this study. In the law of the Scandinavian countries and in the law of most other countries one meets contracts which have a defect regarding the consent of one or both of the parties but which are nevertheless enforceable and therefore possible objects of interpretation.[6]

[6] On case No. 3 Platou makes the statement that there is no contract,

As a second objection one might expect the proposition that although two promises are required to form a contract it is only one of them that counts in this connection. In that case the reasoning might proceed along the following lines. In the analysis of the formation of a contract one is supposed to start with the offer. According to the doctrine of intention the meaning conveyed to the contract of the offeror should prevail, and according to the doctrine of reliance one should ask: How did the offeree understand the contract? The author would answer the possible supporters of this objection by saying that the proposed solutions are not to be recommended. Too often the outcome will depend upon mere chance. The parties seldom attach weight to the question of who happens to be the offeror. Every layman would expect that in insurance contracts the insurance company is the offeror. However, this is generally not the case in Sweden, as the insured person has to apply for his insurance on a form distributed by the company. As far as is known the reasons behind this arrangement are purely practical. Thus the method is not applied because the doctrine of reliance is considered part of Swedish law and according to this doctrine the offeree should be in a favoured position. Further, one must bear in mind that often no one can tell who is the offeror, who the offeree. After a period of bargaining, with numerous projects, offers and counteroffers, a final agreement is reached which is fixed in writing and signed by the parties simultaneously.

Let us sum up the result of our confrontation. Both the doctrine of intention and the doctrine of reliance give the same solutions when one of the parties has acted as a reasonable man, but the other has behaved negligently. The version of the reasonable man holds good (case No. 1). If both parties have acted with reasonable care or have been guilty of negligence, neither the doctrine of intention nor the doctrine of reliance can be made to function. There is no answer to the question whether A's or B's version should hold good.

In this connection a few words should be added on the example of the traditional aspect given in the introductory lines of this section. In legal writing generally, mistake is described as a situation where one of the parties has used in the wrong way an expression which in itself has a clear meaning. My example was

but he contradicts himself, for he mentions in the same context that a mistake does not affect the validity of a contract unless it is on a fundamental point and not due to negligence. See Platou, *op. cit.*, p. 221.

that the party wrote 10 crowns but intended to write 11. This situation, too, can be described with the help of our formula. "A and B have said *x*. A meant *p*, B meant *q*." We have here to deal with case No. 1, i.e. the case where one of the parties has acted as a reasonable man, the other has behaved negligently. To use arithmetical symbols against a clear convention must be considered negligence. The version of the person to whom the letter was addressed will hold good.

9. We have next to ask if the doctrine of objectivism is a better aid in cases of dissension. According to Danz the judge should substitute two reasonable men for the parties and ask what meaning they would give to the acts forming the contract. As far as I can see, this test will mean the same as the application of the doctrine of intention or the doctrine of reliance. A reasonable man substituted for A, who knows about B's mistake, will try to remove the misunderstanding. The party who does not act like a reasonable man must submit to an interpretation in favour of the other party.

For the rest the advocates of the doctrine of objectivism refer to the language of the contract or to various legal rules such as general standards of interpretation or standards applicable to a special category of contracts. Later I will discuss in more detail the import of this description of the process of interpretation.

10. Windscheid considered the true test of a doctrine to be that it explained why a certain rule was part of the law. In other words a doctrine should concern the legal rule and its relation to the sources of law. With the help of the classical Roman law the German *Pandektisten* told the law of their own time, the *gemeines Recht*. The scholars held key positions and their endorsement of a legal rule was often decisive for its survival. This state of affairs is reflected in a statement often met that jurisprudence should be considered as a source of law, equal to the practice of the courts. Lassen, Danz, Stang and other scholars of the 19th or of the early 20th century made the same claims.

Today the legal researcher has another perspective of his work. He does not claim that his theories entitle him to tell what the state of law should be. It is up to the legislator or to the courts to make the choice between competing solutions. The legal scholar prefers the part of the adviser.

11. The policy of law is an important element of the doctrines discussed. The doctrine of intention puts in the forefront the idea that the individual has to consent before he submits to an obligation. The doctrine of reliance is said to be based on the principle that "regard should be paid to the security in exchange which is due to the fact that within the field of law of property one can rely upon promises".[7] The security in exchange is an important part of the doctrine of objectivism, too. As its name indicates, this doctrine even claims to hold the key to the golden chamber of true justice, a justice which is objective and not influenced by the interests of the parties.

For a doctrine of law to contain an element of policy is in my opinion no drawback as such. But on this point all three doctrines are shallower than should be permissible.[8]

The political aims just described are indisputable, for they all appeal to recognized social values. However, the actual problem of a given society is not to decide whether the freedom of the individual or the desire for security should be placed first on the scale of social values. Rather it is to bring those values into harmony. What should the individual pay in the interest of the security? In Scandinavian legal writing one often finds the statement that the desire for security should be given full consideration when ordinary transactions within the field of property are concerned but is of minor importance when we have to deal with such transactions as gifts and wills. I am not convinced that a proper compromise is to be reached with the help of so simple a formula as this. The soil is not the same in all parts of the field of the law of property. That the bill of exchange is a strictly standardized document is explained by the interest of security. But commercial instruments are not to be compared to ordinary debts, e. g., the buyers' duty to pay the selling price. For the rest such principles of law are generally too broad to be helpful when one comes down to the practical details of everyday life.[9]

It is more important to ask about the means of achieving security in exchange. The doctrine of reliance is based upon the postulate that people will rely upon promises for the only reason that promises are enforced exactly as they were understood by trustful promisees. As a programme of legal policy this is nothing

[7] Lassen, *Vilje og Erklæring*, p. 28.
[8] Cf. Arnholm, *op. cit.*, pp. 54 f.
[9] Cf. Hellner, "Legal philosophy in the analysis of tort problems", *Scandinavian Studies in Law*, Vol. 2, esp. p. 154.

but a demand for care in relation to the other party to a legal transaction. Thus the demand for care may be used as a substitute for the doctrine of reliance.

One relevant point has not been considered at all. That people should voluntarily perform their obligations is essential for the promotion of peace and security in social life. Education and private social control are factors of great importance. Probably compliance with legal obligations because of voluntary acceptance or extra-legal sanctions plays a much greater role than submission because of the fact that the individual wants to avoid the discomfort of being exposed to legal sanctions. A drafter should always bear in mind how important it is to win the individual over to free compliance.

12. A doctrine of law should meet certain requirements. First of all, it should describe the state of the law. If it does not take in all the rules concerned, it should designate the most important ones. It is an advantage if the doctrine is *open*. As the reader will find in what follows, this implies that the theory can be made, without reformulation, to cover many possible rules.

As mentioned before, there are two stages in the process of interpretation. During the first stage the court has to determine the meaning of the promise of each party, during the second it has to settle disputes on those points where the parties differ, either because each brought to the contract his own meaning or because they did not contemplate the situation under dispute.

As to the first stage, the doctrine of intention points to the fact that the parties to the contract have the freedom to form their obligations as they want. They may choose to use recognized models, they may create their own patterns. However, the contract is described from the promisor's angle only. The doctrine does not indicate that in the eyes of the judge the process of interpretation starts with a comparison of the contract on trial with other contracts, tried earlier, which may serve as models.

The author has demonstrated that during the second stage it is relevant to find out whether a party to the contract acted as a reasonable man or behaved negligently. On this point the doctrine of intention is a very poor instrument when it comes to description of the state of the law. The relevant fact that a negligent party may be bound by a promise which does not manifest his true intention stands as an exception to the main rule. In case there is a misunderstanding and both the parties were reasonable

men or behaved negligently, the doctrine indicates no solution at all.

The doctrine of reliance is no better as a descriptive instrument. On the face of it this doctrine has no application to the first part of the process of interpretation. But perhaps is it too much to say that the doctrine on this point is altogether void of content. It emphasizes that regard must be paid also to other aspects than the promisor's. As to the second phase of the process of interpretation, the doctrine of reliance has an advantage over the doctrine of intention because it indicates that a party to the contract should act like a reasonable man. On the other hand, it has its weak points. Its ways of thought are intricate and rather bewildering.

In section 8 of this paper the author applied the doctrine of intention and the doctrine of reliance to various situations arising in case of dissension. The behaviour of one party, A, was then compared to the behaviour of the other party, B. As mentioned before, this meant a reformulation of the issue. The approach of the advocates of those doctrines was more individualistic. The doctrine of intention and the doctrine of reliance have it in common that the court, when determining the effect of the agreement, is supposed to pay regard to the situation of one of the two parties only. According to the doctrine of intention the attention is focussed on the promisor, according to the doctrine of reliance on the promisee.

The Swedish Supreme Court decision in *Olsson* v. *Persson,* 1957 N.J.A. 69, gives a very instructive example of the working method implied in the doctrine of reliance. Persson was the owner of two parcels of pastureland which on the surveyor's map were marked "litt. Ga" and "litt. Fb". A heavy storm had caused serious damage to the woods of the district. Persson was an old man too weak to visit the distant parts of his estate and had to rely upon information from neighbouring farmers about what parts of the wood had been wrecked. Some foreign traders crossed the district hoping to buy at a bargain price. Persson had two traders as visitors at the moment when Olsson entered into the room and bid a price. In an oral agreement, later confirmed in writing, Persson sold to Olsson "storm-wrecked and sloping trees for a price of (35 thousand crowns) thirty-five thousand crowns". Persson claimed that he had intended to sell only the timber on litt. Ga, but Olsson argued that he had believed that the timber on litt. Fb was included in the agreement, too. In a majority

decision the Supreme Court held that the agreement had the meaning claimed by Persson. In its opinion the Court carefully examined Persson's behaviour to try to discover whether he knew or had reason to know of the discord between the parties. The principal part of the opinion reads as follows:

> Probably Olsson on his side conveyed to the agreement another and broader meaning than Persson. However, it has not been proved that Persson knew of this mistake on the part of Olsson. Considering particularly the situation under which the agreement was entered into, one cannot blame Persson for not paying attention to Olsson's understanding of the agreement and, in consequence thereof, for failing to inform Olsson of the mistake concerned.

Thus, in its opinion the Supreme Court states that Persson had acted as a reasonable man. But the Court does not so much as touch upon the question why Olsson's understanding of the agreement was not as reasonable as Persson's. Certainly the behaviour of Olsson—whether he acted reasonably or with negligence—should be a matter of equal impact with the behaviour of Persson. It is a serious objection that a doctrine is so narrow that questions of such relevance will fall outside the reasoning.

The doctrine of intention and the doctrine of reliance are narrow from another aspect, too. They are stereotyped with respect to the effect of the contract. A court may base its decision either upon A's or upon B's understanding of the contract. What is between those two extremes is not taken into account. The case of *Olsson* v. *Persson* may be used to demonstrate this point also. Persson believed that he had sold wrecked trees on litt. Ga for the price of 35,000 crowns, Olsson believed that the agreement included wrecked trees on litt. Fb as well. What was wrecked on the latter parcel had a value of 6,000 crowns. Whether one follows the ways of thought indicated by the doctrine of intention or the doctrine of reliance, it is out of the question to consider the possibility of settling the dispute with the help of a compromise by which each party bears a part of the loss. One should consider as an alternative that the court should order Persson to pay to Olsson half the difference, or 3,000 crowns. It is true that the German doctrine of an indemnity for *das negative Vertragsinteresse*[9a] might offer a remedy in some situations, but in the Scandinavian countries this solution has not been an accepted part of the pattern.

My observations on the doctrine of objectivism will not be

[9a] Cf. *supra*, p. 182.

as critical as those earlier made on the other doctrines. Danz should be credited with the merit of having emancipated the study of the process of interpretation from the doctrines concerning the formation of the contract and void or voidable contracts. However, we are on the wrong path if like Stang[1] we consider the language "a recognized system of symbols where each symbol has a definite meaning to everybody who commands the language". This assumption is correct so far as arithmetical symbols, measures, and other similar conventions are concerned. But we have to bear in mind that generally words are vague and that their meaning will be more precise only in a given context. The usage of the language varies from group to group. Further, we have to observe that the standard applicable to the author of a document is not necessarily the same as the standard applicable to the reader. Seller and buyer, shipowner and shipper, employer and employee, landlord and tenant have opposite views and often good reasons for understanding the same text differently.[2]

The doctrine of objectivism has the advantage of being more open than the two other doctrines in its description of the second phase of the process of interpretation. Danz's test with two reasonable men as substitutes for the parties to the contract indicates a matter of great concern, namely that the court has to try whether one or both of the parties have behaved negligently. When you meet in a legal context "the reasonable man", you have indeed before your eyes "the unreasonable man", i.e. a person who has not lived up to the standard required. The advocates of the doctrine of objectivism should be given credit, too, for the fact that they have called our attention to the import of various principles of interpretation, some of them general in character, others of concern to special categories of contracts. Such a concept as "the reasonable man" or its reflected image "negligence" will have a more precise meaning only when the behaviour of the party concerned is compared with patterns which are parts of legal norms.

Recently the observation has been made that the doctrine of intention and the doctrine of reliance were stereotyped with respect to their description of the legal effect of the contract. The court had to make a choice between the version of party A

[1] Cf. *supra*, p. 188.

[2] Cf. Glanville Williams, "Language and the Law", *The Law Quarterly Review*, Vol. 61, 1945, see particularly pp. 384 ff.

and the version of party B. No other alternatives were available. The doctrine of objectivism seems to be more open on this point, too. In the introduction to this study I mentioned Leonhard's argument that the doctrine of reliance was as narrow in its approach as the doctrine of intention, since it paid regard only to the interest of one of the parties. The doctrine of objectivism was supposed to offer something in between two extremes. One met the same argument in Stang's writing. This idea might have opened the gate to new paths. However, the advocates of the doctrine of objectivism seem to have been fenced in by the schemes offered by earlier doctrines. No one put forward for serious consideration the alternative that in certain cases a pecuniary compromise between the parties might offer a proper solution.

13. The present situation can be described as follows. The doctrine of intention, as we meet it in Windscheid's writing, was a method of telling what rules should be considered part of the law. In other words its purpose was to legitimate the existence of certain rules. The advocates of the doctrine of reliance and of the doctrine of objectivism had the same approach. These doctrines, too, concerned the proposal of certain rules and their relation to the sources of law. However, another element came to the forefront. I have in mind matters of legal policy. In the interests of security in exchange, certain new rules were propagated. The third function of a legal theory is the descriptive one. This function has always been a travelling companion of the others.

If one is of the opinion that a legal doctrine cannot serve as an instrument for telling the actual state of law and that the arguments presented in the earlier debate on legal policy are too broad to be of any use, then one has only the descriptive function left. The present writer holds that he has here proved the weakness of the existing doctrines as instruments of description. In his opinion the doctrine of reliance which is supposed to be generally recognized in his own country, Sweden, is poorer than the other two. The time is ripe, he thinks, for throwing it overboard, at any rate as far as the process of interpretation is concerned.

The person who rejects an old construction should have something to offer instead. However, it must be assumed that we have a core of legal rules, or at least a method of trial,

characteristic of the process of interpretation. If that process concerned only rules specific for each type of contract there would be no need for any doctrine of interpretation. Suffice it to say, then, that the traditional doctrines are not appropriate.

So far as I can judge, interpretation is a legal process in which a core of general rules is involved. Further, one should notice that up to a certain point the procedure is the same not only for contracts but for all kinds of legal transactions. It was fruitful to take examples from the law of will and testament in spite of the many differences on other points. Probably some rules of interpretation apply to all contracts, others to contracts within the field of the law of property, and others again to special categories of contracts such as contracts of adhesion.

The present writer is unable to propose a doctrine which, like the classical doctrines, can claim to comprise all the essential points in one simple formula. All I can do is to display some points which have been mentioned before, in the hope that other scholars will take up the subject for debate.

One point is that the law recognizes certain models. It is important to study the process by which such models are created. Nor should one forget the method of trial. We made the very simple observation that the court looks for recognized models and asks the question whether such a model can be applied or whether we have before us a fresh pattern designed by the parties themselves. What models the court has at its disposal is not a suitable subject for a general study on interpretation of contracts, as the situation varies from one category to another. This is probably true, moreover, with respect to the question of what should be required by parties who want to leave the traditional models aside and design their own patterns. Quite different aspects have to be considered in the case of an ordinary sale of a specific chattel from those that have to be considered in the case of a sale of generic goods between merchants, a sale of real property, a charter-party, a bill of lading, a collective labour agreement, a bill of exchange or a cheque. Sometimes one cannot expect that the same principles will apply to all contracts belonging to the same category but has to make new distinctions, such as the distinction between ordinary contracts and contracts of adhesion. However, on all occasions we have as a common denominator the freedom of the parties to choose between recognized models. The author suggests that the words *model* and *intention* may indicate the canons of interpretation now described.

Special attention should be paid to the situation when the parties attach different meanings to the contract. As demonstrated earlier in this paper, the leading principle is the same as within the law of torts, namely that of fault liability. The author has tried to prove that the doctrine of intention and the doctrine of reliance can both be translated into the same rule. In case of negligence on the side of one of the parties the other party's version will hold good. As already mentioned, a fault liability rule is implied in the doctrine of objectivism, too. The proposed canon of fault liability does not only possess the advantage of simplicity. It has a much wider field of view than the doctrine of intention and the doctrine of reliance, with their individualistic approach. The activity of both is before our eyes at the same time.

Further, the parallel with the law of torts indicates that one must also deal with situations where both parties have been negligent. The author will abstain from casting a vote in favour of some specific rule, as we are here concerned only with the descriptive function of a legal doctrine. Suffice it to say that the situation where there is negligence on both sides has not been sufficiently analysed in legal writing. In order to solve the problem, a Swedish court seems to apply the method of letting the most reasonable of the parties have all the favours. His version of the contract will hold. But is it not better to have a principle of apportionment as in the law of torts? Each party should make a sacrifice proportionate to his fault.

It should be mentioned that the concept of fault has the same function as in the law of torts. It serves as a general reference to rules concerning the standard required considering the category of contract and the facts of the case. It is an important task for legal research to discover what rules apply to the handling of the machinery of contracts. A great deal of work has been done within this field by the American scholars Williston and Corbin[3] and by the German scholar Raiser[4]—to mention a few names only. But much remains to be done.[5]

[3] Williston, *On Contracts*, revised edition, Vol. 3 1936, esp. secs. 601 ff., Corbin, *On Contracts*, Vol. 3 1951, esp. secs. 532–560.

[4] See L. Raiser, *Das Recht der allgemeinen Geschäftsbedingungen*, Hamburg 1935.

[5] The special problems which are to be met in contracts of adhesion have been thoroughly analysed by the Finnish professor Curt Olsson in his paper "Verkan av avtalsklausuler i standardformulär", The Reports from the 21st Conference of Nordic Jurists *(Nordiskt juristmöte)*.

The author has no formula to offer for the situation where a court has to enforce a contract in spite of a mutual mistake for which neither of the parties is to blame. One may raise the question whether any general principles are involved. That there are some standards applicable to certain categories of contracts is perhaps the most that can be said on this point.

As a conclusion to this study the present writer would suggest that the process of interpretation should be described as assorting contracts under recognized models, creating new models, and considering the effect of the intention of the parties and of the faults committed by them in handling the machinery of contracts.

Except for this the Scandinavian literature on the field is rather poor. Some writers, e.g. Hellner and the present author, have touched upon the problem of interpretation in studies on the law of insurance, the law of affreightment and the law of collective agreements. See Hellner, *Försäkringsrätt* 1959, pp. 66 ff., and of the present author's own writings his *Kollektiv arbetsrätt*, 3rd ed. 1958, pp. 120 ff.