Very Simple. Just Look at the Evidence! Interpreting Contradictions in Words and Figures in Legal Documents in Common Law Jurisdictions

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ABSTRACT

This article addresses a universal, rare, but serious question which has not been addressed in legal scholarship: how do we interpret contradictions in words and figures in legal documents? In drafting legal documents, human errors may manifest this contradiction. For instance, an obligation may be required "within *fifteen (30) days.*" This rare problem presents a legal issue for the interpreter who must decide in a way: either to pick the word or the figure or reject both. In some common law jurisdictions, there are legislation and rules which express preference for one over the other. This article critiques such legislation and rules and argues that legislating a superior term between words and figures forecloses proof of what the parties agreed—if there ever was an agreement between them in the first place. This article applies the widely adopted Orthodox Theory of interpretation and tests its efficiency in resolving the contradiction. This article then argues that this theory is inefficient in resolving the contradiction, identifying and arguing for an evidence approach in resolving words and figures contradictions.

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I. INTRODUCTION

The question to be addressed by this article is rare, but serious, especially for judges, considering that *generally* and *traditionally,* in common law jurisdictions, a judge's role is limited to interpretation—*jus dicere, et non jus dare*[1]—and about 90% of English judges' work involves interpretation.[2] A loan agreement could provide that payment should be made "within *fifteen (30)* days"[3] or that the principal sum due to the plaintiff is "One Million Seven Thousand and NO/100 ($1,700,000.00)."[4] The judge would then have to decide whether *fifteen* should prevail over *30*, or *$1,700,000* should supersede *One Million Seven Thousand.* The issue may be far more serious than presented, and the court could reject both in extreme circumstances.[5] For instance, in *Lim v. Francia,* the Supreme Court of the Philippines was faced with the most extreme case and had to reject both words and figures rather than formulate a theory of interpretation or adopt existing ones.[6] Lim and Francia were mayoralty

1. In the U.S., *see United States v. Butler*, 297 U.S. 1, 62-63 (1936) ("All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy."); Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L. FORUM 175, 178(2021); John B. Waite, *Performance of an Existing Obligation as Consideration for a Promise*, 16 MICH. L. REV. 182, 182 (1918). In India, *see* K. Jyotsna, *Judges Responsibility is to Interpret and Not to Make Laws: Critical Analysis Along With The Case Laws,* 27 SUPERMO AMICUS 1, 1 (2021). Under English Law, *see* Francis Bacon, *The Essays or Counsels, Civill and Morall, in* 15 THE OXFORD FRANCIS BACON 165 (Michael Kiernan ed., 2000).

2. *See* Johan Steyn, *The Intractable Problem of the Interpretation of Legal Texts*, 25**,** SYD. L. REV. 1, 5 (2003); EDMUND HEWARD, LORD DENNING, A BIOGRAPHY 62 (2nd ed. 1997).

3. Fetch Interactive Television, LLC v. Touchstream Techs., Inc., C.A. No. 2017-0637SG, 2019 Del. Ch. LEXIS 1, at *12 (Del. Ch. Jan. 2, 2019).

4. Charles R. Tips Family Trust v. PB Commer. LLC, 459 S.W.3d 147, 150 (Tex. Ct. App. 2015).

5. For example, the Supreme Court of the Philippines rejected both words and figures in a 1961 case. *See* Lim v. Francia, G.R. No. L-16566 (August 31, 1961) (Phil.), https://perma.cc/8QL7-86Y7.

6. *See id*. The court felt that this electoral matter was a serious matter and declined to adopt any theory or hold that words should prevail over figures. The court cited *Jose Parlade, et al. v. Judges Perfecto Quicho and Mateo Alcasid* and held that: "[i]n this connection, it is best to emphasize that the whole theory of the election law rests on the *prima facie* presumption of honesty and integrity of the board of inspectors . . . *So, the law gives the court of first instance power* to recount the votes cast in the precinct . . ." *Id.*

candidates for Quezon Province.[7] There were nine (9) precincts.[8] Lim had a total of 643 votes in 8 precincts, and the electoral body recorded "one hundred seven (117)" in the 9th.[9] Francia had a total of 760 votes in the nine (9) precincts.[10] If the words were held to prevail in that circumstance, that is, 643 was added to "one hundred seven," Lim's votes would be 750, ten (10) less than that of Francia.[11] If figures were held to prevail, that is, 643 was added to "117," Lim and Francia would have each had 760 votes, making it a tie.[12] The court rejected both words and figure.[13]

Generally, under common law, courts are not "Santa Claus" and have no jurisdiction extending or expanding the boundaries of contracts, facts, claims, or reliefs beyond what the parties have indicated to them.[14] A corollary justification for this rule could be that the court is expected to act only on evidence presented before it,[15] or because the court as an "adjudicatory" body, should not descend into the "arena."[16] In common law jurisdictions, while courts possess discretionary powers,[17] these

7. *See id.*
8. *See id.*
9. *Id.*
10. *See id.*
11. *Id.*
12. *Id.*
13. *See id.*

14. A court is generally expected to be neutral. *See* Paris R. Baldacc, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court,* 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659, 662 (citing Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAMILY CT. REV. 36, 41 (2002)). ("Despite the modern trend toward a more active role for judges, adversary theory requires the judge to remain *passive* until the conclusion of the advocates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of the proceedings . . . [this passivity is] to ensure that the trier will remain neutral until he renders his decision . . . [and neutrality is to ensure] the integrity of adversarial deliberations . . .").

15. This is true in many common law jurisdictions: *See* Wallersteiner v. Moir [1974] 3 All E.R. 217 (United Kingdom); *see also* DHL v. Eze-Uzoamaka (2020) LPELR-50459 (CA) (Nigeria); *Ochonma v. Unosi* [1965] 1 NMLR 321 (Nigeria); Eagle Pack (Nig.) Ltd. v. A.C.B. Plc. [2006] 19 NWLR (Pt. 1013) 20 (Nigeria).

16. *See* Jack B. Weinstein, *The Roles of a Federal District Court Judge*, 76 BROOK. L. REV. 439, 439 (stating that "[u]nder Article III of the United States Constitution, the federal *nisi prius* judge's primary responsibility is to end disputes that can be decided using legal criteria, within the trial court's jurisdiction as set by Congress and the Constitution . . ."). The UK High Court removed an arbitrator in Sierra Fishing C. v Hasan Said Farran because he appeared to "descend into the arena or to take sides." Sierra Fishing C. v Hasan Said Farran [2015] EWHC 140 (Comm); *see also* Randeano Allen v R [2021] JMCA Crim 8 (Jamacia); MTN Nigeria Communications Ltd v. Sadiku [2013] LPELR-21105(CA) (Nigeria).

17. For U.S. decisions, *see* Keen Inc. v. Gecker 264 F. Supp. 2d 659, 663; Kaufman v. S & C Corp., 171 B.R. 38, 40-41 (S.D. Tex. 1994). For UK decisions, *see* Hanson v Radcliffe Urban Council [1922] 2 Ch. 490, 507; Markwald v. Attorney General [1920] 1

powers have generally been said not to extend to the *reformulation of contracts*[18] or prayers[19] on behalf of a party, though, courts of equity may *rectify documents.*[20] Thus, if a legal document contains a contradiction in words and figure, a decision would have to be made—either words prevail or figures prevail or both are rejected. Courts typically do not fold hands to novel matters.[21] In deciding which term prevails, courts generally have two options: (1) the court may use legislation (if available); or (2) the court may select one of the theories of interpretation which have been formulated.[22]

This article contends that neither option, *simpliciter*, is likely to result in the right decision unless an evidence-based approach is adopted—although there may be a presumption, *but only a rebuttable presumption,* favoring the superiority of words. Importantly, the contradiction problem is more manifest where it is contained in a legal document, rather than in a court's judgment or order.[23] Where the contradiction appears in a court's

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Ch. 348. For Nigerian decisions, *see* Kudoro v. Alaka [1956] SCNLR 255; Omotayo v. Ogundipe [1994] LPELR-13756(CA).

18. *See* Nemec v. Shrader*,* 991 A.2d 1120, 1128 (Del. 2010) ("We cannot reform a contract because enforcement of the contract as written would raise 'moral questions'"); *see also* Union Bank (Nig.) Ltd. v. Ozigi [1994] 3 NWLR (Pt. 333) 385 (Nigeria); Bookshop House v. Stanley Consultants [1986] 3 NWLR (Pt. 26) 87 (Nigeria); African Reinsurance Corp. v. Fantaye [1986] 1 NWLR (Pt. 14) 113 (Nigeria).

19. *See* Afekhuai & Anor v. Odubona [2017] JELR 37755 (CA) (Nigeria).

20. *See* George Keeton, *Rectification of Instruments for Mistake in England*, 14 N.Y.U.L.Q. REV. 319 (1937). This distinction between contracts and documents is necessary. A court which sets out to pick the superior term will, in fact, be rectifying the documents, rather than amending the contract. *See* Mackenzie v. Coulson [1869] L.R. 8 Eq. 368. *But see* Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd, [1953] 2 QB 450 ("Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly . . .").

21. Robert S. Lancaster, *Judge Learned Hand and the Limits of Judicial Discretion*, 9 VAND. L. REV. 427, 429 (1956) (writing about Judge Learned Hand: "The judge now, he felt, must adapt himself to a changed society and act as mediator between the forces clamoring for recognition and the old seeking to maintain their ancient dominance[.]").

22. For discussion on some theories of interpretation in common law jurisdictions, *see generally* Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950); Arthur L. Corbin, *Interpretation of Words and The Parol Evidence Rule*, 50 CORNELL. L. REV. 161 (1965); J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU. L. REV. 81 (2000); Patrick S. Ottinger, *Principles of Contractual Interpretation,* 60 LA. L. REV. 767 (2000).

23. In this article, the term "legal document" excludes judgements and orders of courts, but includes contracts, agreements, and all other documents with legal implications. "Legal document" was originally known as "instrument" and may be defined as "any writing intended to have legal effect." *See* Graham McBain, *Legal Documents – Modernising the Formalities,* 8 INT'L L. RES. 1, 28 (2019) (not including court's judgement or order). McBain states that the hierarchy of legal documents in descending order are:

I. [R]oyal [C]harter
II. [I]nstrument of [R]ecord (a registered legal documents)

judgment or order, a common law rule,[24] known as the *Slip Rule,* may be applied to such situation. The rule is described as "a procedure through which a decision or order may be corrected by the court if it contains an unintentional error or omission."[25] This rule is based on the belief that "it is natural that human beings commit error, including judges [who] are not angels but men."[26] In the United States, Federal Rule of Civil Procedure 60(a) operates as the *Slip Rule* and is intended "to correct typographical and transpositional errors, computational errors, misnomers, and incorrect dates."[27]

Accordingly, where a contradiction in words and figures appears in a judgment or order, the *Slip Rule* may properly be invoked to resolve the inconsistency. This is because the court is uniquely positioned to know its own intention, and where the matter is on appeal, the appellate court can readily ascertain the trial judge's intention from the record as a whole. This situation is exemplified in the Nigerian case of *Afekhuai & Anor v. Odubona*.[28] The trial court awarded "the sum of ₦100,000,000 (One Million Naira)… as damages for trespass."[29] On appeal, the Appellant contended that the trial court had awarded "₦100,000,000" rather than

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III. [D]eed
IV. [S]pecialty
V. [I]nstrument under seal (i.e. a sealed legal document);
VI. [I]nstrument under hand (i.e. a signed legal document);
VII. [P]arol (i.e. oral, verbal) declaration (unilateral) or agreement (bilateral).

Id., at 1–2; *see also* PETER BUTT & RICHARD CASTLE, MODERN LEGAL DRAFTING: A GUIDE TO USING CLEARER LANGUAGE 222 (2nd ed. 2006) ("…four types of private legal documents, all commonly encountered in legal practice: leases, company constitutions, wills and conveyances.").

24. *See* Theodore A. Donahue, *A History and Interpretation of Rule 60(a) of the Federal Rules of Civil Procedure,* 42 DRAKE L. REV. 461, 464–69 (1993) (discussing the common law history of this rule).

25. Eka NAM Sihombing & Cynthia Hadita, *The Ideal Mechanism of Clerical Errors Resolution in the Legislation in Indonesia: Comparison with the United Kingdom, United States and Singapore,* 23 J. PENELITIAN HUKUM DE JURE 273, 277 (2019).

26. Unini Chioma, *Whether a Party in Disobedience to an Order of Court can be heard by the Court*, THE NIGERIA LAWYER (May 1, 2018), https://perma.cc/V6H2-LDTJ; *see generally* Axis M&E UK Ltd & Anor v Multiplex Construction Europe Ltd [2019] EWHC 169 (TCC) (UK); NKT Cables A/S v SP Power Systems Ltd [2001] All ER (D) 74 (UK). For a comprehensive jurisprudential analysis of judges' human nature, *see generally* Jerome Frank, *Are Judges Human?* 80 U. PENN. L. REV. 17 (1931).

27. Donahue, *supra* note 24, at 470. There is however, a limitation to the rule. The limitation is that the rule cannot be used to correct errors of substance, nor in an attempt to add to or detract from the original judgment or order made. *See* R + V Verischerung AG v Risk Insurance and Reinsurance Solutions [2006] EWHC 1705 (Comm) (UK); Enterprises Bank Limited v. Deaconess Florence Bose Aroso & Ors [2011] LPELR-24720 (SC) (Nigeria); Soil and Contracting Pty Ltd v Boban Pty Ltd [2014] WASC 402 (Australia).

28. *See* Afekhuai & Anor v. Odubona [2017] JELR 37755 (CA) (Nigeria).

29. *Id.*

"One Million Naira."[30] Applying the *Slip Rule*, the Court of Appeal rejected the Appellant's view, and found that from the record, the trial judge must have intended "One Million Naira" and not "₦100,000,000."[31]

However, a rule like the *Slip Rule* is ill-suited for resolving contradictions in legal documents. While the *Slip Rule* is appropriate in the context of judicial judgments or orders—where its purpose is to ensure that the written decision accurately reflects the court's true intention[32]—it does not serve the same function in relation to legal documents. Apart from the fact that the rule is traditionally applied to judgments and orders, unlike judges, parties to a legal document may have no single, ascertainable intention capable of being objectively discerned.[33]

Part II of this article considers the application, limitation, and danger of legislation and rules placing words over figure or *vice versa*. Part III discusses the inadequacy of the Orthodox Theory, a widely adopted theory of interpretation of contract by common law courts, in resolving the contradiction.[34] Part IV makes a case for the incorporation of an evidence approach with a presumption of the superiority of words in resolving the contradiction. Part V concludes this article.

II. APPLICATION, LIMITATION, AND DANGER OF LEGISLATION IN RESOLVING THE PANDORA'S BOX

In some common law jurisdictions, adopting a written rule on which term prevails is thought to be the haven.[35] In the United States, for instance, the Uniform Commercial Code (the "UCC"), which has been adopted by several states, provides that "if an instrument contains contradictory terms . . . words prevail over numbers."[36] In Nigeria, another

30. *Id.*

31. *Id.* The reasoning of the Court of Appeal was that at the trial court level, the Appellant had claimed the sum of Ten Million Naira. The court felt that the trial judge could not have awarded N100,000,000, since doing so would have meant awarding that which was not claimed. *See id.*

32. Donahue, *supra* note 24, at 470 ("The purpose of Rule 60(a) is to permit the correction of discrepancies in the original record or judgment in order to make them 'speak the truth' and 'reflect what was intended at the time of trial.'").

33. *See* Curtis, *supra* note 22, at 410.

34. The theory of law which searches for the intention of the parties in interpretation was named the "orthodox theory" by Charles Curtis. *See id.* at 407, 408. This theory seeks to search for the intent of the parties. Ottinger states that this theory is "the most fundamental tenet regulating the interpretation of contracts." Ottinger, *supra* note 22, at 766.

35. For instance, the U.S. Uniform Commercial Code adopts this by expressly providing that words prevail over figures.

36. 6 Del. C. § 3-114 (". . . words prevail over numbers."). *See* Tex. Bus. & Com. Code Ann. § 3.114 (applying to negotiable instruments); Guthrie v. Nat'l Homes Corp.,

common law jurisdiction[37]—though not explicitly legislated by the National Assembly[38]—the courts' rules express preference for numbers over words.[39] But the majority of rules and decisions in most common law jurisdictions tend to support the superiority of words over figures.[40] Generally, the proposition that words should prevail over figures mostly rests on the belief that words "more likely represents the parties' true intentions than writing numbers."[41] This article critiques this proposition.

There are some seeming benefits of legislation and rules expressing preference for either words or figures. For instance, legislation makes the already tasking duty of interpreting the contradiction facile. Also, legislation, according to legal positivism, tends to create certainty in law.[42] Nevertheless, the dangers in this approach outweigh its benefits. First, legislating a superior term in this case will underscore the *Strict Theory of Law* which has been criticized by several scholars.[43] In the U.S. states, which have generally adopted the provisions of the UCC, the courts have been stern and strict in the application of the rule, even in the presence of

394 S.W.2d 494, 495 (Tex.1965) (applying the previous rule to non-negotiable instruments).

37. *See generally* E.S. Nwauche, *The Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana,* 25 TUL. EUR. & CIVIL L. FORUM 37 (2010).

38. The National Assembly is the highest legislative body in Nigeria and is akin to the U.S. Congress. *See generally* Hassan A Saliu & Adebola Bakare, *An Analysis of The Role of The National Assembly in Nigeria's Fourth Republic and Its Possible Reform,* 20 STUDIA POLITICA: ROM. POL. SCI. REV. 271 (2020).

39. *See, e.g.*, Lagos State Civil Procedure Rules, Order 17 Rule 2(2) ("Pleadings shall be divided into paragraphs and numbered consecutively, with dates, sums and numbers expressed in figures.").

40. This is especially so in the U.S. due to the provision of Uniform Commercial Code. *See* First State Bank v. Keilman, 851 S.W.2d 914, 921 (Tex. Ct. App. 1993) (writ denied); Duvall v. Clark, 158 S.W.2d 565, 567 (Tex. Civ. App. 1941). The Philippine Supreme Court appeared to suggest that ordinarily, words prevailed over figures in *Lim v. Francia*. *See* Lim v. Francia, G.R. No. L-16566 (August 31, 1961) (Phil.), https://perma.cc/8QL7-86Y7.

41. LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-114:5R (3d ed. 2003).

42. *See* Anthony D'Amato, *Legal Uncertainty,* 71 CAL. L. REV. 1, 39 (1983) ("The age of positivism, dating from Bentham and Austin in the early nineteenth century, has attempted to combat legal uncertainty by adding more and more statutes and regulations to the body of law while accepting a permissive attitude toward the jurisdiction of courts.").

43. *See, e.g.,* Roscoe Pound, *A Theory of Judicial Decision for Today,* 36 HARV. L. REV. 940, 940 (1923) ("In a developed legal system when a judge decides a cause he seeks, first, to attain justice in that particular cause, and second, to attain it in accordance with law – that is, on grounds and by a process prescribed in or provided by law. One must admit that the strict theory of the last century denied the first proposition, conceiving the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitively prescribed as such or exactly deduced from authoritatively prescribed premises.").

evidence to the contrary and when such strict application would lead to an absurdity.[44] For instance, in *France v. Ford Motor Credit Co.,*[45] "'8,000.00' . . . '(Eight dollars and 00/100)'" was written on a check to a creditor.[46] The court held that "eight dollars" was the appropriate sum to be paid.[47]

In *Guthrie v. National Homes Corp*.,[48] the Supreme Court of Texas considered a case where an instrument stated that the obligor would pay " '$5,780.00' . . . (Five Thousand Eighty and 00/100 Dollars)'".[49] "Five Thousand Eighty Dollars" was held to prevail over $5,780.00.[50] Also, in *First State Bank v. Keilman,*[51] where the interest rate was stated to be "[t]wo percent (12.5%)", the Texas Court of Appeals held that "two percent" prevailed.[52] In *Charles Tips,* before the Texas Court of Appeals, the defendant argued that, notwithstanding that the written rules provided that words prevailed, the courts might commit manifest error if it insisted on strict application, for instance, a scenario in which "scrivener's error replaced 'million' with 'billion'."[53] In such situation, the defendant argued that the discrepancy would be too great and absurd not to consider extrinsic evidence of what the parties had intended.[54] The court rejected this view and insisted on strict application of the law:

> "It does not matter that the discrepancy between the words and numbers here is a large one. Neither Section 3.114 nor Texas case law makes a distinction on the basis of the size of the obligation or the significance of the conflict in terms. Indeed, at least one court has applied the logic of *Guthrie* in holding that words controlled over numbers when a discrepancy was even larger relative to the transaction size than it is here. In *In re Regency Chevrolet, Inc.,* 122 B.R. 60 (Bankr.S.D.Tex.1990) (mem.op.), the bankruptcy court for the Southern District of Texas held that the terms "Seventeen Thousand Five Hundred

44. For some cases on this, *see generally* VAL RICKS, THE STORY OF CONTRACT LAW: IMPLEMENTING THE BARGAIN (2017).

45. *See* France v. Ford Motor Credit Co., 913 S.W.2d 770, 770 (Ark. 1996).

46. *Id.* at 772.

47. *Id.*

48. *See* Guthrie v. National Homes Corp., 394 S.W.2d 494, 494 (Tex. 1965).

49. *Id.* at 495.

50. *Id.*

51. *See* First State Bank v. Keilman, 851 S.W.2d 914, 914 (Tex. Ct. App. 1993).

52. *Id.* at 919.

53. Charles R. Tips Family Trust v. PB Commer. LLC, 459 S.W.3d 147, 155 (Tex. Ct. App. 2015).

54. *See id.*

> Dollars ($10,000.00)" and "Seventeen Thousand Five Hundred Dollars ($14,000.00)" in two different leases created two monthly obligations of $17,500.00 each."[55]

Although in *Charles Tips*, one of the court's reasons for not considering extrinsic evidence was because PBC commenced the action by way of summary judgment, "[A] court may not consider extrinsic evidence about a contract's meaning unless the contract is ambiguous. PBC does not contend that the documents are ambiguous; any material ambiguity in the contracts would have made summary judgment for PBC improper for that reason alone."[56] Notwithstanding, the court's approach has been criticized as it re-emphasizes the *Strict Theory of Law*.[57] In the UK, the rule disallowing extrinsic evidence in summary judgment hearings has been relaxed.[58] In fact, there can be cross-examination in summary judgment hearings in the English courts, provided that the hearing is not a mini-trial.[59]

Secondly, legislation presupposes one of the terms is superior to the other, without any (scientific) proof of the validity of this proposition. In common law jurisdictions where words have been legislated to be superior, the basis for this proposition is that words are more likely to capture the parties' intent. The view has been expressed with respect to the UCC, which places words over figures, that "words are preferred because writing words more likely effects the parties' true intentions than writing numbers."[60] However, this view is challengeable, and one can disagree, rightly. For instance, Ken Adams provides an interesting illustration: ". . . [I]f I say one thousand dollars ($2,000), there's a decent chance that I'll focus on the more eye-catching digits and not notice that the words state an incorrect number."[61] If parties have their focus on the "more eye-catching digits," there is a likelihood that they had seen the digits and had intended it.[62] Yet, there is also no certainty that they intended the digits rather than the words. There is a third possibility that the parties, in fact,

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55. *Id.* at 154-155.

56. *Id.* at 155.

57. Ken Adams, *The Texas Court of Appeals on Words-and-Digits Inconsistency*, ADAMS ON CONTRACT DRAFTING (Jul. 2, 2015), https://perma.cc/E47F-JC6C.

58. For example, Civil Procedure Rule (CPR) 32.6 provides that a party can rely on oral evidence in summary judgment hearings if the court permits.

59. *See* Swain v Hillman [2001] 1 All ER 91.

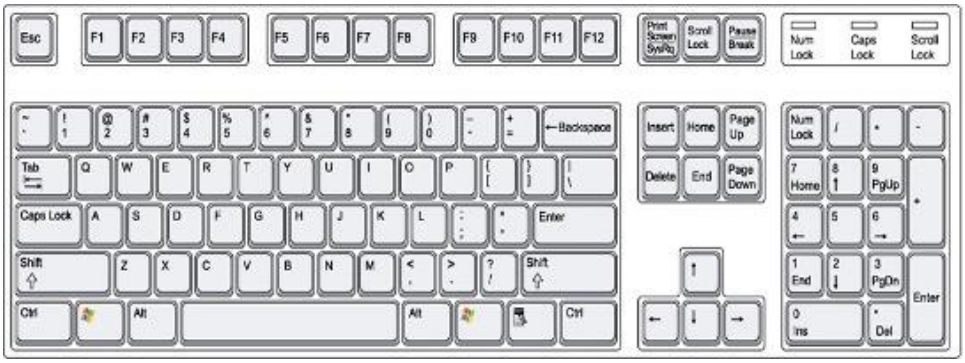
60. WILLIAM D. HAWKLAND & LARY LAWRENCE, HAWKLAND & LAWRENCE UCC SERIES § 3.114:1 (1999).

61. Adams, *supra* note 57.

62. *Id.*

had no intention,[63] or that their intention cannot easily be discerned in the absence of further proof.

Because computer keyboards are used to type most documents in the modern era, many spelling errors—either "typographical" or "cognitive"—are generated during typing.[64] Thus, a document may provide for "Eighti (8) days." Since there is no such word as "Eighti," the trouble in interpreting this would be which word prevails: "eight" or "eighty"? A court may be tempted to choose "eight" over "eighty." It may be argued that "Y" comes right after "T" on the widely used computer QWERTY keyboard,[65] and as such, the "I" must have been a typographical error, since "I" is farther from "T" than "Y." Yet, the court would be wrong to pick one over the other in the absence of extrinsic evidence that a QWERTY keyboard was used, rather than a DVORAK keyboard.[66] In the case of a DVORAK keyboard, it may be argued that "eighty" is the right word, since "I" is far from "T" but just below "Y" and that the intention must have been to type "Y" and not "I." Yet, this is also not certain.



This is a standard "QWERTY" keyboard curled from Heggan.[67]

63. *See generally*, Curtis, *supra* note 22.

64. Yukino Baba & Hisami Suzuki, *How are Spelling Errors Generated and Corrected? A Study of Corrected and Uncorrected Spelling Errors Using Keystroke Logs*, *in* PROCEEDINGS OF THE 50TH ANNUAL MEETING OF THE ASSOCIATION FOR COMPUTATIONAL LINGUISTICS 373 (2012) (stating that "when we type text using a keyboard, we generate many spelling errors, both typographical (caused by the keyboard layout and hand/finger movement) and cognitive (caused by phonetic or orthographic similarity)").

65. *See* Koichi Yasuoka & Motoko Yasuoka, *On the Prehistory of QWERTY,* 42 ZINBUN 161, 161 (2011) ("QWERTY keyboard is widely used for information processing nowadays in Japan, United States, and other countries.").

66. The Dvorak keyboard is also found in the U.S. and is said to be "included with most US-based computer operating systems today." HHKB Team, *The Dvorak Keyboard Layout: Benefits and History Explained,* HHKB (Aug. 28, 2024), https://perma.cc/3Y9E-44LU.

67. *Introduction to the Keyboard*, Margaret E. Heggan Free Public Library**,** https://perma.cc/79BA-PNAS (last visited Mar. 14, 2026).

This is a standard "DVORAK" keyboard curled from Cassingham.[68]

The UCC provides that in a case where there is an ambiguity in the words, figures should *control* the ambiguous words.[69] So, if a document provides for "Eighti (8) days," based on this provision, 8 days will prevail. But what if the document provides for "Eighti (24) days"? It does not seem that the figure (24) would be able to control the ambiguous word (eighti). Thirdly, under common law, courts are generally enjoined to do justice in deciding the rights of parties and not to punish them for mistakes they make, especially if made by their lawyers.[70] In *Cropper v. Smith,*[71] Bowen LJ had said that he knew of "no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party."[72] However, legislation and rules would do quite the opposite, as it would tie the hands of the courts; it might cripple the course of justice and punish parties for their mistakes. Thus, even where a party can clearly demonstrate by credible evidence that it paid "$1,700,000.00" rather than "One Million Seven Thousand," legislation would force the judge to shut their eyes on such evidence—just as the court did in *Charles Tips,* stating that "it does not matter that the discrepancy between the words and numbers here is a large one."[73]

68. Randy Cassingham, *The Dvorak Keyboard: The Basics*, https://perma.cc/86VB-62WY (last visited Mar. 14, 2026).

69. *See* UCC § 3-114.

70. *See generally* Adam Liptak*, Agency and Equity: Why Do We Blame Clients for Their Lawyers' Mistakes*, 110 MICH. L. Rev. 875 (2012).

71. *See* Cropper v. Smith [1884] 26 Ch.D. 700.

72. Cropper v. Smith [1884] 26 Ch.D. 700, 710; *see* Dangote General Textile Products Ltd v. H.A. (Nig.) Ltd [2013] 16 NWLR (Pt. 1379) 60, 90.

73. Charles R. Tips Family Trust v. PB Commer. LLC, 459 S.W.3d 147, 154 (Tex. Ct. App. 2015).

One way one might justify this rather absurd situation is to argue that under common law, "the construction of documents or writings in evidence is a question of law" and not fact, such that evidence will not be received to clarify which term was agreed.[74] In *Charles Tips,* for instance, the court alluded to this point. In beginning its analysis, the court stated that "an *unambiguous* contract [would be construed as a matter of law and] enforced as written, and parol evidence [would] not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports."[75] However, the problem created by legislation and rules expressing preference for words became apparent when the court's analysis began by qualifying only the *words* with "unambiguity": "It is well settled that *unambiguous written words* prevail over arithmetic numbers . . ."[76] The court felt that there was no ambiguity in "One Million Seven Thousand ($1,700,000.00)" because the words, "One Million Seven Thousand" were not ambiguous.[77] In other words, the court separated "One Million Seven Thousand" from "$1,700,000.00."[78]

The issue here is an interesting one. If unambiguity is used to qualify *only the words*, then the decision, and many others in this article,[79] make sense. Nonetheless, qualifying *only* the *words* with "unambiguity" appears faulty by logic, since construction becomes a question of law after the true meaning of the words in which an instrument has been expressed and the *surrounding circumstances, if any,* have been ascertained as facts.[80] Thus, the qualification with *unambiguity* should be for *both* words and figures, so that in every situation where there is a contradiction in words and figures in a document, such words are ambiguous. For instance, Adams opines that when words and figures are written, they are intended to say

74. Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 5 (1922); *see* Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J. L. & PUB. POL'Y 13, 17 (2020) ("Whereas rules of interpretation originate outside the law, rules of construction are creatures of law."); Woodhouse AC Israel Cocoa Ltd. SA et al. v. Nigerian Produce Marketing Co. Ltd. [1971] 1 All E.R. 665 (Lord Denning) (UK); Purvines v. Harrison 37 N. E. 705 (Ill. 1894).

75. *Charles R. Tips Family Trust*, 459 S.W.3d at 153 (emphasis added).

76. *Id*.

77. *Id.* at 150.

78. *Id.*

79. *See generally* France v. Ford Motor Credit Co., 913 S.W.2d 770 (Ark. 1996); Guthrie v. National Homes Corp., 394 S.W.2d 494 (Tex. 1965); First State Bank v. Keilman, 851 S.W.2d 914 (Tex. Ct. App. 1993).

80. *See* Vincent R. Martorana, *A Guide to Contract Interpretation*, REED SMITH LLP 11, 13-14 (July 2014), https://perma.cc/U2KH-398X ("Therefore, the Court cannot rely on parol evidence to interpret the Contract unless it is ambiguous, but the Court can look to the surrounding circumstances to determine whether ambiguity exists in the first place.").

"the same thing twice."[81] Logically, if both terms were seen as *intending to say the same thing,* then, they are equal in intent and should be in law too. But with legislation and rules, the law places one over the other, even when evidence shows otherwise.

Fourthly, legislating the superior term shuts out evidence as a means of establishing which term was indeed agreed by the parties. Conversely, one radical way to interpret such legislation would be to rule the legislation as intending to apply for as long as there is no evidence to the contrary or to rule that it creates only a rebuttable presumption for the preferred term.[82] Yet, this approach is purely equitable and very debatable, though very reasonable. For a long time, courts have been told that it "lies within the[ir] general [equitable] jurisdiction . . . to reform [] *all* agreements defective or imperfect through [] error."[83] There have been two views on this.[84]

First, there have been authorities which have insisted that a specific provision of a statute bars the court from applying equity.[85] On the other hand, these authorities have been criticized as archaic, in that they occurred pre-development of the Court of Chancery, and a "monstrous" suggestion "that the arm of the judiciary [is] too short, or too weak, to reach and relieve" a document from mistake[86] and that the court may apply equity "even if doing so may require more effort than reading legal text."[87] This latter view seems more reasonable, since it would be manifestly absurd to insist on the superiority of a term over the other in the light of extrinsic evidence which shows otherwise. Perhaps, no legislature would intend this absurdity when enacting legislation placing one over the other. Cutis cites an analogous case of the immigration officer and the newborn child:

> "An example both of the defects of statutes and of the embarrassment courts may have in interpreting them was furnished a few years ago when a Chinese woman who had a permit to come to this country landed at San Francisco with a child born on the voyage. The immigration officer asked the authorities in Washington

81. Adams, *supra* note 57.

82. *See* Otis H. Fisk, *Presumptions,* 11 CORNELL L. Q. 20, 25 (1925) (stating that "a rebuttable presumption is one which the law allows to be defeated").

83. H. Campbell Black, *Reformation in Equity of Contracts Void Under the Statute of Frauds*, 33 AM. L. REG. 81, 82 (1885).

84. *See id.* at 81-82.

85 *See id.* at 82, 89. Equity will also be barred where the contract is clear.

86. *Id.*

87. Asaf Raz, *The Original Meaning of Equity,* 102 WASH. U. L. REV. 541, 543 (2024).

> whether the child, having no permit to land, must be sent back to China. In view of the statute refusing immigration without a permit, the legal question might have presented difficulties, and the answer was appropriate: 'Don't be a damned fool.' Now suppose the question had come before a court. Obviously, Congress had no such case in mind, and yet the statute was in terms explicit. If the court, relying on the language of the act, had decided that the child must be sent back, who would have been the 'damned fool'?"[88]

Similarly, this analogy may be made for jurisdictions which place figures over words. Nigerian rules of courts, for instance, express preference for figures over words in pleadings. The rules provide that "[p]leadings *shall* be divided into paragraphs and numbered consecutively, with dates, sums and numbers expressed in figures."[89] Nigerian courts have always guarded the courts' rules and are quick to state that they are meant to be obeyed.[90] Thus, if a pleading claims "₦1,000,000 (Ten Million Naira)", the court could be tempted to hold that the rules mandatorily require sums to be expressed in figures, and thus, discountenance the words. Rather than adopt this approach, which may inadvertently punish the parties for the mistake of their lawyers who drafted the pleadings, there are better approaches to this. One is that, if the claim is for special damages—which requires proof in common law jurisdictions—the court can wait and decide on which of the terms is proved by evidence.[91] If the contradictory claims is for general damages, picking either would not offend any known principle of law, since the grant of general damages is discretional,[92] provided that whichever one is picked is not unreasonable.[93]

88. Curtis, *supra* note 22, at 413.

89. High Court of Lagos State (Civil Procedure) Rules (2019), Order 17, Rule 2(2) (emphasis added).

90, *See generally* Duke v. Akpabuyo Local Government [2005] JELR 45204 (SC) (Nigeria); Revenue Mobilization, Allocation and Fiscal Commission v. Onwuekweikpe [2008] LPELR-8398 (CA) (Nigeria).

91. *See* Dumez Limited v. Ogboli [1972] 1 All N.L.R. 241 (Nigeria); Osuji v. Isiocha [1989] 3 N.W.L.R. (Pt.111) 623 (Nigeria); Jaber v. Basma [1952] 14 WACA 140 (Nigeria); Ratcliffe v. Evans [1892] 2 QB 524 (UK).

92. *See generally* Cameroon Airlines v. Otutuizu [2011] LPELR-827 (SC) (Nigeria); Odulaja v. Haddad [1973] 11 S.C. 357 (Nigeria); Lar v. Stirling Astaldi Limited [1977] 11-12 S.C. 53 (Nigeria).

93. *See generally* Union Bank of Nigeria v. Ajabule [2011] 12 MJSC (Pt. 11) 155; Nigeria Agip Co. Ltd. v. Nwoburu & Co. [2018] LPELR-49134 (CA).

III. APPLYING THE ORTHODOX THEORY TO DETERMINE THE SUPERIOR TERM

It is said that whenever the Orthodox Theory[94] is adopted in the interpretation of a legal document, generally, two things are set to be achieved—first, to ascertain the intention of the writer,[95] and secondly, to see whether "the language used sufficiently expresses that" intention.[96] This theory, though said to be orthodox, is still widely adopted by courts of different jurisdictions.[97] Importantly, the Orthodox Theory does not in fact advocate for the search of the intent as the *first step*. Rather, " . . . a court must look to the words and provisions of the contract *first*; when words and provisions are clear and explicit, no further interpretation may be made in search of the parties' intent."[98] Thus, when it is argued that the Orthodox Theory should be adopted in determining the superior term between the contradicting words and figures, what is being stated is: first, the interpretation should be confined to the words of the documents when they are clear ("Element 1"); second, if the words are ambiguous, then the intent of the parties should be ascertained ("Element 2"); and third, a determination should be made of whether the language used sufficiently expresses that intention ("Element 3").[99]

There are jurisprudential criticisms of this theory by Holmes[100] and Williston.[101] Perhaps, Curtis was more apt in his criticism of the theory:

> [T]he orthodox is no more than a futile gesture of maintaining his control over his words by expecting everyone to surmise what he may have meant by them.[102] It is a hallucination, this search for intent. The room is

94. *See* Curtis, *supra* note 22, at 413. It appears that this orthodox theory of interpretation is the same as the "purposive theory." *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 85 (2005).

95. This is referred to as the internal element. *See* Curtis, *supra* note 22, at 407 ("The legal act, so to speak, is made up of two elements,—an internal and external one; it originates in intention and is perfected by expression. Intention is the fundamental and necessary basis of the legal effect of the writing . . .").

96. *Id.*; *see generally* Marjorie Grene, *Theories of Interpretation in the Law of Contracts*, 6 U. CHI. L. REV. 374 (1939); Reyes v. Metromedia Software, Inc. 840 F. Supp. 2d 752 (S.D.N.Y. 2012); Green v. Ashland Sixty-Third State Bank, 178 N.E. 468 (Ill. 1931).

97. *See* Ottinger, *supra* note 22, at 767.

98. *Id.* (emphasis added).

99. *See generally id.*

100. *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899).

101. *See* Curtis, *supra* note 22, at 417-419; Grene, *supra* note 96, at 387, 398.

102. Curtis, *supra* note 22, at 423.

> always dark. The hat we are looking for is often black. If it is there at all, it is on our own head.[103]

Despite the plenitude of authorities on the adoption of the Orthodox Theory in the interpretation of legal documents in modern times,[104] its criticisms make it undesirable in determining the superior term between words and figures. For instance, Element 1 is only useful where a document is clear and unambiguous on its face, in which case, the interpretation must be confined to the "four corners of the [instrument]."[105] However, there is an ambiguity when "fifteen (30)" is written in a document, and thus Element 1 is not useful for this purpose. Element 2 requires that where there is ambiguity, the intent of the parties is to be ascertained. In the English courts, the equitable doctrine of rectification may be adopted to correct the *document* where "words have been added, omitted or wrongly written as a result of careless copying or the like"[106] to bring it to what the parties had intended.[107]

Notwithstanding, there are apparent issues with the ascertainment of the intent of the parties. First, the path to finding the intent is opaque as we are left with contradictory authorities on whether an objective test or subjective test should apply in determining the intent.[108] Indeed, we are left with what Curtis describes as "mild confusion as we are when the waiter hands us the menu."[109] For example, where "two percent (12%) interest rate" is written, do we interpret it the way a reasonable man would have? Or the way the parties, in the circumstances, would have? Or the way the party performing the obligation would have?[110] Secondly, the search for intent presupposes *consensus ad idem* where there might be none. If "two percent (12%) interest rate" is stated, "each party may quite justifiably have a different intention"—A may intend "two percent" and B, "12%"— "so justifiably there is no contract."[111]

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103. *Id.* at 409.

104. *See generally* Ottinger, *supra* note 22.

105. *Id.* at 783.

106. Thomas Reuters Legal Australia, *Chapter 6: Rectification*, THOMAS REUTERS 630, 635 (n.d), https://perma.cc/37CF-5F94.

107. Though it appears now that there is no need for ambiguity before the court can order rectification. *See* Roger Toulson, *Does Rectification Require Rectifying? in* TECBAR ANNUAL LECTURE (Oct. 31, 2013), https://perma.cc/VYP3-ZBTW. Thus, when a clause in a lease accidentally said 'Landlord' where it should have said 'Tenant', the clause was rectified to correct the mistake. *See* Littman & Anor v Aspen Oil (Broking) Ltd [2005] EWCA Civ 1579.

108. *See* Terence Etherton, *Contract Formation and the Fog of Rectification,* 68 CUR. LEG. PROB. 367 (2015).

109. Curtis, *supra* note 22, at 417.

110. *See* Grene, *supra* note 96, at 375, 384.

111. Curtis, *supra* note 22, at 417.

Element 3—which determines whether the language used sufficiently expresses the parties' intention—also negates the possibility of the parties intending anything outside either the figures or the words expressed. This has been criticized by some scholars. McLauchlan stated within the context of New Zealand that:

> Gallen J is simply wrong when he says in *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd,* the leading New Zealand case on the plain meaning rule: "If a contract refers to apples, then it will not be open to parties to aver that the real intention was to refer to pears." There may be clear unimpeachable evidence that the parties, perhaps because they wished to keep the nature of their dealings secret from others, had a longstanding private code whereby "apples" did mean "pears". Of course, the existence of such a code is inherently unlikely. But, as I have argued elsewhere, that is a matter going to the weight of evidence needed to rebut the presumption that the parties used language bearing its ordinary meaning.[112]

The drawback of Element 3 is that it does not accommodate the possibility of evidence to prove which term was agreed by the parties. If a contract provides that "payment should be made every fifteen (30) days," but there is evidence that payment had always been made every 20 days with no objection, would it be right to insist that the parties had intended either fifteen or 30 and never anything else? After all, it has been held—at least in some common law jurisdictions, including the U.S.—that parties' conduct can vary the written agreement of the parties,[113] even where the contract says otherwise.[114]

IV. VERY SIMPLE. JUST LOOK AT THE EVIDENCE! THE EVIDENCE APPROACH

A contradiction in words and figures in legal documents poses a significant issue in commerce. A creditor was held entitled to just eight dollars when "8,000.00" "(Eight dollars and 00/100)" was written on a check without any proof thereof.[115] The Texas Court of Appeals held in another case that the interest rate was two percent when the interest rate

112. David McLauchlan, *A Contract Contradiction,* 30 VIC. U. WELL. L. REV. 175, 185-186 (1999).

113. *See Rao v. International Licensing Industry Merchandisers' Ass'n*, No. 652955, slip op. at 12 (N.Y. Sup. Ct. July 20, 2015).

114. *See Globe Motors Inc & Others v TRW Lucas Variety Electric Steering Ltd & Others* [2016] EWCA Civ 396.

115. France v. Ford Motor Credit Co., 913 S.W.2d 770, 772 (Ark. 1996).

was stated to be "two percent (12.5%)."[116] In *Charles Tips,* the Texas Court of Appeals held that it did not matter the extent of the discrepancy in the contradiction, words prevail due to the legislation expressing preference for words over figures, notwithstanding any evidence to the contrary.[117]

The first argument advanced by this article is that where there is a contradiction in words and figures in legal documents, this amounts to ambiguity. An ambiguity occurs where a provision is left open to two or more interpretations.[118] A document which reads that "a car would pass to Mr. X provided he pays 'nine dollars ($9,000)' within 6 months" may be interpreted in different manners. It could be said that the parties intended nine dollars because one is less likely to make a mistake writing words than figures.[119] Yet, the parties could have mistakenly omitted "thousand" while typing the document. Conversely, one may argue objectively that the parties intended $9,000, because it is unreasonable to dispose of a car for nine dollars. Yet, we have seen contracts where the considerations were nominal—for as little as $1.[120]

One way to avoid the preemption of legislation or the complexities of the theories of interpretation is to allow evidence from the parties to prove which term was intended and agreed on. In jurisdictions with legislation expressing preference for one over the other, such as the U.S., the legislation could be interpreted to mean that it would apply in the absence of any evidence to the contrary. In other words, the legislation could be interpreted as a rebuttable presumption expressing preference for one over the other, until there is evidence which clears the ambiguity. In jurisdictions with no legislation, courts could allow evidence from parties. Although simplistic, this approach is not immune to criticism considering some authorities in some common law jurisdictions.[121] This is because in most common law jurisdictions, evidence of the subjective intention of the parties is not considered in determining the meaning of terms.[122]

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116. First State Bank v. Keilman, 851 S.W.2d 914, 919 (Tex. Ct. App. 1993)

117. *See* Charles R. Tips Family Trust v. PB Commer. LLC, 459 S.W.3d 147, 153 (Tex. Ct. App. 2015).

118. *See* Gen. Teamsters Local Union 326 v. City of Rehoboth Beach, No. S11C–03–019, 2012 WL 2337296, at *2 (Del. Sup. Ct. Apr. 24, 2012); *see also* Salami v. Union Bank of Nigeria [2010] LPELR-8975 (CA) (Nigeria).

119. *See* HAWKLAND & LARY LAWRENCE, *supra* note 60.

120. *See* Edmund Polubinski, *The Peppercorn Theory and the Restatement of Contracts*, 10 WM. & MARY L. REV. 201, 202 (1968).

121. For some of the challenges in Australia, the UK, and Singapore, *see generally* McLauchlan, *supra* note 112.

122. *See id*; Sundaresh Menon, *The Interpretation of Documents: Saying What They Mean or Meaning What They Say,* 32 SING. L. REV. 3 (2014).

In the UK, though Lord Wilberforce had in 1971 declared that "[t]he time has long passed when agreements . . . were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations,"[123] courts have still refused to depart from the principle which excludes evidence of the intention of the parties in interpretation as there was "no clearly established case" requiring them to do so.[124] The reason for this reluctance could be partly due to the "uncertainty" which would ensue if such evidence were allowed.[125] However, it is submitted that since it is the duty of the court to resolve uncertainty with evidence, the evidence approach constitutes the best way to ascertain the agreed term. McLauchlan generally subscribes to this type of evidence approach in resolving ambiguity.[126] He cited a New Zealand Court of Appeal authority (*Air New Zealand Ltd v The Nippon Credit Bank Ltd*) where it was held that:

> If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the Court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention.[127]

Rightly, this evidence approach could possibly "swallow up" the rule which excludes evidence in the construction of contractual terms.[128] In the context of contradiction in words and figures, the evidence approach seems to be the best approach in determining which term was agreed by the parties.

V. CONCLUSION

This article has made the following arguments and propositions:

1. Legislation expressing preference to either words or figures in case of a contradiction has more disadvantages than advantages. Such

123. Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1383-1384.
124. Chartbrook Ltd v. Persimmon Homes Ltd [2009] 1 A.C. 1101.
125. Menon, *supra* note 122.
126. *See* McLauchlan, *supra* note 112, at 184-86.
127. *Id.,* at 186.
128. *Id.*

legislation or rule would have presumed that there was *consensus ad idem,* where there might indeed be none. A call for law reform is therefore appropriate. Also, when both words and figures are written, parties do not intend to make one superior to the other, as both are always written to say the same thing twice.

2. The theory which proposes the search for the intent of the parties with the words expressed is unhelpful. Parties may have no intention. Even if they do, the intention may differ. There is much controversy regarding the test to adopt—subjective or objective—in the search for the intent of the parties. In fact, such search for intent has been described as a "hallucination."

3. In jurisdictions with legislation expressing preference for one of the terms, the legislation could be interpreted to mean that it would apply in the absence of any evidence to the contrary. In other words, the legislation could be interpreted as a rebuttable presumption until there is evidence which clears the ambiguity. In jurisdictions with no legislation, the evidence approach remains the best way to resolve the contradiction.