A VIEW OF THE PAROL-EVIDENCE RULE.—PART II.

§ 7. *Integration by Requirement of Law.* The process of Integration, from which it results that the terms of a particular transaction are to be sought only in a written memorial, is one dependent usually upon the intent of the parties. If they have willed that a certain writing shall exclusively be and represent their act, then the court will so treat it; if they have not so willed, then the court will resort to any negotiations that may have occurred, and to any dealings, whether oral or written, to ascertain and piece together the total of terms of the act. But there is another case in which the court may decline to consider sundry acts and dealings as furnishing the terms of a legal act, and may confine itself solely to a single written memorial; and that is where by provision of law the act is to be valid only when it is transacted in the shape of a single written memorial. When the law has provided that the only way in which an act may be given legal significance or existence is by doing it, and all of it, in writing, then no other conduct or dealings, purporting to be such an act, can be considered, and evidence of them is, of course, inadmissible because tending to prove an immaterial *factum probandum.* The difference between the effect of non-integration of this sort and of the preceding sort is that, in the former case (integration by intent of the parties), resort to parol[1] transactions is forbidden only when the parties have by intention made the single writing the exclusive memorial; and if they have not, then resort may be had to parol transactions if any occurred; while in the latter case (integration by requirement of law) resort to parol transactions is absolutely forbidden,[2] so that if the act has not been integrated in writing as required, a trans-

[1] By "parol," in connection with the present principle is properly meant, not merely oral utterances, but also informal writings, *i. e.*, writings (letters, memoranda, etc.) other than the single and final written memorial; see *ante*, § 1.

[2] There is one apparent exception, to be noted later.

action in parol will still be of no significance for the purpose in hand.

The cases in which, by requirement of law, there must be an integration in writing, are of two general sorts: (1) certain acts by ordinary persons, creating, transferring, and extinguishing rights and obligations; (2) proceedings by judicial and other officers.

(1) In only a few instances does a requirement of law prescribe that an act, to be valid, must be reduced to writing; the genius of our law being contrary to that of the Continental law in this respect. Almost universally such a requirement is made for wills of realty;[1] in most jurisdictions the requirement extends to wills of personalty also; in probably all jurisdictions an exception exists for oral (nuncupative) wills by soldiers and sailors in service, and, sometimes, by persons on a deathbed or during a journey.[2] In most jurisdictions, also, grants of realty are required to be reduced wholly to writing. The requirement of a memorandum of certain data in a transaction of sale, provided for in the fourth and seventeenth sections of the Statute of Frauds, is to be distinguished from a requirement of the above sort; that which the statute requires is merely an accompanying or collateral written memorandum of some parts of the transaction;[3] it thus differs in the two important respects that an oral contract of sale may exist independently of the memorandum[4] (whereas the written will, and nothing else, is the testamentary act), and that only certain parts of the transaction need be noted in the momorandum (whereas the written will must contain every part of the testamentary act).

(2) It has long been a principle of our law, irrespective of any statutory requirement, that the proceedings of a court exist and are to be found only in the "record." Precisely what the "record" is has been the subject of many detailed rulings and

[1] See Jarman on Wills, 6 Am. ed. 76.

[2] See Jarman, *ubi supra*, 784.

[3] See Browne, Statute of Frauds, cc. 17, 18.

[4] So that, for example, the memorandum may be made after the actual contract of sale.

much statutory regulation; but the general notion conceives it as the final enrolment or written expansion of all the proceedings in a litigation, made by the clerk or the judge, and verified by the judge.[1] This "record" is, in legal theory, not a testimonial report by the officer of the proceedings, nor a copy of some other written act; it *is* the proceeding and the act itself.[2] Nothing that is not in this record is a legal act or a part of the proceedings; what is not in the record has not been done; and, consequently, it cannot be shown that something was done which is not noted in the record, or that a thing noted in the record was in truth done differently. The principle applies, of course, only to such proceedings as properly form a component part of the proceedings; and hence transactions not properly forming a part of the record may be shown otherwise than by the record; and there is much learning as to the discriminations here necessary to be taken. Moreover, though in legal theory the record is the proceeding itself, nevertheless it is usually not prepared till an interval of time has elapsed after the actual oral proceeding, and in the meantime the clerk or the judge has, in a docket or a minute-book, made a temporary note of the various things done. Thus a question may arise as to the propriety of using the minutes to correct the record;[3] though even when this is allowed, the record is still in legal theory the proceeding itself, and stands effective until formally corrected. Thus, again, resort may be had to the minutes as representing and constituting the proceeding, where the record proper has been lost or destroyed or has never been made up;[4] and here occurs the

[1] See the nature and policy of the doctrine expounded in Pruden *v.* Alden, 23 Pick. 184; Ward *v.* Saunders, 6 Ired. 382; Wells *v.* Stevens, 2 Gray, 115.

[2] "The record is tried by inspection; and if the judgment does not there appear, the conclusion of law is that none was rendered:" Nisbet, J., in Bryant *v.* Owen, 1 Ga. 355, 367.

[3] By making an entry *nunc pro tunc;* see Jacks *v.* Adamson, 56 Oh. 397; State *v.* Feister (Or.), 50 Pac. 561.

[4] "Until they can be made up, the short notes must stand as the record:" Pruden *v.* Alden, 23 Pick. 184; "Minutes may be introduced as . . . in truth for the time being constituting the record itself:" McGrath *v.* Seagrave, 2 All. 443. Where the final record is lost, the minutes take its place: Cook *v.* Wood, 1 McCord, 139.

peculiar difference[1] between this kind of integration by law and the preceding kind; for in the case, for example, of a will, if no will in writing exists, no oral or other informal attempt at a will may take its place; while, if a record has not been made up, the provisional minute-book or docket is treated as representing the proceeding.

There are but few other official proceedings which are treated, after the analogy of judicial records, as constituted solely in and by the official writing. The principle is sometimes applied to the records of a public corporation;[2] and is usually applied to the journals of a legislature. The acknowledgment by a married woman that she signs a deed of her own free will is in many jurisdictions treated as a judicial proceeding, and the official certificate can thus not be shown to be incorrect; but other views have often (sometimes by express statute) prevailed.[3] The registration of a deed is usually regarded as merely the preservation of an official copy of the original and effective document;[4] but, perhaps, under the recent improved systems of transfer the official registry may be treated on the principles of judicial records.[5] To be distinguished from the principles applicable to judicial records is a principle not infrequently treated as equivalent, by which an

[1] See note, *ante*.

[2] See Saxton *v.* Ninnus, 14 Mass. 315; Thayer *v.* Stearns, 1 Pick. 109; Roland *v.* District, 161 Pa. 102, 106. But there is sometimes a difference, in that oral proceedings can be shown if no record was made: Boggs *v.* Ass'n, 111 Cal. 354; Zalesky *v.* Ins. Co., 102 Ia. 512; *contra*, Taylor *v.* Henry, 2 Pick. 397.

[3] One view is that the certificate is conclusive except as to appearance or jurisdiction in general; another, that it is impeachable only for fraud or, perhaps, for mistake; another, that it may be contradicted on any point; see the various views represented in Elliott *v.* Peirsol, 1 Pet. 328; Edinb. R. L. M. Co. *v.* Peoples, 102 Ala. 241; Woodhead *v.* Foulds, 7 Bush, 222; Dodge *v.* Hollinshead, 6 Minn. 25, 39; Davis *v.* Howard, 172 Ill. 340; Harkins *v.* Forsyth, 11 Leigh, 294.

[4] See Harvey *v.* Thorpe, 28 Ala. 250; Gaston *v.* Merriam, 33 Minn. 271; Fleming *v.* Parry, 24 Pa. 47; Hastings *v.* B. H. T. Co., 9 Pick. 80; Ames *v.* Phelps, 18 Pick. 314; Jones, Real Property, § 1475; so also as to its non-conclusiveness in regard to the time of recording: Bartlett *v.* Boyd, 34 Vt. 256; Horsley *v.* Garth, 2 Gratt. 371, 391.

[5] See articles in 6 Harv. L. Rev. 302, 369, 410; 7 id. 24.

official's report or certificate of an act done before him by a person wishing to do a legal act is treated as conclusive testimony to the nature of the act done. There are but few well-established instances of this; the chief one being the magistrate's report, as required by many statutes, of the statement of an accused person examined before him;[1] here the real process seems to be the making of a specific witness' testimony conclusive.[2]

§ 8. *Parol-Evidence Rule applicable only between the Parties.* It is usually said that the parol-evidence rule is applicable only between the parties. That this is correct, for many purposes at least, may be seen by noticing the principle of the rule so far as the integration was made by intent of the parties. Their determination is that, for the purposes of consti-

[1] There are many other instances in which such a conclusive effect has been claimed but usually denied for an official certificate; for example, to a registration of birth (Hermann *v.* State, 73 Wis. 248); to an enrolment of recruits by a military officer (Wilson *v.* McClure, 50 Ill. 366); to a notarial certificate (Wood *v.* Trust Co., 7 How. (Miss.) 309, 630; Merrill *v.* Sypert (Ark.), 44 S. W. 462); to the certificate of an oath-taking, or jurat (see R. *v.* Emden, 9 East, 437; Thurston *v.* Slatford, 1 Salk. 284; Sherman *v.* Needham, 4 Pick. 66).

[2] The feature superficially common to both principles is that it is forbidden to show that the thing was done other than as stated in the document. But the reasons for this identical result are not the same in both cases. In the case of a judicial record, the record is the proceeding; consequently nothing else may be consulted as constituting the proceeding. In the case of an official's report, the effective legal act is still what was done or said before him; and his writing is no more than a reporting or testifying to that act of another person; it is a preferred report and is conclusive, but it is still only a report. The practical difference is that, in the case of a magistrate's report, if it is for any reason not available (by loss or destruction, for example), it is sufficient to prove directly the oral statements of the accused by one who heard them, on the theory that when a preferred witness is unavailable, an ordinary witness will suffice; while in the case of a judicial record, if the record itself was never made, then the proceeding cannot be proved at all (as well expounded by Hubbard, J., in Sayles *v.* Briggs, 4 Metc. 421), and if it was made but is lost, then the proof would be, not of the oral doings, but of the record's contents (Mandeville *v.* Reynolds, 68 N. Y. 528, 533); and where by statute the resort to oral doings is allowable in order to restore lost records, it is in legal theory, not the substitution of one kind of testimony for another, but the re-constitution, by compilation, of the judicial act itself.

tuting a certain legal act of theirs, a particular writing shall alone be consulted; but, so far as concerns their relations to other persons, their conduct and utterances extrinsic to that writing may still be considered, so far as such data are not treated as part of that act but become material for some other purpose. For example, where the issue is as to adverse possession of a right of way, the deed not reserving such a right, a conversation between grantor and grantee, the former conceding the way, would be receivable as affecting the adverse nature of the grantee's possession;[1] so also a creditor, claiming to set aside a mortgage as fraudulent, could show, as evidence of fraud, the debtor's oral agreement with the mortgagee;[2] so, also, in a criminal prosecution for embezzlement, in which the intent is the material issue, an oral promise by the employer to allow certain sums to the employe, could be shown, in spite of the terms of the written contract between them.[3] Where the integration is required by law, the same consequence may follow; thus, on an issue as to the contents of a lost will or of undue influence, the testator's normal testamentary intentions being admissible in evidence, oral statements of intention, or a will not duly executed, or a will not proved by the attesting witnesses,[4] could be used as showing the testamentary intention; since here there is no attempt to use the utterances as having testamentary effectiveness. The truth seems to be, then, that the rule, as regards others than the parties to the act, does not exclude extrinsic utterances so far as they are for any purpose admissible; but that even for other parties, it would still apply to exclude, where the object was to show the terms of the act as the effective transaction between the parties. Nevertheless, it is common to say, without qualification, that the rule applies only in suits between the parties.[5]

[1] 1 Ashley *v.* Ashley, 4 Gray, 197.

[2] Jewett *v.* Sundback, 5 S. D. 111, 119.

[3] Walker *v.* State (Ala.), 23 So. 149; compare *Re* Clapton, 3 Cox Cr. 126.

[4] Demombreun *v.* Walker, 4 Baxt. 199.

[5] For other instances, see Dunn *v.* Price, 112 Cal. 46; Roof *v.* Pulley Co., 36 Fla. 284; Kellogg *v.* Tompson, 142 Mass. 76; Plainfield F. N. B'k

§ 9. (II) *Interpretation of Legal Acts.* Assuming that a legal act has been consummated (whether it has or has not been integrated), a peculiar situation and a new set of questions are presented when the act comes before the courts for enforcement. The process of realizing, enforcing, or giving objective effectiveness to the party's act involves the application of the terms of the act to external objects so as to carry out and make good, by process of law, the results prescribed by the act. Assuming that there is no legal objection to this realization of the act, then the sole aim of the court is to ascertain the significance of its terms, or, in other words, the associations or connections between the terms of the act and the various possible objects of the external world. The process of fulfilling this aim is the process of Interpretation. In order to understand the questions which it presents, two fundamental distinctions must be noticed at the outset: (1) the distinction between the intention of the party and the meaning of his words; (2) the distinction between various standards of meaning, *i. e.* individual, mutual, and customary meaning.

(1) The distinction between "intention" and "meaning" (quite apart from any dispute as to the propriety of these names) is vital. Interpretation as a legal process is concerned with the meaning of words and not with the intention of the one using them.[1] It is commonly said, as explaining the pro-

v. Dunn, 57 N. J. L. 404; Libby *v.* Land Co. (N. H.), 32 Atl. 772; Hankinson *v.* Vantine, 152 N. Y. 20; Johnson *v.* Portwood, 89 Tex. 235; Signa Iron Co. *v.* Greeve, U. S. App., 88 Fed. 207.

[1] This distinction and the above canon, insisted upon by many judges (*e. g.* Lord Denman, C. J., in Rickman *v.* Carstairs, 5 B. & Ad. 663: "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used") and by Sir J. Wigram, in his treatise on "Extrinsic Evidence in Aid of the Interpretation of Wills," has been acutely and strenuously denied by F. V. Hawkins, Esq., in his paper "On the Principles of Legal Interpretation (2 Jurid. Soc. Papers, 298; reprinted in Professor Thayer's "Preliminary Treatise on Evidence," App. C); Mr. Hawkins calls the above principle "a fallacy of no small importance," since interpretation is mainly "a collecting of the intent from all available signs or marks." Nevertheless, it would be possible to show that the fallacy, on the contrary, lies in not recognizing this principle; and its recognition seems to enable us better to understand the actual rules of law; see the discussions in Leonhard, Das Irrthum bei nichtigen Vertragen, referred to *ante*, § 2.

cess, that the words are symbols, and that the object of interpretation is to ascertain the meaning of the symbols. But it is here still open to believe that in ascertaining the "meaning" of the symbols we are endeavoring to ascertain the state of the party's mind as fixed upon certain objects; and we are thus relegated once more to his mental condition as the ultimate object of the investigation. This mode of defining the process is likely to mislead, because the private intent of the party is constantly found to be excluded by the law from consideration, and it is difficult to reconcile this prohibition with the theory that interpretation aims ultimately to ascertain intention. Perhaps a better notion of the distinction between intent and the meaning of words may be obtained from the analogy of other illustrations. Suppose a vessel coasting the shore and entering various harbors where the government maintains a uniform system of harbor-buoys of various colors and shapes, indicating respectively channels, sandbars, sunken rocks, and safe anchorages; here the significance of each kind of buoy is known to be the same in every harbor under government control. But suppose the vessel to enter a harbor or inlet under the control of an individual or a city having a peculiar and different code of usage for the buoys; here it is immaterial whether a red buoy under the government system signifies a channel or a sandbar; the vital question for the vessel now is what a red buoy signifies under the code of the local authority, and all other systems of meaning are thrown aside as useless. This illustrates that though, in interpreting a party's (*e. g.* a testator's) words, we are concerned with *his* individual meaning, as distinguished from the customary sense of words, still we are not dealing with his state of mind, but with the associations affixed by him to an expressed symbol as indicating to others an external object. That is to say, the local harbor authorities may have "intended" to put a green buoy instead of a red buoy, or to have put the red buoy at another spot, just as the testator may have intended to use other words; but in both cases the state of mind as to intention is a wholly different thing from the fixed association, according to that individual's standard, between the expressed

symbol and some external object. To illustrate another aspect of the subject, suppose a game, *e. g.* of chess, to be played by B with his guest A. If the two are of the same nation, their standards—*e. g.* as to the shape of each chessman, the allowable moves, and the effect of a move—will be the same. But some nations differ from others in one or more of these respects; so that if, for example, B's national rules allowed a rook to threaten diagonally on the board, A as guest would accept and accommodate himself, as best he might, to this standard of operation. But, though this much might be conceded to B as host, in the adoption of his standards for giving effect or meaning to his acts of moving the chessmen, yet it would remain true that his private intent or state of mind, as distinguished from the significance of his acts of moving, would be immaterial; so that, for example, his intent to have touched and moved a different piece, or to have placed the piece on a different square, would not be taken into consideration. In the same way, the process of interpretation may concern itself with the individual significance of a testator's words as associated by his standards with specific objects, but it may at the same time refuse to concern itself with the state of mind that led up to the use of those words.[1] On the one hand, then, is to be noted the distinction between "intention" (or state of mind at the time of acting) and "meaning" (or the association between specific words and external objects). The process of interpretation may best be thought of as the tracing and ascertainment of this association.

(2) In this process of ascertainment, whose standard of meaning shall be taken? The standards may be different, according as the transaction is a unilateral or a bilateral one. Where effect is to be given to the act of a single person—for example, a testator—there is no reason why his individual standard of usage should not be employed; for example, if he names a house on "Maple Place," the words are to be applied to the locality habitually associated by him with that

[1] The law might conceivably choose to give effect to the intention; it does rarely, as in the case of reformation for mutual mistake; why it usually does not is noted in the next section.

term, even though that locality is commonly designated as "Maple Street."[1] But if the transaction is one in which another person has shared (as a deed or contract) so that the other person has acted on the faith of a certain meaning to the words, then the standard must be enlarged; it is not to be the individual standard of the first party, but the standard which the other party was reasonably justified in acting upon,—primarily and usually, the standard common to other persons generally, but, secondarily and peculiarly, the particular standard of the second party, if that should differ from the standard of the community and still be a reasonable one. It follows (1) that the individual meaning or sense used by the first party alone is in itself immaterial;[2] (2) that the sense to be taken is that which the other party was by universal usage in the community justified in attributing to the words; (3) that provided both parties are acquainted with a special (usually a commercial) usage, which would naturally apply to the case in hand, the term may be interpreted according to that special usage;[3] (4) that where the first party employs the term in an individual sense, which differs from the general sense, but is nevertheless known to the second party to be attached to the term, the second party is not entitled to invoke the general standard, but must be content with an enforcement according to this individual sense.[4]

§ 10. *Same: General Principle of Interpretation.* In this process of ascertaining the association between specific words, as used by the person acting, and external objects, a large

[1] For the supposed rule against disturbing a clear meaning, see *post*, § 12.

[2] Fox *v.* R. Co. *v.* Conn., 38 Atl. 871; Gamble *v.* Mfg. Co., 50 Nebr. 463; Rickerson *v.* Ins. Co., 149 N. Y. 307; Fudge *v.* Payne, 86 Va. 306; Anderson *v.* Jarrett, 43 W. Va. 246. The case of an ambiguity, in which each party's sense is a reasonable one (Raffles *v.* Wichelhaus, 2 H. & C. 906, "ex Peerless"), rests on peculiar grounds.

[3] See Armstrong *v.* Granite Co. (Ill.), 42 N. E. 186; Eaton *v.* Gladwell, 108 Mich. 678; Rickerson *v.* Ins. Co., 149 N. Y. 307. These cases illustrate that the usage must be in fact known to the other party, or so general that it was probably known to him.

[4] For the application here of the supposed rule against disturbing a clear meaning, see *post*, § 12.

field of investigation is opened. So far as concerns the implications of the process itself, it is natural, and it may be accepted as a legal principle, that all sources of information should be consulted. The circumstances amid which the person lived and acted, his usages as to words and phrases, his conduct and expressions, may all furnish data throwing light upon his association of specific objects with specific words and phrases,—*i. e.* upon the meaning of such words and phrases. "To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the subject of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words."[1] "The court has a right to ascertain all the facts which were known to the testator at the time he made the will, and thus to place itself in the testator's position, in order to ascertain the bearing and application of the language which he uses, and in order to ascertain whether there exists any person or thing to which the whole description given in the will can be, reasonably and with sufficient certainty, applied."[2] "To get at the intention expressed by the will, . . . as a will must necessarily apply to persons and things external, any evidence may be given of facts and circumstances which have any tendency to give effect and operation to the will—such as the names, descriptions and designations of persons, the relations in which they stood to the testator, the facts of his life, as having been single or married one or more times, having had children by one or more wives, their names, ages, places of residence, occupations; so of grandchildren, brothers and sisters, nephews and nieces, and all similar facts; and the same kind of evidence may be given of all facts and circumstances attending the property be-

[1] Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363.

[2] Lord Cairns, L. C., in Charter *v.* Charter, L. R. 7 H. L. 364.

queathed, its name, place and description, as by its former owner, present occupant, or otherwise."[1] "The general rule is that in construing a will the court is entitled to put itself into the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will."[2]

There is thus, so far as the natural suggestions of the process of interpretation are concerned, a "free and full range among extrinsic facts in aid of interpretation."[3] But are there any limitations upon this range of search, other than the ordinary rules as to the admissibility of evidence? It is not easy to trace and distinguish the various elusive shapes taken by certain supposed rules of limitation. But those that have, in one shape or another, received effect, correctly or incorrectly, seem reducible to three general rules: (1) a rule against using declarations of intention; (2) a rule against disturbing a clear meaning, and (3) a rule against correcting a false description.[4]

§ 11. *Same:* (1) *Rule against using Declarations of Intention.* An established rule, never questioned, is that, for the purpose of interpretation, declarations of intention are not to be consulted. The reason is not that such declarations can-

[1] Shaw, C. J., in Tucker *v.* Seaman's Aid Society, 7 Met. 188.

[2] Blackburn, J., in Allgood *v.* Blake, L. R. 8 Ex. 160.

[3] Thayer, Preliminary Treatise, 414.

[4] Nothing will here be said about Lord Bacon's distinction (*ante*, § 297) between "patent" and "latent" ambiguities; this "unprofitable subtlety" which "still performs a great and confusing function in our legal discussions," in spite of the repeated exposures of its inutility as a working rule, has been fully disposed of in Professor Thayer's "Preliminary Treatise," pp. 422, 471.

The limitations noted *ante*, § 9, as to employing usage to interpret contracts or deeds, are to be understood as additional to those above mentioned; but they do not flow from the nature of data that may be consulted, so much as from the standard controlling the entire process of interpretation. Where a unilateral act is to be interpreted, the standard or object is the sense employed by the single actor; where a bilateral act is to be interpreted, the standard is primarily the joint sense of the two parties; and the special limitations applicable in the latter case are thus outside of and preliminary to the further limitations now to be noted.

not throw light upon the application of the words; for they might conceivably do so; but that their chief and overshadowing function and effect would be to set up a rival declaration of volition, coming directly into competition with the words of the document which alone is to be regarded as the legal act. Thus, where a will provides for a bequest of the testator's library to his cousin James, an oral declaration of his "I want my nephew William to have my library," while conceivably it might with other facts help out a disputed interpretation, would be likely to have the paramount effect, if considered, of overturning the words of the will and substituting, as that part of the testamentary act, a declaration not in itself available as a testamentary act; in other words, it violates the rule of Integration already examined.[1]

To this rule of limitation there is one exception well set-

[1] In the case of wills, such declarations are excluded "upon this plain ground, because his will ought to be made in writing" (Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363; so also Shaw, C. J., in Tucker *v.* Seaman's Aid Society, 7 Met. 188); in the case of contracts and deeds, because the parties by intention made the writing the sole memorial of the act, and further, because one party's intention or sense is immaterial. If we could suppose that a will were not required to be in writing and signed, it would seem that various declarations of testamentary intention might be consulted for the purpose of determining which was the effective testamentary act and what its tenor. Moreover, wherever the actual intent or state of mind may, by the Integration rule, be looked to for the purpose of invalidating or reforming a supposed act (as in reformation of a deed for mutual mistake—*ante*, § 3—or in those cases where a testator's mistake as to the contents of a will may be shown—*ante*, § 3), it would seem that declarations of intention could be considered. So that the exclusion of such declarations in the process of interpretation seems to be explainable, not as a rule of evidence affecting interpretation, but as the consequence of the rule, already treated, about integration or parol-evidence. Professor Thayer has expressed the view (Preliminary Treatise, 414) that it is "usually and rightly regarded as an excluding rule of evidence;" though he elsewhere (p. 144) concedes that it "partakes of the character of both" a rule of evidence and a rule of construction; yet the suggestion of Lord Abinger, *supra*, that it is a consequence of the general rule excluding utterances which compete with the writing, seems preferable.

Distinguish the use of ante-testamentary declarations of a testator as showing the probable contents of the will as ultimately executed; here there is no attempt at interpretation nor at setting up declarations to compete with conceded contents.

tled, and another once prevailing but now generally repudiated.

(*a*) Where an object is described in terms equally applicable to two or more objects, the testator's declarations specifying the particular one signified are admissible; as in the often-used illustration, if one devise his manor of S. to A. B., and he has two manors, North S. and South S., "it being clear that he means to devise one only, whereas both are equally denoted by the words he has used."[1] This is the situation ordinarily known as "equivocation;"[2] and the exception is unquestioned.[3] The same principle may be applied to contracts and deeds, so as to admit the understanding of the parties, though expressed independently of the document, as to the application of ambiguous words or phrases.[4] (*a'*) Where a blank occurs, the exception does not ordinarily apply to admit such declarations; because the blank will usually indicate a deliberate non-exercise of testamentary or contractual action on that subject in the document, and so the use of other declarations to supply the blank would in effect violate the rule of integration, already described, requiring the terms of the act

[1] Bacon's Maxims, R. 25; Lord Abinger, C. B., in Doe *v.* Hiscocks, 5 M. & W. 363.

[2] Here the declarations are not obnoxious to the parol-evidence or integration rule, because they do not compete for effect with any terms of the writing, and thus their interpretative force, as showing the significance of the words "manor of S.," can be given full play without the danger of contravening that rule; this is the explanation of Parke, B., in Doe *v.* Needs, 2 M. & W. 129: "The words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the court to reject one of the subjects or objects to which the description in the will applies and to determine which of the two the devisor understood to be signified by the description which he used in the will;" see the same language adopted by Bigelow, C. J., in Bodman *v.* American Tract Society, 9 All. 447.

[3] The Lord Cheney's Case, 5 Co. 68 *b* (on a devise "to his son John generally," it might be shown "that he, at the time of the will made, named his son John the younger."

[4] Diggs *v.* Kurtz, 132 Mo. 250 (deed of "lot No. 312," not naming boundaries or plat; oral agreement admitted); Maynard *v.* Render (Ga.), 23 S. E. 194 ("cords" of wood; mutual understanding as to a cord's length admitted).

to be sought in the written memorial alone.[1] But where the blank indicates merely the party's ignorance of the complete description and not a failure to make a definite act or transfer, the situation is the ordinary one of an equivocation.[2] (*a''*) Where a gift is to one or more than one of a class, the situation may be equivalent to that of a blank—*e. g.*, a devise to "A and B and heirs," or to "one of the sons of C," or to "my nephew D or E;" for here there is a failure to complete the testamentary disposition.[3] But, on the other hand, it may be in effect a definite disposition giving an election to some donee to choose out of a class of objects; here the gift is not void for uncertainty.[4] (*b*) Where the terms of the will are not applicable to any object, *i. e.* where the description "is true in part but not true in every particular—as where an estate is devised called A, and is described as in the occupation of B, and it is found that though there is an estate called A, yet the whole is not in B's occupation, or where an estate is devised to a person whose surname or whose Christian name is mistaken, or

[1] In the following instances the declarations were not admitted: Hunt *v.* Hort, 3 Prec. Ch. 311 ("to become the property of Lady "); Baylis *v.* Attorney-General, 2 Atk. 237 (money given "according to Mr. —— his will"). It may be noted that this situation may occur even where the document does not contain what could be termed literally a blank; for example, where a will contained a list of devisees indicated by successive letters, K, L, M, etc., and provided that "the key and index to initials is in my writing-desk," but the key to the cipher was dated eight years later than the will; this was excluded, because the will was in effect unfinished when executed, and the subsequent key was not a valid testamentary act. On this principle the following case may be questionable: Dennis *v.* Holsapple, 148 Ind. 297; devise to "whoever shall take care of me and maintain, nurse, clothe and furnish me, etc., during the time of life yet when I shall need the same;" the claimant was allowed to show that she fulfilled this description, and that the testatrix had in asking her aid, referred to the above provision.

[2] This was the case in the following instances: Price *v.* Page, 4 Ves. Jr. 679 (bequest to " Price, the son of Price"); Marske *v.* Willard, 169 Ill. 276 (lease of "lot No. ——, in assessor's subdivision of Whiting's Block, No. 8").

[3] Altham's Case. 8 Co. 155; Strode *v.* Russell, 2 Vern. 621.

[4] Bacon, Maxims, Rule 25; though it would apparently not be a case of equivocation where declarations could be used.

whose description is imperfect or inaccurate,"[1] there seems no reason against using declarations of intention; because their effect is not to compete with the terms of the will, but merely to aid in determining which is the essential part of the description and which the non-essential part. The description had a definite sense for the testator, but some part of it has to yield, being inaccurate, and the only effect of the declarations can be to aid in applying the description as used by the testator. That declarations of intention are in such a case admissible, may fairly be said to have been once the law in England;[2] but subsequent rulings have rejected such evidence.[3] In the United States the evidence has sometimes been received.[4]

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(To be continued.)

[1] Tindal, C. J., in Miller *v.* Travers, 8 Bing. 244.

[2] Thomas *v.* Thomas, 6 T. R. 671 ("to my granddaughter, Mary Thomas, of L., in M. parish;" there was an M. T., but she was a great-granddaughter, and lived in another parish; there was an E. E., who was a granddaughter and lived in M. parish; declarations of intent made at the time of execution were held admissible); Selwood *v.* Mildmay, 3 Ves. Jr. 306 (bequest of stock "in the four per cent. annuities of the Bank of England;" the testator had only long annuities not four per cents; instructions to his attorney admitted); Still *v.* Hoste, 6 Madd. 192 (bequest to "Sophia S., daughter of P. S.;" P. S. had daughters, but none named Sophia; instructions to scrivener admitted); Tindal, C. J., in Miller *v.* Travers, quoted *supra.*

[3] Doe *v.* Hiscocks, 5 M. & W. 363 (to "my grandson, J. H., eldest son of the said J. H.;" J. H., the father, had a son S., the eldest by his first wife, and a son J. H., the eldest by his second wife; instructions and declarations excluded, almost solely on the authority of Miller *v.* Travers, *supra;* the decision thus rests on a direct misunderstanding); Bernasconi *v.* Atkinson, 10 Hare 345 (following Doe *v.* Hiscocks); Drake *v.* Drake, 8 H. L. C. 172, 175 (resting solely on Doe *v.* Hiscocks); Charter *v.* Charter, L. R. 7 H. L. 364 (by three judges; but Lord Selborne, one of them, added, "Why the law should be so . . . I am not sure that I clearly understand;" the preceding cases were held to control). Professor Thayer, Preliminary Treatise, 480, accepts this result as sound.

[4] The question has not often been discussed because of a tendency to ignore the distinction between declarations of intention and other evidence; *admitted:* Covert *v.* Sebern, 73 Ia. 564; Lassing *v.* James, 107 Cal. 348; Gordon *v.* Burris, 141 Mo. 602; *excluded:* Eckford *v.* Eckford (Ia.), 53 N. W. 344; Judy *v.* Gilbert, 77 Ind. 96; Funk *v.* Davis, 122 *id.* 281; Ehrman *v.* Hoskins, 57 Miss. 192.