

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

§ 12. *Same: Rule against disturbing a Clear Meaning.* It is often said that where a word or a phrase bears a single clear meaning or application, no showing will be allowed that the party or parties actually used it in a different sense; and that therefore no evidence of usage or circumstances tending to prove such a sense will be considered. This limitation finds expression in varying forms; sometimes, for example, it is said that outside circumstances may be considered to identify and apply the description, and if a single object is found which exactly fits the description, then that object alone will be taken as designated by the terms of the document; sometimes it is said that where no ambiguity exists, no facts showing a peculiar intent will be considered. These varying phrasings, however, seem to rest on the same general notion, that, where the literal terms of the document have a clear and precise significance according to general standards, then the process of appealing to the individual standard of party or parties making the document, and of showing the application or sense of the words to have been used by them peculiarly and differently from the ordinary or apparent one, will be prohibited. This attitude may be partly accounted for historically, as a survival of an early scholastic and narrow view of the limits of interpretation,¹ partly (in the American cases) by a misapplication of the preceding exclusionary rule about declarations of intention to the whole field of interpretative data.² But it will be seen that it can have no justification in principle. The object of interpretation, as already explained, is to discover and enforce the terms of the document in the sense employed by the party (if one only) or parties (if two or more); and it cannot mat-

¹ This history is fully expounded by Professor Thayer, *Preliminary Treatise*, 410, 445.

² Usually by treating that rule as equivalent to the exclusion of all "parol evidence" unless an "ambiguity" existed.

ter what other persons might have understood by the words, if the party himself has not used them in that significance. It may be difficult, in a given instance, to believe that the party did use them in a peculiar and (to others) unnatural sense, and the evidence may be in a given case insufficient to convince that he did; but if it can be shown beyond doubt that he did, then there is no legal reason why his sense and application of the words should not be enforced and why the data that show it should not be considered. "No amount of evidence," said Sir George Jessel, Master of the Rolls, in a well-known witticism, "would convince him that black was white;"¹ but it is one thing not to be convinced by the evidence in a given case, and a very different thing not to listen to evidence at all or not to accept the consequences if the evidence does convince. The truth is that this rule about not disturbing a clear meaning, so far as it should have any recognition, ought to be (in the epigrammatic phrase of Lord Justice Bowen²) "not so much a canon of construction as a counsel of caution."

To-day this supposed rule has an anomalous standing. On the one hand, we find it frequently mentioned and occasionally enforced; on the other hand, we find rulings which clearly demonstrate that it has no necessary part and no established status in the law. (1) In the case of *wills*, it has been repudiated in several rulings which go to the extreme in illustrating the true process of interpretation, namely, that of finding and enforcing the sense used by the testator, no matter what the sense obtaining among other persons; the possible result of this process is typified in Chief Justice Doe's summing up,³ that "a person known to the testator as A. B., and to all others as C. D., may take a legacy given to A. B.;"⁴ a fre-

¹ *Mitchell v. Henry*, 24 Sol. Journ. 690; 15 Ch. D. 181; the question was whether the term "white selvage" could be shown by trade usage to be applicable to an article which to ordinary observers was dark gray or black.

² *Re Jodrell*, 44 Ch. D. 590.

³ *Tilton v. Amer. Bible Soc'y*, 60 N. H. 377.

⁴ Some of the cases are as follows: *Ryall v. Hannam*, 10 Beav. 536 ("to Elizabeth Abbott, a natural daughter of E. A., of the parish of G., single woman, and who formerly lived in my service;") on data too

quent field for the process is in enforcing the testator's individual usage of terms which ordinarily have a fixed legal significance of a different purport.¹ On the other hand, there are many rulings in which the apparent or natural sense has been enforced, and no showing of the testator's individual and abnormal usage has been allowed.² (2) In the case of *contracts*

numerous to note here, this description was held to signify John, the natural son of E. A., then married); *Parsons v. Parsons*, 1 Ves. Jr. 266 (to his "brother Edward Parsons;" taken to apply to Samuel P., whom the testator had habitually called Edward; though there was a deceased brother Edward); *Beaumont v. Fell*, 2 P. Wms. 141 (to "Catharine Earnley;" interpreted to apply to one Gertrude Yardley); *Blundell v. Gladstone*, 11 Sim. 467, on appeal in 1 Phillips, 279 (particularly the opinion of Patteson, J.); *Powell v. Biddle*, 2 Dall. 70 (to "Samuel P., son of S. P., of the city of Philadelphia, carpenter;" S. P. had sons William and Samuel; the legacy was given to William, on the strength of the testator's usage as to the name); *Smith v. Kimball*, 62 N. H. 606 (to "Meredith Institution;" construed on the facts as applicable to the Kimball Union Academy of Meriden); *Ross v. Kiger*, 42 W. Va. 402 (similar to the preceding case).

¹ *Doe v. Beynon*, 12 A. & E. 431 (to "her three daughters;" application to illegitimate daughter, allowed to be evidence); *Grant v. Grant*, L. R. 5 C. P. 727, per Blackburn, J. ("my nephew, J. G.;" there were two such nephews, sons respectively of the testator's brother and of his wife's brother; the term was held applicable, by the testator's usage, to the latter); *Re Horner*, 37 C. H. D. 695 (to "my sister C., the wife of T. H.," and on her death, "among her children;" H. was only cohabiting with C., and the testator knew this; but his words were interpreted to signify C.'s illegitimate children); *Re Jodrell*, 44 Ch. D. 590 (to "relatives;" held to apply to "all those the testator had before treated as relatives," even including persons related through illegitimate children); *Robb's Estate*, 37 S. C. 19, 28, 39 (to "such persons as shall be entitled under the law;" the law did not recognize persons related through illegitimacy; but the testator's usage as applying the terms to such persons was admitted).

² *Stringer v. Gardiner*, 4 DeG. & J. 468 ("my said niece E. S.;" a niece E. S. had died before the date of the will; a granddaughter of this niece, also named E. S., was living; the description was applied to the former, by the present rule); *Dorin v. Dorin*, L. R. 7 H. L. 568 (to "our children;" not applied to two illegitimate children by a person married to the testator just before the making of the will, there being no children after the marriage; the legal meaning held, in defiance of common sense, to apply and to exclude those children); *Re Fish*, 1894, 2 Ch. 83 (to a "niece E. W.;" there was no such niece, but there was a legitimate and an illegitimate grandniece of the wife, each named E. W.; facts showing the applicability of the terms to the latter were excluded); *American*

and *deeds*, the standard of usage is changed, *i. e.*, it is the joint sense of the parties that it is to be sought;¹ but if it can be clearly discovered, in the shape of usage or express agreement, there is on principle no objection to it merely on the score that it varies, however widely, from the natural or common or legal sense of the terms. Such is the attitude of many courts.² But here also we find many rulings adopting the principle that a clear meaning cannot be overturned, by any express understanding or special usage.³

§ 13. *Same*: (3) *Rule Against Correcting a False Description*. A doctrine has obtained some footing in the United States that where a description does not apply exactly to any object, but applies partly to one or partly to another, no data at all

Bible Soc'y *v.* Pratt, 9 All. 109 ("Dedham Bank;" there was such a bank, but also a Dedham Institution for Savings; facts showing the applicability of the term to the latter were excluded); Tucker *v.* Seaman's Aid Society, 7 Met. 188 (to "the Seaman's Aid Society in the city of Boston;" there were two societies, one named as above, the other named the Seaman's Friend Society; the bequest given to the former, by the present rule); Flora *v.* Anderson, U. S. App., 67 Fed. 182.

¹ *Ante*, § 9, p. 438.

² Mitchell *v.* Henry, L. R. 15 Ch. D. 181 (stated *supra*, p. 684; James, L. J., said: "The question is not whether the selvage is white, but whether it is what the trade know as a white selvage"); Cochran *v.* Retberg, 3 Esp. 121 (vessel to pay "five guineas a day demurrage; custom not to reckon Sundays and holidays, held to prevail); Com. *v.* Hobbs, 140 Mass. 443 ("white arsenic," in fact colored with lamp-black, "still remained the substance known as white arsenic"); Farnum *v.* R. Co., 66 N. H. 569 ("noiseless steam motor;" technical application to motors making some noise, allowed); Read *v.* Tacoma Assoc., 2 Wash. 198 (deed running a line "west;" custom to run such lines a little north of west, admitted).

³ Balfour *v.* Fresno C. & I. Co., 109 Cal. 221; Harrison *v.* Tate, 100 Ga. 383; Armstrong *v.* Granite Co., Ill., 42 N. E. 186; Allen *v.* Kingsbury, 16 Pick. 238 ("evidence of usage is never to be received to overturn the words of a deed"); Brackett *v.* Bartholomew, 6 Met. 396; Goode *v.* Riley, 153 Mass. 585 ("You cannot prove a mere private convention between the parties to give language a different meaning from its common one. It would open too great risks if evidence were admissible to show that when they said 500 feet they agreed it should mean 100 inches, or that Bunker Hill Monument should signify the old South Church;" as to this, the sufficient answer is that the real significance of a large proportion of commercial cipher telegrams could then never be proved).

can be considered to interpret and apply the description to an object which would be sufficiently and correctly described if a part of the terms of the writing were omitted. This result seems to have been reached in part by the influence of the supposed rule (just explained) against disturbing a clear meaning, and in part by the influence of the Baconian phrases about ambiguities, *i. e.*, it is argued in such ruling that there is no ambiguity in such a case, and then it is assumed (forgetting that the *excludi g* rule—*ante*, § 11—to which there is an exception for ambiguities or equivocations, affects merely declarations of intention) that, not merely declarations of intention, but all circumstances whatever, helping to interpret the description, are to be excluded.¹ There is no support on principle, or in orthodox precedent, for such a result; the process is merely that of applying or interpreting a description, and of perceiving, upon the comparison of the terms with an external object, that one or more terms are non-essential and superfluous, and that the remainder are vital and decisive indices of description. Thus, if a will gives property to “James Winchendon, native of Portland, Maine, husband of my daughter Sarah, carpenter by trade, and residing at No. 48 West Street, Jamesville,” and we find a person who fulfils all these terms except that he lives at No. 348 West Place, we may treat that term of the description as non-essential, and still be satisfied that a person fulfilling the other and essential terms is the one signified. This process, as including an examination of all the circumstances, a rejection of part of the description as superfluous, and an application of the remainder to an object fulfilling it, is correct on principle, whether it is as simple as in the above instance or more extensive and radical; the only question can be whether in a given instance the cir-

¹ This attitude is seen in the dissenting opinion in *Patch v. White*, 117 U. S. 210, cited *post*, where, after much reference to ambiguities, it is finally said: “If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the intention of the testator, unless it be to explain a latent ambiguity;” here the real rule referred to is the rule excluding declarations of intention; and this unfortunate confusion of declarations of intention with all “extrinsic evidence” whatever is frequently found as the source of erroneous rulings.

cumstances sufficiently convince us that a certain part of the description may be rejected as non-essential and superfluous. This result has long been established in England.¹ In the United States no difficulty seems to have been experienced in cases other than wills of land containing erroneous descriptions. In deeds of land it seems to be generally accepted (according to the maxim, *falsa demonstratio non nocet*) that the process of ascertaining what terms (*e. g.*, courses and calls) may be rejected as non-essential, and of considering the circumstances for that purpose, is a proper one; the only limitation being that enough must remain to indicate the land with certainty.² Where a will is involved, a distinction may conceivably, though perhaps not properly, be taken between a will devising "all my land, to wit," followed by the description in question, and a will not so premising ownership; in the former case, if the description names "the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sect. 36, t. 18, r. 10," and the testator owns no such land, but owns the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, then the whole description may be interpreted to read, omitting the first term as non-essential, "my land in the N. E. $\frac{1}{4}$," etc., which is easily applied; in the latter case, there being no such preliminary term in the will, the description, omitting the first part, would

¹ Co. Litt. 3 a: "If lands be given to Robert, Earl of Pembroke, where his name is Henry, . . . in these and like cases there can be but one of that dignity or name, and therefore such a grant is good, albeit the name of baptism is mistaken;" *Goodtitle v. Southern*, 1 M. & S. 299 ("all my farm, lands, and hereditaments called T. farm, . . . now in the occupation of A. C.;" though two closes of T. farm were occupied by M., the whole was held to pass); *Doe v. Huthwaite*, 3 B. & Ald. 632 (to "G. H., eldest son of J. H., etc., in default, etc., to S. H., second son of J. H., etc., in default, etc., to J. H., third son of J. H.;" in fact, S. H. was third son and J. H. second son; circumstances considered to show which part of the description was essential); *Cowen v. Truefitt*, [1893] 2 Ch. 551 (deed of rooms on second floor of Nos. 13 and 14, Old Bond Street, with free ingress "through the staircase and passage of No. 13;" there was a staircase and passage in No. 14, but none in No. 13; the words "of No. 13" rejected as *falsa demonstratio*).

² See examples in *Fancher v. DeMontegre*, 1 Head, 40; *Higdon v. Rice*, 119 N. C. 623; *Davidson v. Shuler*, *ib.* 582, and cases cited; *New York L. I. Co. v. Aitkin*, 125 N. Y. 661; *Gordon v. Kitrell* (Miss.), 21 So. 922; *Rushton v. Hallett* (Utah), 30 Pac. 1014.

run, "the N. E. $\frac{1}{4}$ of sect. 36," etc., which could not be enforced, because the testator does not own the whole N. E. $\frac{1}{4}$.¹ Thus we have a further distinction between rulings which regard it possible to imply such a term as "my land," where it is wanting, and rulings which regard such an implication as improper.² Of the general state of the rulings it may be said (1) that the process of ascertaining the non-essential terms, by considering all the circumstances and by applying the description with the omission of the non-essential terms, is in the United States almost everywhere treated (as it is in England) as proper; (2) that where it is necessary, in order to obtain a sufficient description, to imply into the will such a term as "land belonging to me," there are varying rulings

¹ The controversy has centered around the case of *Kurtz v. Hibner*, 55 Ill. 514; criticised by Judge Redfield, of Vermont, in 10 AMER. LAW REG. N. S. 93, and defended by Judge Caton, of Illinois, *id.* 353, and by Julius Rosenthal, Esq., of Chicago, in *Chicago Legal News*, March 18, 1871. In that case, the devise was of "the west half of the southwest quarter of section 32, township 35, range 10, containing eighty acres;" it was offered to show, among other circumstances, that the testator owned only one 80-acre tract in township 35, but in section 33, and that by the draughtsman's mistake "32" had been written instead of "33;" and a similar showing was offered as to another bequest. The second part of this evidence (as to mistake) was rightly rejected, but the court excluded the first part also, and it is from this latter point of view that the ruling is to be questioned and has been the subject of controversy. The court laid stress on the fact that there were no other words in the will by which the description could be applied to section 33.

² The answer to the above suggestions seems to be that it is not necessary to imply any terms at all into the will; that the inquiry is merely what object the description as a whole signifies in the light of the circumstances; and that the circumstance of the testator's owning *e. g.* one-quarter section and not owning another may suffice to indicate that the description taken as a whole was applied to the former, even though it is not literally accurate in common usage. If there were a bequest to "James Ryder," and the testator's usage applied this name to Joseph Ryder, of Jamestown, it would be useless to argue that, by striking out the incorrect "James," the remaining "Ryder" could not be applied to that particular Ryder named Joseph because that would mean implying the word "Joseph" or "Jamestown" into the will; and yet the two arguments seem to rest on the same footing.

(in the few instances where the question has been raised), even by courts of the same jurisdiction.¹

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¹The question seems to have arisen chiefly in Illinois, Indiana, and Iowa, but in none of these jurisdictions, particularly in Illinois, are the successive rulings consistent: *Donchow v. Johnson*, 113 Ala. 126; *Kurtz v. Hibner*, 55 Ill. 514; *Bowen v. Allen*, 43 *id.* 53; *Bishop v. Morgan*, 82 *id.* 351 (the dissenting opinion of Dickey, J., is valuable); *Emmert v. Hayes*, 89 *id.* 16; *Decker v. Decker*, 121 *id.* 341 (practically overruling *Kurtz v. Hibner*); *Bingel v. Volz*, 142 *id.* 214 (following *Kurtz v. Hibner*); *Hallady v. Hess*, 147 *id.* 588; *Cleveland v. Spillman*, 25 Ind. 95; *Judy v. Gilbert*, 77 *id.* 96; *Funk v. Davis*, 112 *id.* 281; *Sturgis v. Work*, 122 *id.* 134; *Rook v. Wilson*, 142 *id.* 24; *Hartwig v. Schiefer*, 147 *id.* 64; *Fitzpatrick v. Fitzpatrick*, 36 Ia. 674; *Christy v. Badger*, 72 *id.* 581; *Covert v. Sebern*, 73 *id.* 564; *Eckford v. Eckford*, *id.*, 53 N. W. 344; *Wilson v. Stevens* (Kan.), 51 Pac. 903; *Riggs v. Myers*, 20 Mo. 239; *Gordon v. Burris*, 141 *id.* 602; *Winkley v. Kaime*, 32 N. H. 268 (useful case); *Jackson v. Sill*, 11 Johns. 201; *Scates v. Henderson*, 44 S. C. 548; *Minor v. Powers* (Tex.), 24 S. W. 710; *Patch v. White*, 117 U. S. 210; *Wildberger v. Cheek*, 94 Va. 517; *Ross v. Kiger*, 42 W. Va. 402.

From the above cases should be distinguished those in which a real equivocation exists, *e. g.* where a deed or will names "the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sect. 10," but does not name range or township, county or state; here the description is equally and correctly applicable to several pieces of land, and the case is analogous to a bequest to "John Smith;" in such cases, even declarations of intention would be admissible (*ante*, § 11); and it is clear that at least the circumstances may be looked to in applying the equivocal description; see instances: *Hallady v. Hess*, 147 Ill. 588; *Ill. Cent. R. Co. v. LeBlanc*, 74 Miss. 650; *Ladnier v. Ladnier*, *id.*, 23 So. 430; and cases cited therein.