1939

Irregularities of Testamentary Expression

Alvin E. Evans

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Jurisprudence Commons, and the Legal Writing and Research Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol27/iss3/1

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
IRREGULARITIES OF TESTAMENTARY EXPRESSION

By Alvin E. Evans*

The writing of a document requires the use of symbols of thought and these symbols are chosen either by the maker himself or by the agent or draftsman chosen by him. Either may choose inaccurate symbols. To what extent may they differ in effect from that given them by objective standards (e.g., standards of literature) but conform to the individual standard of the maker? Judge Cardozo has aptly said, "Signs and symbols must be turned into their equivalent realities. . . . How far the process will be extended is a question of degree." Lord Bacon has added to the usual difficulties of courts in interpreting symbols by creating his famous antithesis between latent and patent ambiguities.

Wigram, also, clear and succinct and liberal as he was in his day, sought to clarify the problem of interpretation by his second proposition that a plain meaning (objectively determined) cannot be disturbed, no matter what testator's actual intent may have been. It is followed in many quarters, not as a maxim of caution, but as an unyielding rule without reference to its consequences. It seems absurd, for example, to assign a legacy to a beneficiary identified by name only of whom testator may never have heard just because some person exists in the world bearing the exact name used. It is only somewhat less absurd to make the award to one who is so slightly within the ken of the testator that it is highly improbable that he is the intended beneficiary. Vaughn Hawkins, the elder Thayer, and Wigmore all found this antithesis of Bacon and the plain meaning rule of Wigram.

* Dean of the College of Law, University of Kentucky. Author of various articles on Wills, Administration of Estates, Trusts, Contracts and Community Property.

¹ Re Rausch, 258 N. Y. 334, 179 N. E. 757 (1932).
embedded in the decisions and have struggled to limit or modify their consequences.

The English courts have adopted the practice of "striking out" under some circumstances in order to be rid of objectionable matter, which apparently conflicts with the intent. American courts are more likely to reach much the same result by construction and this seems to be the only justifiable procedure.

If the testator knows the words he is using, there may still be some irregularity in case, unknown to him, they have a legal significance which he does not conceive that they have. It has usually been assumed that if he read the will over, or if it were read to him, he knew both the individual words and their combined import. It seems, then, that a discussion of irregularities of expression should not be divorced from the issue of knowledge of the contents and of understanding of their legal effect.

The title of this paper is "Irregularities of Expression" rather than "Mistake". Professor Page defines "mistake" as "the unconscious ignorance or forgetfulness of some fact . . . as a result of which testator executed a will which otherwise he would not have executed." Professor Atkinson describes mistake as relating either (1) to the document executed; (2) to the contents; (3) to the legal effect of the words; (4) to matters of inducement; or (5) to description of the property or of the beneficiary.

Jarman discusses "mistake" in two pages and concerns himself with (a) the identity of the instrument and (b) insertions and omissions. On page 32 he says: "If the execution of a will has been induced by mistake probate of it will be refused." On the opposite page (33) he states: "As a general rule a bequest that is induced by mistake . . . is nevertheless valid." This is purely a verbal clash and is caused by the application of the term "mistake" to entirely disparate situations.

Since the illustrations of mistake are of such an infinite variety that a useful classification is not at hand, it seems better

\[ \text{Page, Wills (2d ed., 1926), Sec. 168.} \]
\[ \text{Atkinson, Wills (1937) 228. See Rood, Wills (2d ed., 1926), Secs. 155-168; Godolphin, The Orphan's Legacy, 446 (10), (11). (The problems of mistake are treated as arising from errors of expression.)} \]
\[ \text{Theobold, Treatise on Wills (8th ed., 1927), 132-144, and Underhill, Wills (1900), Vol. 1, Sec. 164, Vol. 2, Secs. 595-600, 912-914, contain useful discussions. Many of the current treatises are completely or substantially worthless on this subject.} \]
\[ \text{Wills (7th ed., 1930), 32-33.} \]
to suggest an arrangement of the materials under a heading which lends itself to a surer analysis. Types of irregularities of testamentary expression are believed to exist and when the illustrations of each are brought together, more suitable conclusions may be reached.

Thus, the issue of mistake would be confined principally to mistake of inducement or motive. When mistake is so confined, most authorities agree with Professor Warren, that unless the mistake appears upon the face of the instrument, the will stands as written. Further consideration of mistake of motive is not given in this paper.

The types of irregularities which are here to be investigated are (a) misdescriptions, whether of beneficiaries or of the property given, usually involving a falsa demonstratio; (b) loose, inexact or informal descriptions which do not permit of technical interpretations, if the intent is to control. Another rather common situation arises (c) where testator's expression is elliptical or

---

4Warren (1928), Fraud, Undue Influence, and Mistake in Wills, 41 Harv. L. Rev. 309, 329.
5Re Carson, 184 Cal. 437, 194 Pac. 5, Note, 17 A. L. R. 248 (1920) (Gift to one who sustains relation of wife may be avoided for fraud but not for mistake). Cf., Wenning v. Teepe, 144 Ind. 189, 41 N. E. 600 (1895); Durham v. Avery, 45 Conn. 61 (1877); Jones v. Habershaw, 63 Ga. 146 (1879) (Mistake as to identity of next of kin); Jones v. Grogan, 98 Ga. 552, 25 S. E. 590 (1896) (Mistake respecting heirs' attitude); Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306 (1904); Dibble v. Currier, 142 Ga. 855, 83 S. E. 948 (1914) (same); Adams v. Cooper, 148 Ga. 852, 96 S. E. 858 (1914) (similar); Smith v. Diggs, 128 Md. 394, 97 Atl. 712 (1916); 130 Md. 101, 99 Atl. 952 (1917); (similar); Hayes v. Hayes, 21 N. J. Eq. 265 (1871) (The will gave a brother $15,000. A codicil reduced this amount because as erroneously recited testator had given the legatee other property. Reduction stands); Creeky v. Ostrander, 3 Brad. 107 (N. Y. Surr. 1855) (One of next of kin overlooked); Clapp v. Fullerton, 84 N. Y. 190 (1866) (Daughter mistaken for illegitimate); Re White, 131 N. Y. 409, 24 N. E. 935 (1890) (Mistaken belief regarding son's attitude); Bedlow's Will, 22 N. Y. S. 290 (Sup. Ct. 1893) (Mistake as to attitude of family); re Janes, 33 N. Y. S. 968, Affd., 155 N. Y. 647, 46 N. E. 1148 (1897) (Legacy to housekeeper under the belief that she was unmarried, testator having declared that he would not have a married woman as housekeeper); Mendenhall's Appeal, 124 Pa. 387, 16 Atl. 881 (1889) (Revocation of a legacy because testator erroneously believed that he had made a gift of certain stocks to legatee's husband.) See N. 108, 115, 116 and 117 infra.

For mistake appearing on the face of the will, see Mordecai v. Boylan, 55 N. C. 365 (1865) (T by codicil gave his grandson a legacy because, as alleged, the latter had been disinherited in the will. But this was not true and he accordingly does not take the codicillary legacy). But a revocation may be set aside because of mistake which does not appear on the face of the will. See Snyder v. Raymond, 48 Idaho 810, 285 Pac. 478 (1930); Cf., Padelford's Estate, 190 Pa. 35, 42 Atl. 381 (1899).
incomplete. Often the language is cryptic, or there is an hiatus or an inconcinunity in the expression, the meaning of which must be patiently spelled out by the court within the limits of the Wills Statute. (d) The enumeration of beneficiaries has often been faulty so that a conflict arises between the dominant intent respecting the beneficiaries and the number of beneficiaries actually named. (e) The problem of the identity of the executed instrument arises now and then as also (f) dubious assertions respecting advancements. It seems wise, first, to examine, as a useful prelude, the matter of latent and patent ambiguities, which may lurk in all types of irregularities of expression.

**LATENT AND PATENT AMBIGUITIES**

As already indicated, the idea of a sharp and all pervading distinction between latent and patent ambiguities arose with Bacon. This notion has some inherent significance but often proves deceptive in its consequences. The frequent repetition of it tends to conceal its dangers. Courts have frequently been misled by the formula that latent ambiguities may be clarified by extrinsic evidence, whereas patent ambiguities may not be so explained. The stock illustration of a latent ambiguity was a gift to a named person, there being two who equally well fitted the description, or a gift of "my manor of Dale" when there

---

*Maxims Regula, XXV. See 9 Holdsworth, "History of English Law" (1926), 219-222; 7 ib. 339-350. Thayer, on the Parol Evidence Rule (Chaper X) in A preliminary Treatise on Evidence at the Common Law (1898), says of Bacon's distinction, p. 424, "Bacon's Maxim was an unprofitable subtlety." "Bacon, when he spoke of ambiguities, latent and patent, meant only a limited sort of thing, namely, what he said, 'ambiguity'." "Bacon's maxim is inadequate and un instructive," p. 482. He further says that Bacon's maxim, enunciated about 1596-97, laid unnoticed until 1761, when it was resurrected by Apsley, uncle of Buller. See also 1 Jarman on Wills (7th ed., 1930), p. 493; 5 Am. Law. Reg. (N. S. 1866), p. 140, Patent and Latent Ambiguities by S. H. O. It is commonly stated in the American cases that a patent ambiguity cannot be explained by extrinsic evidence. See Evans v. Van Meter, 320 Ill. 195, 150 N. E. 693 (1928) (Will gave all to wife. "In default of her death", over. Since ambiguity is patent, parol evidence is inadmissible. Presumption of vesting in first taker applied). Cf., Grimes v. Harmon, 35 Ind. 198, 208 (1871); McConnell v. Robbins, 195 Ind. 359, 140 N. E. 59 (1923) (T gave all his estate to a trustee and all the rest to A); Bank of Manhattan v. Gray, 53 R. I. 377, 166 Atl. 817 (1933) (T gave all his estate to a trustee, all the rest and residue to A. "If this is an ambiguity, it is patent"); Jennings v. Talbert, 77 S. C. 458, 58 S. E. 429 (1907) ("Ambiguity is patent where there is a conflict between words and clauses").
IRREGULARITIES OF TESTAMENTARY EXPRESSION

were two of them. Bacon’s hypothetical illustrations of a patent ambiguity were a devise of land to I. D. and I. S. et haeredibus, and a devise of ten acres of land not further described, the testator being seized of one hundred acres. A patent ambiguity, then, so it is said is an uncertainty appearing upon the face of the will which cannot be explained and which causes the will, or parts of it, to fail. It is said that the uncertainty cannot be resolved by extrinsic evidence, for that would be to make an insensible will sensible by an unattested act. As a matter of fact, the English courts have often done just that thing.

There was no consistent rule by which the two types were clearly distinguished. Thus, while it has been held that where there was a gift to one of the sons of J. S., he having several, the one intended could not be identified by extrinsic evidence, yet a gift to “Godly persons” could be so explained. Ambiguities or equivocations vary in the degree of the intelligibility manifested. If an instrument is completely insensible, it seems that no evidence to put meaning into it should be permissible.

7 Redfield, Wills (4th ed., 1876) 507; Jarman, Wills (7th ed., 1930) 492, 494. “An ambiguity apparent on the face of the will cannot be explained by parol evidence.” Jarman, however (493) says the distinction is unsubstantial or is confined to a special class of cases.

8 Fonnerau v. Poyntz, 1 Bro. C. C. 472 (Ch. 1785) (T gave the sum of £500 stock in long annuities to A, same to B, and £200 to C. As annuities this called for 10 times more assets than T had and left nothing to the residuary legatees. Evidence of the condition of the estate was admitted to show that T meant to give each a principal sum of the amount named rather than annuities. In Colpoys v. Colpoys, Jacob. 451 (Ch. 1822), the facts being almost identical, the court spoke of exceptions to the rule as to patent ambiguities. “Common sense and the law of England (rarely at variance) warrant the departure from the general rule and call in the light of extrinsic evidence.” See Penick v. Walker, 125 Va. 274, 99 S. E. 559 (1919) (The will directed that $10,000 be paid to a legatee “which sum can be made up out of my insurance policies”. These policies were already payable to her (daughter). There was no intent to give her an additional sum.

9 Strode v. Russell, 2 Vern. 621, 625 (Ch. 1708). Cf. cases cited in n. 94. See Jansen v. Field, cited in Rogers v. Pittis, 1 Add. 30, 38 (Eccl., 1822) (a reference to a codicil of a named date, there being none of that date, was said to be a patent ambiguity); Smith v. Doe, 2 Brod. & B. 473, 553 (C. P. 1921) (similar); Grainger v. Dawson (1909), 2 Ch. 766, 773 (an uncertainty upon the face of the will was resolved by extrinsic evidence). In Castledon v. Turner, 3 Atk. 257 (Ch., 1745), T gave his lands to his wife for life, then over to her niece. Then, he gave the “use of £500 during her natural life and after her decease to the brothers and sisters of my said wife.” This was called a patent ambiguity and was explained. See also Gord v. Gord, 2 M. & W. 129 (Exch., 1836).

10 Shore v. Wilson, 9 Cl. & Fin. 355 (H. L., 1842).
Such a document is sometimes declared to be ambiguous. There are perhaps three gradations of expression, all of which may in some sense be called ambiguous. The lowest form is that of insensibility, to which the term ambiguity is not properly applied. Rising somewhat from that and not utterly devoid of sense is the case of obscurity\textsuperscript{11} of expression. Finally, the situation arises where an instrument is susceptible of two or more interpretations. It may be described as being uncertain or equivocal or truly ambiguous. Perhaps it should be observed that while an ambiguity is an obscurity, an obscurity need not be and very often is not an ambiguity.

In \textit{Eichorn v. Morat}\textsuperscript{12} the testatrix said: "I ... bequeath my personal and real estate which I received ... without security so long as \textit{he} lives, and should \textit{he} have need \textit{he} can sell it." This is a clear case of an obscurity which might be termed a patent ambiguity. The will does not indicate what "\textit{he}" was intended. The Kentucky court, however, admitted proof that the testatrix was a German woman and that German women habitually referred to their husbands as "\textit{he}" and therefore that "my husband" was the unexpressed antecedent of \textit{he}. This court will have its difficulty in the future if it still proposes to abide by Bacon's distinction.

There seems to be no adequate justification for saying that an obscure instrument may not be clarified by evidence of the circumstances affecting its execution,\textsuperscript{13} appropriate caution being

\textsuperscript{11} A provision written in code known and used in a business may be interpreted according to the usage of a business and may be translated as in \textit{Kell v. Charmer}, 23 Beav. 195 (Rolls Ct., 1856), where a gift to testator's son of the sum of i.x.x was interpreted by the code used by jewelers. It is not, properly speaking, obscure. In \textit{Goblet v. Beechey} where the testator had in his codicil named certain articles of little value giving them to B and among the items he had written "\textit{mod}" it was held that this term was too obscure to cause a revocation of a gift in the will to A of his valuable "\textit{models}". It may have been a symbol known only to testator.

\textsuperscript{12} 175 Ky. 180, 193 S. W. 1013 (1917). Note the absurd result in \textit{Bruce v. Bruce}, 90 N. J. Eq. 118, 105 Atl. 492 (1918). Paragraphs 2-7 of the will were devises; 8-15 were bequests. Paragraph 16 devised certain land to my son, John S. Bruce, and ended in the middle of a line. Paragraph 17 gave the residue to "him and his heirs and executors". Held, paragraph 17 being apparently independent of 16, cannot be construed with the latter. Thus, there is a patent ambiguity, extrinsic evidence is inadmissible and the residuary clause fails. \textit{See 17 Mich. L. Rev. 610} (1919).

\textsuperscript{13} \textit{See Payne v. Todd}, 45 Ariz. 389, 43 P. (2d) 1004 (1935); dictum in \textit{Bond v. Riley}, 317 Mo. 594, 296 S. W. 401 (1927).
observed respecting the admission of testator's own declarations whether oral or made in other preserved wills. A distinction has been taken between oblique and direct declarations.\textsuperscript{14} Thus, "Look in my desk and get my will"\textsuperscript{15} is an oblique statement showing the testator's mental attitude toward an existing instrument and may be admitted in evidence in the proper case. If the question were one whether testator meant A or B to be legatee of a particular legacy, the direct declaration that he had given a legacy to A in his will would not be acceptable.\textsuperscript{16}

With this brief look at Bacon's antithesis, we are ready to examine specific types of irregularities.

I. MISDESCRIPTIONS

Misdescriptions occur both with respect to the beneficiary and the property. The general principle applicable to them is, that where enough appears upon the face of the will to indicate what the intention was, the false description will not defeat the will, \textit{falsa demonstratio non nocet}. The beneficiary may be a charity, or an individual. In either case there may be a competition between claimants, each maintaining that it or he is the beneficiary intended and that the description, wholly or partially fits him. An individual beneficiary may be misdescribed either by name or by his relationship to the testator or to another person, or by the statement of certain qualities or characteristics asserted in the will. The misdescription of the property may consist of a partial misstatement of a quality or of a loose description capable of varying degrees of identification when applied to the object.

1. THE BENEFICIARY

(a) Charities. According to Wigram's second proposition,
where there is a beneficiary exactly corresponding to the name or
description given, no evidence of a contrary intent is admissible.
A rigid application of his proposition must necessarily result in
a failure to accomplish the intent of the testator in many cases.
Thus\(^{17}\) a Scotsman named The National Society for the Preven-
tion of Cruelty to Children as beneficiary but all his associations
were with the Scottish National Society for the Prevention of
Cruelty to Children. He had lived all his life in Scotland and
the latter society had recently been called to his attention. He
did not know of the former, which did not operate in Scotland.
Wigram's rule, unfortunately, was applied.\(^{18}\) The more recent
rule is to admit the evidence. In most cases the description does
not fit accurately any known charity. If there be competition
between claimants, it is not necessarily the one whose name is
most nearly like the one used in the will, that prevails. Thus, a
legacy to "Sailors' Home of Boston" was awarded not to the
"National Sailors' Home" but to the "Boston Ladies Bethel
Society" which maintained a sailors' home in Boston.\(^{19}\)

\(^{17}\) National Society for the Prevention of Cruelty to Children v.
Scottish National Society for the Prevention of Cruelty to Children
(1915), A. C. 207.

\(^{18}\) Another extreme case in Union Trust Co. v. St. Luke's Hospital,
77 N. Y. S. 528 (1902), Affd., 175 N. Y. 505 (Devise to "skin and cancer
hospital"). The competitors were N. Y. Skin & Cancer Hospital and
New York Cancer Hospital. Court would not permit evidence to show
the latter was intended; Tucker v. Seaman's Aid Society, 7 Metc. 188
(Mass., 1843) (legacy to Seaman's Aid Society); "Seamans' Friend
Society" claimed it. Proof that T did not know of the existente of
the Seaman's Aid Society was not admitted. In Minot v. Curtis,
7 Mass. 441 (1831), however, it was recognized that a corporation
might be popularly known by many different names.

\(^{19}\) Faulkner v. National Sailors Home, 155 Mass. 458, 29 N. E. 645
(1892). In In re Kilvert's Trusts, L. R. 7 Ch. 170 (1871), the name of
the legatee being inaccurate, the beneficiary was determined between
competitors by the fact that testator had contributed in the past only
to the one (here preferred). In King v. Long, L. L. T. Rep. 60 (1919),
an Irish testatrix bequeathed certain stocks to "The American Society
for the Prevention of Cruelty to Children". None existed by that
name. Being a foreign charity, the doctrine of cy pres and of admin-
istration by sign manual did not apply. In various American cities
there were societies of that general nature. The uncertainty was
resolved by evidence that T had lived in New York, the stocks had
been bequeathed to T by a former N. Y. owner. The New York Society
for the Prevention of Cruelty to Children was the first in the field and
best known and so was identified as the one intended (no competitor);
In re Little's Estate, 170 Cal. 52, 145 Pac. 194 (1915) (Legacy to
Womans' Christian Temperance Union of L. A. Three competitors.
Awarded to the one that owned and managed a temperance temple);
In re Moeller's Estate, 199 Cal. 705, 251 Pac. 311 (1926) (Legacy to
"Mount Mellick Union Workhouse" awarded at Laloghis Hospital and
Homes Commission which by statute had charge of the said work-
(b) *Individuals.* Mr. Justice Holmes once said:20 "By the theory of our language, while other words may mean different things, a proper name means one person and no other." This statement seems to be a limited adoption of Wigram's second proposition. It is agreed that while one name may be "*idem sonans*" with another, yet the two are different names. But if the name alone is conclusive of identity it would follow that if only one person in the world should happen to bear the name used, he would take the gift no matter whether he were completely unknown to the donor, or were in the outer fringe of his acquaintances, or were an intimate friend or a close relative. A court should most certainly look further if the only claimant of the exact name were a complete stranger and it is almost as certain that the testator did not mean to be generous toward anyone with whom he had merely a bowing acquaintance. We should

---

therefore reach the conclusion that the exact name of an individual is no more determinative than is the name of a charity. We have already seen in the latter case that the variations in name identifications are as great as are those in other word usages.

It has generally not been difficult to identify the beneficiary where there is a conflict in the description but no competition of claimants. Though in many of the cases there is either a competition between persons claiming as beneficiaries or between these and the heirs of the decedent, still the tendency is overwhelmingly in favor of the admission of evidence to qualify the language and to identify the beneficiary, even in cases where there is a person who exactly fulfills the description. Two recent cases illustrate this tendency. In Moseley v. Goodman, T gave a legacy to "Mrs. Moseley" and another to "Mrs. Moseley's housekeeper". Mrs. Lenoir Moseley claimed the legacy, as did also Mrs. Lillian Trimble. The testator had had no association with Mrs. Lenoir Moseley. He had traded with one Trimble.

2 Goods of Shuttleworth, 1 Curt. 911 (Eccl., 1838) (Gift to "Barton Nicholas Shuttleworth" awarded to "Barton Nicholas Bayey"). Cf., Beaumont v. Fell, 2 P. Wms. 151 (1723) (Legacy to Catharine—none such but there was one named Gatty); Gilchrist v. Corliss, 155 Mich. 126, 118 N. W. 938 (1908) (Misstatement of name and residence does not make gift fail); In re Halston (1912), 1 Ch. 435 (Gift to "John William Halston" awarded to "John Robert Halston"); In Goods of Cooper (1899), P. 193, T appointed "Thomas Stevenson" to be one of several trustees and "the said Thomas Cooper" to be one of his executors. (The court should not find it troublesome as a matter of law to find that "Stevenson" was intended. It has "said" and "Thomas" to rely on); In re Wray (1916), 1 Ch. 461 (Devise to T's nephew Frederick Johnson awarded to Joseph Francomb Johnstone, partly because he was sometimes called "Fred" and partly because he was a barber and T had said that the premises devised would be a good barber shop location (oblique declaration?)); Gregson v. Taylor (1917), P. 256 (Legacy in will to Adelaide Maude Ashewin, daughter of F. M. B. A., goes to same person); In re Ofner (1909), 1 Ch. 60 (To grand-nephew Robert Ofner. There was no Robert but T had four grand-nephews, Alfred, Curt, Richard and Bothe. Awarded to Alfred); Covert v. Sebern, 73 Ia. 564, 35 N. W. 636 (1887) (H. S. Covert identified as J. H. Covert); Gordon v. Burris, 141 Mo. 602, 43 S. W. 642 (1897) (Legacy to T's granddaughter Lucy May Gordon awarded to granddaughter Mary J. Gordon); Farrell v. Sullivan, 49 I. 468, 144 Atl. 155 (1929) (Legacies to "Arlene Dyer, daughter of J. H. D," and to "William Cronin", son of W. G. C," awarded to "Helene Dyer" and "Daniel Cronin"). 54 N. C. 110 (1861), is contra (Legacy to "Celia". There was no "Celia" but there was a "Sarah". Held, mistake could not be corrected. The result here is doubtless due to the pleadings. A bill was filed to reform the will and the court held it had no power of reformation).

21 138 Tenn. 1, 195 S. W. 590 (1917). For further discussion, see Warren, Interpretation of Wills— Recent Developments (1936), 49 Harv. L. Rev. 689, 690-698.
husband of Lillian Trimble, who was a representative for a wholesaler "Moseley" and so he called "Trimble" "Moseley". He also roomed at the home of Mrs. Trimble, whom he always called "Mrs. Moseley" and both she and her housekeeper had given him devoted attention in his illness. Evidence of the real intent was admitted. So in *Siegley v. Simpson*\(^2\) T made a bequest to "my friend Richard H. Simpson". For years he had been intimately associated with one "Hamilton Ross Simpson". There was a person, Richard H. Simpson, barely known to the testator, who claimed the legacy. The word "friend" helps to identify Hamilton Ross Simpson, but without that, it seems the court would have awarded the legacy to the latter. These cases illustrate the absurdity of the primary meaning rule as even recently followed.\(^2\)

Reference to a jury of the question of identity should be even more a matter of course where, instead of the name, the relationship or characteristics or qualities of the beneficiary are inaccurately given. Thus, a gift to a beneficiary identified but erroneously described as "wife" should not fail.\(^2\) So a gift to my niece (correct) Mary (incorrect), daughter of my sister, Mary (correct but ambiguous, there being two daughters, Mary and Annie), resident of New York (correct) was awarded to Annie (Mary lived in Ireland).\(^2\)

---

\(^2\) Wash. 69, 131 Pac. 479 (1913).
\(^4\) In re Boddington (1882), 25 Ch. Div. 685; Re Smalley (1929), 2 Ch. 112; Martindale v. Bridgeforth, 210 Ala. 565, 98 So. 800 (1924) ("To my half-sister, Alice Bridgeforth", gift does not fail because T was mistaken in the relationship.)
\(^5\) Donnellan's Estate, 164 Cal. 14, 127 Pac. 166 (1912). See note (1912), 1 Calif. L. Rev. 57; Careless v. Careless, 19 Ves. Jr. 601 (Ch., 1816) (Legacies to two nephews, Robert C., one the son of brother John, the other the son of brother Joseph. There was such a son of John but there was no brother Joseph. "Robert C.", son of "Thomas", prevailed); Still v. Hoste, 6 Madd. 192 (V. C. 1821) (Legacy to Sophia, daughter of Peter. Peter had two daughters, Selina and Mary. Direct a reference to the jury); Doe v. Hiscocks, 5 M. & W. 364 (Exch., 1839) (To son J. for life, then to his oldest son, J., and thereafter to the oldest son, John, in tail male in succession. J's oldest son was named Simon. The oldest son by his second wife was named John. An issue was directed as to T's intent); Bernasconi v. Atkinson, 10 Hare 344 (V. C., 1853) (Legacy to "my first cousin Vincent", commonly called "Vincent" son of T's "Uncle Joseph". Peter's son was named "Frederick". Evidence shows that T meant the former; Re Taylor, 34 Ch. D. 255 (1886) (To "cousin Harriet Cloak"; T had no own cousin by that name but had two cousins by marriage, one, "Harriet Crane" nee
Three cases of this type call for special comment. In Goods of Durlacher27 testator bequeathed legacies to F. L. S. and to T. S., children of J. F. S., and to G and to R, children of A. E. S. and F. S. The names and relationships were reversed, the latter named legatees being the children of the first named parents and the first named children being the offspring of the last named forbears. The result was that all four legacies failed. Such a miscarriage may well be attributable (a) to the Baconian distinction between latent and patent ambiguities as regards extrinsic evidence, this being declared a patent ambiguity; (b) to the common practice in England of striking out words used erroneously (which words, in this case the court would not strike because it was not shown that they were mistakenly inserted) and to the application of Wigram’s “plain meaning” rule. As shown above, there are many precedents for accepting the name for identification and disregarding the relationship. A sound construction in the light of the facts would have accomplished the testator’s wishes in that case. The beneficiaries were identified sufficiently to make it possible to disregard the erroneous statement of relationship. A sounder result was reached in In Re Dominici’s Estate.28 The testator gave the residue to three legatees, viz. to his sister, L. J., to his nephew, H. S., and to his nephew’s sister “my niece residing at Luchow”. This niece’s name was Christine. After the death of L. J. the testator, by codicil, gave the lapsed share to the “other two residuary legatees”, describing them this time as H. S. and his sister “Marie Kohler, living at Almark”. “Marie Kohler” was another niece of the testator but was not the sister of H. S. It was

“Cloak”, and the other “Harriet Cloak”. Latter was one intended); Re Estate of Cawley (1920), Ir. R. 78 (“All my property to my sister Annie Neary”. He had four sisters, all living in America. One was a nun. The other three, Mary Walsh, Annie Flynn and Bessie Neary. Given to Annie Flynn and parol evidence is not necessary. Given name will prevail over married name); In re King’s Will, 132 S. C. 63, 128 S. E. 850 (1925) (T had two daughters, “Bessie” a normal child, and “Lessie”, a cripple. The will provides for Bessie, who is described as the afflicted one. His intent is clear and the description prevails over the name).

27 75 L. T. 664 (1896).

28 151 Cal. 181, 90 Pac. 448 (1907). In Hare v. Cartridge, 13 Sim. 165, 60 Eng. Rep. 63 (V. C., 1842), the will read, “residue to my first cousins, the children of my father’s brother of the name of Cartridge”. Father had two brothers of that name, each of whom left children. The court struck out “children of my father’s brother” and gave the residue to testator’s “first cousins named Cartridge”. Case is questioned in In re Stephenson (1897), 1 Ch. 75.
held that Christine takes one third under the will and Marie Kohler takes one sixth under the codicil. A statute in California\textsuperscript{29} is regarded by the court as requiring the unraveling of patent ambiguities. One court disregarded the matter of relationship as stated and reached a sensible result by construction. In a Massachusetts case\textsuperscript{30} the testatrix had given certain property in trust for her son, N, and his wife and on the death of the survivor over to "their three children". N and his wife had no children. Testatrix, however, had three grandchildren, offspring of a deceased child, of whom she was very fond and they were otherwise unprovided for. The court said (a) if N had had children they would have been testatrix' grandchildren; (b) she therefore meant to give to her grandchildren and since there were no children of N she meant to give the property to the children of her other child now deceased. The only other alternative is a partial intestacy.

There is under this interpretation a misdescription of the beneficiaries, they being erroneously called the children of N. Then there is the inference that since the children of N must be testatrix' grandchildren, grandchildren of different parentage are intended. The court declared it had no power to reform the will and the result must be reached by construction. The language means "to my three grandchildren, the children of N and his wife." The words "the children of N and his wife" were disregarded (stricken under the English practice). This is a sound method of approach under the applicable precedents.

2. The Subject Matter

There are two types of misdescription of property, particularly of land, one of which involves a falsa demonstratio. The other type is illustrated by Doe v. Chichester,\textsuperscript{31} where the question was should "Ashton Estate" be used in a more or in a less comprehensive sense. These latter cases are considered under gifts by implication, both for convenience and as a matter of classification. The type where there is a clear misdescription is discussed at this point.

One of the common errors arises in the effort to describe

\textsuperscript{29} Probate Code of California (Deering, 1937), Sec. 105; see Bordwell, Statute Law of Wills (1929), 14 Ia. L. Rev. 1, 436.


\textsuperscript{31} 4 Dow 65 (H. L., 1816).
rural lands by subsection, section, and range, and urban realty by subdivision, square, and lot. There may be different situations:

1. The subsection figures may be partly erroneous but may still include the land intended to be devised, seeing that the section and range are accurately stated, in which event Professor Wigmore would say that the description will be accepted, disregarding the part that does not fit.32

2. The error may be such that the description does not embrace the land intended to be devised nor land owned by the testator. In that event (a) the land may still be identifiable if he has used "my" or the equivalent, applicable to it. It is unnecessary to a devise to describe land by metes and bounds, as is the usual practice in a conveyance. Thus, a falsa demonstratio arises. (b) There may be nothing on the face of the will to show what land was intended other than that described, which he did not own. Here the doctrine of falsa demonstratio is inapplicable because there is nothing to identify the premises save the demonstratio, which is falsa.

It has been urged, however, that decisions such as Kurtz v. Hibner,33 the leading case, are erroneous. There the testator had devised a lot in section 32 of the town of Joliet, which he did not own, though he did own a lot in section 31. It was held that parol evidence was inadmissible to show that he meant a lot in section 31. The opposing argument is that the remainder of the description is correct and sufficient to identify the property intended, inasmuch as testator could not have intended to give a lot he did not own.34 But to so hold involves dealing cavalierly with the wills act, and is not justifiable. Professor Wigmore favors reading into the language the assumption that the testator intended to devise his own lot, which amounts, as he admits, to an exception to the rule against implying terms into the will.35

---


33 55 Ill. 514 (1870).

34 See note (1871), 10 Am. L. Reg. (N. S.) 93, 97, and reply thereto, 353.

35 Note (1911), 5 Ill. L. Rev. 315, 316. See Weichert v. Weichert, 317 Mo. 118, 294 S. W. 721 (1927).
Kales would not quarrel with such an implication. Warren

is against it.

There seems to be no more reason for courts to go further
in this type of case than in other cases of testamentary hardship. The question is not whether the testator meant to give a lot which he owned, in which case it is possible to apply falsa demonstratio but rather the issue is whether the testator has made a devise in writing which can be effective. He has not in this case identified anything that can pass under his will.

Patch v. White is the leading decision in which the devise would have failed if the equivalent of “my” had not been used. The testator devised lot No. 6 in square 403 though he owned Lot No. 3 in square 406, but he used additional words which were held to identify the property and to make the principle of falsa demonstratio applicable. Thus, he described the premises as being “improved” (lot 6 in square 403 was not). He said “touching worldly estate whereof it has pleased Almighty God to bless me” (“my” lot) and he concluded, “The balance of my personal estate”, etc., showing that he was describing all the time something he possessed. Though there is some loose language about reforming the will, the court held by construction that an improved lot otherwise undevised passed under the will. This seems so clearly sound that one is surprised to find a dis-

---

2 Ill. L. Bull. 287, 290 (1920).

Warren (1920), The Progress of the Law, 1918-1919, 33 Harv. L. Rev. 556 at 560-565. And see 2 Ill. L. Bull. 175 and 233 for proposed statutory modifications.

Kurtz v. Hibner was followed in Stevenson v. Stevenson, 285 Ill. 486, 121 N. E. 202 (1918); Bimslater v. Bimslater, 323 Ill. 303, 154 N. E. 135 (1926); and the same rule is followed in California, Lynch’s Estate, 142 Cal. 373, 75 Pac. 1086 (1904); In Iowa, see Fitzpatrick v. Fitzpatrick, 36 Ia. 674 (1873) (The relief sought here was reformation rather than construction); see contra, Whitehouse v. Whitehouse, 136 Ia. 165, 113 N. W. 769 (1907); Flynn v. Holman, 119 Ia. 731, 94 N. W. 447 (1903), and Wilmes v. Tiernay, 187 Ia. 390, 174 N. W. 271 (1919); Pemberton v. Perrin, 94 Neb. 718, 144 N. W. 104 (1913); Boeck’s Estate, 160 Wis. 577, 152 N. W. 185 (1915). In each of these cases parol evidence was introduced to correct by construction the description and “my” or the equivalent was not used. Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757 (1878), may appear to be in conflict with Boeck’s Estate, but it probably went on a question of pleading, a reformation of the will being sought and refused. See 36 Ann. Cas. 68; 6 L. R. A. (N. S.) 942; 5 Wigmore on Evidence (2d ed., 1923), Sec. 2477; Chafee (1922), The Progress of the Law, 1919-1922.

117 U. S. 210 (1886). The case is generally followed. See Rook v. Wilson, 142 Ind. 24, 41 N. E. 311 (1895).
In *Armstrong v. Armstrong* testatrix devised "all my interest in our former home at Revenna (Nebraska) Illinois being lot 12, block 2, Max Meyer's Add. to Revenna, Mason County, Illinois". She also devised the rest and residue of "my" property. There is no town, Revenna, in Illinois and testatrix owned no property in Nebraska. She meant to devise lot 2 in said block in Havana, Mason Co., Illinois, in Marguerita Meyer's Subdivision, which had been "our former home". To disregard "Revenna", "Nebraska", and "Max" is clearly proper. So in *Griffith's Will*, where testator owned a house at "488 Van Buren Street" and the nurse, on preparing his will, described the premises as "my 480 acres on Van Buren Street", the house passed under the will.

### II. IMPLIED PROVISIONS, CRYPTIC EXPRESSIONS AND COMPREHENSIVE DESCRIPTIONS

While many irregularities of expression may be classified as misdescriptions known as *falsae demonstrationes*, others consist of eliptical or cryptic terms while still more are comprehensive or collective in nature, being used in a free sense and lacking in precision. The inconcinnity or hiatus in expression may not reach such a degree of insufficiency as to prevent an attempt at interpretation. Thus, an equivocation arises. On the other hand, as Professor Wigmore points out, (1) such a degree of irregularity may exist that no interpretation is possible.

The general problems studied in this paper are to be distinguished from another class of cases. Thus, the identification of the beneficiary or of the subject matter may not be entirely discoverable from the will. The beneficiary or property may be described generally but the precise identification may depend upon a subsequent act having independent significance, which

---

*Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919)*, where testatrix gave a lot in a certain block, the latter only being properly numbered. But she concluded with the "rest and residue of my estate" and in a codicil gave "the remaining one-third of all my property." *Thayer, ibid.,* p. 466, 473, points out the error of the court in holding that the devise fails. It arose from the blind adoption of Bacon's "latent ambiguity" and the assumption that defects and errors are not ambiguities.

*327 Ill. 85, 158 N. E. 356 (1927).*

*165 Wis. 601, 163 N. W. 138 (1917).*
IRREGULARITIES OF TESTAMENTARY EXPRESSION

act is not performed for the purpose of complementing the will. Such a non-testamentary act has been described elsewhere.\textsuperscript{43}

Statutes have been passed in some states which were designed to afford aid to the court in cases of irregularity of expression requiring it to declare the applicable rule in cases of mistake.\textsuperscript{44} It is not clear that anything substantial has been added to the common law power of the courts.\textsuperscript{46}

If the identity of the beneficiary is represented by a complete blank, there is evidently no beneficiary named by a writing, and the bequest or devise must therefore fail.\textsuperscript{46} It seems likewise clear that a blank in the space where the subject matter purports to be described makes the will equally ineffective.\textsuperscript{47} But a mere blank does not cause a failure where there is a partial identification such as the Christian or the surname and the identity becomes determinable by evidence dehors the will.\textsuperscript{48} A complete failure to identify the subject matter of the gift is equivalent to leaving a blank line and testator's consciousness of the omission or the lack of it makes no difference.\textsuperscript{49}

Incompleteness of expression often arises from the inexperience of the draftsman. The interpreter must then look for his ideas within the fragments which are present (read between the lines). Such an interpreter does not have the freedom which

\textsuperscript{43}See Swetland v. Swetland, 102 N. J. Eq. 294, 140 Atl. 279 (1928); Evans (1925), Incorporation by Reference, Integration and Non-Testamentary Acts, 25 Col. L. Rev. 879, 898; Scott (1930), Trusts and the Statue of Wills, 43 Harv. L. Rev. 521, 552.

\textsuperscript{44}See Bordwell (1928), Statute Law of Wills, 14 Ia. L. Rev. 1, 174, VIII A, 436, XVI B (a). Bordwell lists such statutes in California, Georgia, Louisiana, Missouri, Montana, North Dakota, Oklahoma, Oregon, Utah, and Washington.

\textsuperscript{45}See Re Dominici's Estate, 151 Cal. 181, 90 Pac. 448 (1907); Dibble v. Currier, 142 Ga. 855, 83 S. E. 949 (1914).

\textsuperscript{46}E. g., Trustees of Offutt, 45 Ky. 535 (1846); Re Wirsig's Estate, 128 Neb. 297, 263 N. W. 467 (1935).

\textsuperscript{47}Crooks v. Whitford, 47 Mich. 283, 11 N. W. 159 (1882).


\textsuperscript{49}Karsten v. Karsten, 254 Ill. 480, 93 N. E. 947 (1912) ("my will is that my daughter Mary and my son Charles and my daughter Annie shall be equally divided between them"); Harris v. Pue, 39 Md. 548 (1874) (no subject matter named); Wootton v. Redd, 12 Gratt. 196 (Va. 1885) (description embraced no land); Hawman v. Thomas, 44 Md. 30 (1876) (same); Davis v. Davis, 8 Mo. 56 (1843) ("I will that John Ellis receive my ——— in the service"); Mohun v. Mohun, 1 Swanst. 201 (Ch., 1818) (No subject matter mentioned); Re Bassett's Estate, L. R. 14 Eq. 54 (1872) (same).
may be assumed by an historian who, for example, seeks to build up a philosophical system from the extant fragments of the writings of a Greek philosopher. The historian relies upon inference, intuition, upon concepts known to be current at the time, upon interpretations made by contemporaries and followers, upon tradition, and all other methods by which these fragments, oft-times meaningless, individually, are reassembled into a system. But a will must be in writing. The inferences, if any, must come from the text aided in the proper case by extrinsic proof and mere conjecture is clearly excluded. But inference which does not involve too wide conjecture is an essential element of interpretation and if no inference is required, there is small need for interpretation. Thus the court may infer in a proper case that “net revenue” of my estate was inadvertently used for “net residue”.

While the language may be cryptic or hieroglyphic or lacking in fullness of expression, still it may implicitly contain an expression sufficient to show what the testator meant to say and, in such a case it is submitted that what he meant to say is what he did say. The court need only be assured with respect to the question what persons or property or interests or qualities were intended to be identified. Suppose we apply this principle to the case where the testator instructed his nephew to draw his will giving the estate to “your” (the nephew’s) “mother”. The nephew made it read, “rest to my mother”. On the face of the will nothing is wrong. But testator did not mean his own mother; he no longer had one for she was not living when the will was executed. If the cryptic words “your mother” had been used, the meaning of “your” would be explainable. But “your” means “my” when transferred from speaker to addressee. “Your” used by the testator means “my” when the words are assigned to the nephew, the draftsman. One is dis-

---

50 Hawkins MS, p. 13, found in Thayer’s Preliminary Treatise on Evidence.

51 Kellogg v. Mix, 37 Conn, 243 (1870) [(a) no disposition was otherwise made during wife’s lifetime; (b) the revenue was given to her children after her death; (c) she was to have the free use of her portion of the estate, which could be nothing else than the net revenue.] See also Zerbe v. Zerbe, 84 Pa. St. 147 (1877) (“I bequeath to my children, naming some of them, but the others, naming them, shall have nothing of "my estate". "Estate" was inferred as the object of bequeath). Cleland v. Waters, 16 Ga. 496 (1854) (the word slaves was made more inclusive than was strictly called for by the grammatical structure).
posed to say that it is not proper to strike out "my" and convert "mother" into "sister" as the court did. Children often amuse themselves in play upon this species of double entendre of "your" and "my". "My" and "your" are variables and the use of "my" creates an ambiguity. It therefore does not appear to be overriding the statute to allow the proof that "my" equals "your" and "your" refers to the nephew. There is authority for the statement that if the court can tell from his language what the testator meant to say, it may find that he has said that thing.

Sometimes the irregularity may be so slight as to involve little more than a stylistic elipsis. But the English courts have gone much further. Thus, they have supplied "if he should live so long" to a limitation to the testator's son for ninety-nine years. In another case "first" (son) was inferred and so

---

13 Chapman v. Brown, 3 Burr, 1626, 1634 (K. B., 1765) ("The court may imply an intent not particularly specified in the words"); Covenhoven v. Shuler, 2 Paige 122, 130 (N. Y., 1830) ("where the intention is incorrectly expressed the court will effectuate it by supplying the proper words . . . the words may be transposed to make a limitation sensible or to carry into effect the intent of the testator"); Dew v. Barnes, 54 N. C. 149 (Eq., 1854) ("May supply words where the sense manifestly requires it"); McKeehan v. Wilson, 53 Pa. St. 74 (1866) (Where the omission or insertion of words has left unexpressed or wrongly expressed what from the tenor of the will was the intention of the testator the court will permit the will to be read as if the words were inserted or omitted). See also Ferson v. Dodge, 23 Pick. 287 (Mass., 1839). In Knight v. Knight, 12 N. E. (2d) 649 (Ill., 1937), rehearing denied, 1938), an interesting subversion of this plain meaning rule arose. T gave to his two children, all his real estate, with the proviso that . . . in the event of the death of either of them the real estate should go to the survivor. It was held on the death of one of his share did not vest in the survivor and evidence would not be admitted to show that his intent corresponded exactly with his words, in view of the general principle of interpretation that where property is devised simplicitter to one person and on his death to another, the death contemplated, is to be regarded as one occurring before testator's own and a fee vests on death of the testator. Thus, where a plain meaning attaches to words but a rule of law gives them a different significance, a new plain meaning arises which cannot be modified by evidence showing that the unqualified plain meaning was intended. See also Pickering v. Langdon, 22 Me. 413 (1843); Howland v. Union Seminary, 5 N. Y. 193 (1851). See especially Delmare v. Robello, 1 Ves. Jr. 412 (Ch., 1782), discussed below (note 58).

44 Re Bassett's Estate, L. R. 14 Eq. 54 (1872) ("After these legacies are paid I leave the residue to my sister"); Reid v. Hancock, 29 Tenn. 368 (1849) ("Property to my wife during her widowhood until my children come of age, then divide (it) among them").

supplied\textsuperscript{56} from the context. In \textit{Abbott v. Middleton} the words “without leaving issue” were inserted.\textsuperscript{57} The converse case appears where by a narrow construction the court refused to omit a beneficiary whose name was inserted by a palpable mistake.\textsuperscript{58}

The American courts have occasionally made similar inferences. Thus, where testator said, “I give to my beloved wife … so long as she remains single”\textsuperscript{59} the words “net income” were supplied from the context by inference. In \textit{Cleland v. Waters}\textsuperscript{60} the words “said slaves” were given a more comprehensive meaning than was called for grammatically, the court inferring the enlarged meaning because of the implications of the whole will and also because otherwise there would be little sense in the expression. The testator had named various others of his slaves closing with special mention of William, whose emancipation he desired because of his faithful service, “with the issue of all females mentioned in this item of my will.” It was held that from the context the court should find that the females also were

\begin{itemize}
  \item \textit{Langston v. Pole}, Tamlyn 119 (Rolls Ct., 1829) (T, in a devise, passed over the first son of A and limited the remainder to trustees for the second, third, fourth, fifth and all and every other son in tail successively and then to the first and other daughters and in like manner. The word first was implied from the use of “second” and from “other”. This was affirmed in the House of Lords).
  \item \textit{Abbott v. Middleton}, 21 Beav. 143, 52 Eng. Rep. 813 (Rolls Ct., 1855) (Devises to wife for life and on her death to T’s son for life and on his death to any children he may leave but if he dies before his mother (supply without leaving issue), then over. See also \textit{Spalding v. Spalding}, Cro. Car. 185, 79 Eng. Rep. 762 (K. B., 1631) (similar); \textit{Re Warrington}, N. Z. L. R. 124 (1917) (T wrote “but not including all other real and personal property, “not” was struck out as being inadvertent); but in \textit{Neal v. Hamilton Co.}, 70 W. Va. 250, 73 S. E. 971 (1912), the court refused to insert “without issue”. In McKie v. Col-linson, 292 Ill. 458, 127 N. E. 92 (1920), the word “wife” was supplied.
  \item \textit{Mellish v. Mellish}, 4 Ves. 47, 31 Eng. Rep. 24 (Ch., 1798) (T gave to his natural daughter, Ann, child of E, a large legacy with provision against lapse. He gave the residue to his natural children born of his housekeeper, M. He then provided that if any of them (referring presumably to the females sharing the residue, the said Ann, Mary, Fanny, or Charlotte) die before reaching twenty-one or without issue, their shares should go to the survivors. On the death of one of the second set of children, held Ann shares in the part so given over. In \textit{Doe v. Allen}, 8 T. R. 497, 101 Eng. Rep. 1510 (K. B., 1800) by Kenyon, however, the court refused to hold that a fee was created, though such was the intent because technical words of inheritance were not used.
  \item \textit{Kellogg v. Mix}, 37 Conn. 243 (1870).
  \item 16 Ga. 496 (1854).
\end{itemize}
emancipated. He had other slaves not mentioned in this item and that fact is the principal basis for this insertion. In *Tudor v. Terrell*, the testator gave his wife "the following slaves, to-wit" and he named them, giving thirteen names and intending to name all he owned. But he mentioned *Phillis* twice and *Philip* not at all by name. It was held that *Phillip* also passes. The fact that he meant to name all, used thirteen names and two names were exactly the same save for one letter was held sufficient to pass the entire number of thirteen. *Eickhorn v. Morat* is even more interesting. The testatrix said: "I . . . bequeath my personal and real property which I received from my father in real estate, to wit . . . without security so long as he lives", etc. The court treated this principally as a problem of admissibility of extrinsic proof as to the identity of "he". But it is not simply that. There is, in fact, no devisee named except by inference, which inference arises from the word "he" itself unexplained in the will. Suppose we substitute for "he" "my husband", whom the evidence shows was the intended antecedent of the pronoun. It would still be highly questionable whether a devise to him is implicit in the language which the testatrix used. The result should probably be sustained. In another case it was held that "my estate" may be inferred where the testator had said, "I give and bequeath to my children" naming them but expressing no object of the verb and concluding with the declaration that they should take in equal shares.
These four cases amply show that a necessary inference may be drawn, even though in form it is an emendation of the will in the particular case. It also seems that there is little value in the oft repeated test stated by the Kentucky court that the question is not, "what did the testator intend to say" but "what is meant by what he said"? One cannot know what is meant by what he said unless one knows what he intended to say. Hence, the more appropriate test is, "what did he mean to say and is it implicit in what he said"?

In an early case, however, *Delmare v. Robello*, the court refused to infer a gift which seems to be implicit in the language used. The testator gave his property to the children of his sisters, Reyne and Estella. He had three sisters, Reyne, Estella, and Rebecca. The latter two were married and had children, but Reyne was a nun. Evidence of intent from circumstances and oblique declarations that he meant Rebecca's children and not Reyne's was refused. The testator named Reyne but he meant a sister who had children. The only one (besides Estella) who had children was Rebecca. Thus, the *falsa demonstratio* should not prevent the children of Rebecca from taking. In *Baum's Estate* T executed a will on a day after his child was born but he inadvertently placed a date on it which preceded the child's birth. A will executed prior to the birth of a child and not referring to it is revoked as respects the child in that state. By a narrow construction of the statute it was held that the Orphan's Court had no jurisdiction to consider the issue involved, inasmuch as the statute grants jurisdiction only when the issue of validity is in question. The court, however, was correct in saying that the validity of a will is determined by its due execution and not by the issue whether it can operate or not. There appears, however, no reason why the Orphan's Court could not have found that the date was erroneous and not an intended part of the will.

Johnson, 128 Ind. 93, 27 N. E. 340 (1890), T said "but if they die with any children" then over, the court substituted "without" for "with".

In Massachusetts Institute of Technology v. Atty. Gen., 235 Mass. 228, 126 N. E. 521 (1920) (Legacy to found a school of naval architecture and marine insurance. Held, insurance is to be construed as intended for engineering).

1 Ves. Jr. 412 (Ch., 1792).

*260 Pa. 33, 103 Atl. 614 (1918).* *Cf.*, Whiteman v. Whiteman, 152 Ind. 263, 53 N. E. 225 (1899), (where such evidence of mistaken date was admitted).
A series of cases raises the question whether certain descriptive terms applied to lands are to be interpreted comprehensively or exclusively. Thus, Lord Eldon held in Doe v. Oxenden\(^6\) that a devise of "my Ashton estate" should be narrowly interpreted as a matter of law to include only the lands in Ashton parish. The testator owned lands in Ashton, Ashton parish, but he also owned lands in other parishes, all of which he was wont to call his "Ashton Estate". Some thirty years later, the House of Lords refused to follow this narrow construction.\(^67\)

Another series of decisions involves to some extent a falsa demonstratio in that the premises are described in comprehensive terms, but a limitation is inserted describing them as being in the possession of some named person which would restrict the devise, if applied. Thus, in Goodtitle v. Southern\(^68\) the testator devised all his farms in a named county and parish "in the occupation" of one "Clay". The restriction was rejected because testator was mistaken in part as to the occupier.

The comprehensive term "My Cropwell farm" should have

\(^4\)Dow 65 (H. L., 1816). See also Doe v. Greening, 3 M. & S. 171 (K. B., 1814) (similar), and Doe v. Lyford, 4 M. & S. 550 (K. B., 1816) (similar).

\(^67\)Ricketts v. Turquand, 1 H. L. Cas. 473 (1848). See Lewis v. Singleton, 8 Ky. 523 (1 A. K. Marsh. 1819) (Devide to one son, John, of 1,000 acres, "part of my 2,000 acre tract"). He to take 1,000 acres in a body at either end that may best please him, all the rest of the 2,000 acre tract to three other sons. The tract included 2,666 acres. John takes 1/2 of 2,666 acres.

\(^68\)1 M. & S. 299 (K. B., 1813). See Down v. Down, 7 Taunt. 343 (C. P., 1817) (similar); West v. Lawday, 11 H. L. Cas. 375 (1865) ("Now in my own occupation" disregarded); Hardwick v. Hardwick, L. R. 16 Eq. 168 (1873) (similar); Whitfield v. Langdale, 1 Ch. D. 51 (1875) (Farm called "Hookland" by estimation 80 acres, "more or less" in the occupation of C. T's farm by that name consisted of 173 acres all in C's possession. Name and possession prevail over quantity. Should not evidence of intent be admitted?) See also Doe v. Hubbard, 15 Q. B. 227 (1850), where possession prevailed over all other considerations and resulted in a narrow construction. In re Seal (1894), 1 Ch. 316 (My residence called S house and premises thereto, the same as now occupied by me).

Whether the comprehensive description should carry all the premises which might come within it or whether the restriction should cut down the devise would now seem to depend upon the intent of the testator as shown in the evidence. The comprehensive term should be sufficient to embrace the entire gift intended to be made; Wilson v. Mount, 3 Ves. 191 (1796) (Freehold and copyholds whereasover "which I have surrendered to the use of my will" does not include freeholds); Corballis v. Corballis, 9 Ir. L. T. 309 (1882) (T recited that he was possessed of certain leaseholds at D and he devised his said D property. This does not include freeholds at D); Miller v. Travers, 8 Bing. 244 (C. P., 1832).
been interpreted with an extended meaning in *Griscom v. Evans.* There was a devise to Thomas of "my Cropwell farm where my son Thomas now resides containing 85 acres more or less". The scrivener, without instructions thereto, added "conveyed to me by the heirs of my deceased wife". That part of the "Cropwell" farm coming from the testator's wife's heirs amounted to 72 62/100 acres. The testator also had 14 73/100 acres acquired from another source which for many years had been treated as part of this farm and the whole was in the possession of Thomas. The court refused to disregard the addition made by the scrivener and held that Thomas took only so much as came from the wife's heirs. Relying on *Bacon,* it was said that where there is a clear enumeration of particulars appearing as qualifications, the general description must yield. This case illustrates the error often arising from the application of unyielding, general rules, to particular cases. One observes that the acreage is given with near exactness, which fact the decision disregards. The farm is described as being in Thomas' possession and this again was overlooked. The fact that the addition of the source was without instructions should also be significant.

III. *Inexact and Loose Identifications*

We are required to interpret the terms "money", "personal property", "real property", "this world's goods", "surplus" and "business" where the context may obscurely show that the terms are used in an extended sense. In none of the illustrative cases does it appear that parol evidence was offered to explain the use. The term "money" or "monies" has been used to denote the general personal property of the testator. The result may not necessarily conflict with Wigram's rule against violating a primary meaning, because the meaning is gotten from the context and not from extrinsic proof. "Monies" is an
Inexact term and while it has not often included lands or even personal property generally, it should not be narrowly limited unless such an intent is clear. To hold that it does not include notes, bonds, mortgages or other securities, but is limited to gold and silver coin or other currency must often be overly narrow.73

"Personal property" has been held to include land. The testator in such a case means by "personal" something that is his own.74 "All this world’s goods" may also include land.75

73 Mann v. Mann, 1 Johns. Ch. 231 (N. Y., 1814).

74 Re Wass, 95 L. T. 758 (1906) ("All my personal estate . . . of which I am possessed . . . whether in possession, reversion, remainder, or expectancy"); re Olsen’s Estate, 50 P. (2d) 70 (Cal. App., 1935) ("All my personal property", "personal" means what is one’s "own" and includes realty); Cf., note, 34 Mich. L. Rev. 901 (1934); West v. West, 213 N. Y. S. 380 (App. D., 1926) ("Personal property of which I die seized . . . I authorize her to sell . . . and to give title to same."); West v. West, 213 N. Y. S. 380 (App. D., 1926) ("any money left after everything is paid from my estate I give to A."); Contra: Swert v. Burnett, 136 N. Y. 204, 32 N. E. 628 (1892) (dissent). See Wigram’s Propositions I and III. For emphasis on ‘home-made’ will, see also Strickland v. Delta Inv. Co., 163 Miss. 772, 137 So. 734 (1931). Cf., re Wells’ Will, 221 N. Y. S. 714 (Surr., 1927).

75 Torrey v. Torrey, 70 N. J. L. 672, 59 Atl. 450 (1904) ("All this world’s goods of which I may be possessed at the time of my death"); Anderson v. Gibson, 116 Okla. 684, 167 N. E. 377 (1927) ("All my worldly goods" to H. Emphasis upon composition by a layman). The contrary view in Bradford v. Bradford, 6 Whart. 235 (Pa., 1840)
The Supreme Court of the United States placed a narrow construction upon the word "surplus" in Allen v. Allen\(^7\) in order to favor the heir. "Surplus" is almost a precise equivalent of "residue", which term would clearly include both realty and personalty unless restricted.

Is it possible to devise or bequeath "leaseholds" as "realty"? In Anglo-American law a leasehold for years is personal property, though it constitutes an interest in land. In an early case, Rose v. Bartlett,\(^7\) it was held that if A has both lands in fee and lands for years, a general devise of his lands does not pass the leaseholds, but if the testator owns leaseholds only, they will pass under such a devise. In Burger v. Hill,\(^7\) however, where the testator gave all his personalty to A and his realty to B, a different result was reached. The draftsman had asked the testator concerning his realty and was told he owned a store. His interest, however, was a leasehold and he had no other realty. It was held that the leasehold went neither to A nor to B, not to A because testator had intended it to go to B and not to B because it was not realty. Under the appropriate precedents, B should have it.

Where a collective term is used and the word "other" is employed to expand its application, it is commonly said that "other" can be applied only to an item of the same general character—*eiusdem generis*. This rule, though now largely abandoned, is itself a loose generalization admitting of varying degrees of similarity and should be applied according to the evidences of the intent. Thus, in one case the testator gave all his stocks, bonds, notes and "other securities" found in his strong box at a named bank to his grandson, A. Along with such bonds, ("Worldly goods of all sorts and kinds" is contrary to parallel Pennsylvania decisions). And see Thompson v. Betts, 74 Conn. 578, 51 Atl. 564 (1902), where T gave the residue of his personal property, saying nothing about his realty but in a codicil he indicated that he had used personal to include all his property.

\(^7\) 18 How. 385 (U. S., 1855) (prior part of will had referred to both classes of property and the "surplus" was then disposed of). For case where "capital" includes land-heritage, see 45 Jurid. Rev. 183 (1933). *In re McCarthy's Estate*, 15 P. (2d) 223 (Cal. App., 1932) ("business" was held to include certain realty).

\(^7\) 18 How. 385 (U. S., 1855) (prior part of will had referred to both classes of property and the "surplus" was then disposed of). For case where "capital" includes land-heritage, see 45 Jurid. Rev. 183 (1933). *In re McCarthy's Estate*, 15 P. (2d) 223 (Cal. App., 1932) ("business" was held to include certain realty).


\(^7\) 1 Bradf. 360 (N. Y. Surr., 1850); affd. 10 How. Pr. 264.
 stocks and notes, valued at $15,000, there were three life insurance policies, each for $1,000, two payable to his estate and one to his widow. Should they pass as "other securities"? The fact that he gave securities of large value to A and all that he had in the container save possibly the policies, and the fact that all these documents have identity of location in common, being at the same bank and in the same box, and the further fact that no mention otherwise was made of the policies, would seem to indicate that "other securities" should be liberally construed to include the two insurance policies payable to the estate. After all, a bond, a note, and an insurance policy is each a promise to pay and may be regarded freely as *eiusdem generis* with each other. An insurance policy contains a promise and is more like a bond in that respect than is a certificate of stock, save that it probably is not the subject of commercial exchange to the same extent. Even a bank-stock certificate, by a narrow construction, might be construed as not being *eiusdem generis* with stock certificates of other types of corporations.

Here also may properly be considered the use of those loose terms denoting relationships where, for example, one speaks of his wife's nephews as "my nephews", of "children" when step-children or illegitimates are intended, of "children" when grand-children are meant, "cousins" meaning cousins by marriage, etc. Thus, a gift of the residue "to my nephews and nieces" may pass to the nephews and nieces of testator's wife, especially where the testator has none of his own. The same principle should

---

7 Ruh v. Ruh, 270 Ky. 792, 803, 110 S. W. (2d) 1097 (1937). The fact that the testator may have mistakenly thought that one of the life insurance policies payable to the widow would pass under the will, makes little difference.


9 Sherratt v. Mountford, L. R. 8 Ch. 923 (Ch., 1873). In Grant v. Grant, L. R. 5 C. P. 727 (Exch., 1870) T had a nephew of his own as well but meant his wife's nephew. Evidence allowed to show his intent. Root's Estate, 187 Pa. 118, 40 Atl. 818 (1898) (contra). In Drake v. Drake, 25 Beav. 642 (Rolls Ct., 1858), affirmed, 8 H. L. Cas. 172, T described his sister as his wife's sister; Blower's Trusts, L. R. 6 Ch. 351 (1871) (T made provision for his "grand nephew". Then he gave the residue to his "nephews and nieces". The confusion of terms "grand nephew" and "nephew" would make it possible to assign the residue to "grand nephews and grand nieces" as well as to "nephews
apply in the case where the testator refers to a step-child by the term "child" or where an illegitimate is referred to by the relationship "child" appropriately applied only to one who is legitimate. Thus, in Wickersham v. Wickersham the testator had several legitimate children and one illegitimate child. The latter child had grown up in the testator's family with the others and was regarded and acknowledged by the testator as his child without discrimination as the offered evidence showed. The testator divided his property among his "children" and the illegitimate child claimed an equal share. The Kentucky Court of Appeals relied upon its oft repeated declaration as a principle of interpretation that it must consider what testator meant to say but what he meant by what he said. The court, therefore, held that evidence could not be admitted to show that the illegitimate child was intended to share because the court can't be concerned with what he meant to say. This proposition that the court cannot be concerned with what testator meant to say seems first to have been asserted in substantially the same form by Lord Wensleydale in Doe v. Givillim; was repeated Lord Den-...
man;\textsuperscript{87} adopted by Wigram;\textsuperscript{88} and from him probably it was borrowed by American courts and applied. The answer to the use of such a formula or solving phrase is well given by Vaughan Hawkins.\textsuperscript{89} He points out that the function of interpretation properly used is (a) to discover what the writer meant and (b) to determine the meaning of his words. There is therefore no appropriate contrast "between what he meant to say" and "the meaning of his words",\textsuperscript{90} because otherwise interpretation is cut down to a mere dictionary determination of the meaning of words. Interpretation can arise only where the words fail to express the meaning clearly.\textsuperscript{91} A perfect expression is not essential. Language is full of ellipses and ambiguities which are clarified in many ways. The requirement by statute of a writing is addressed to the writer, not to the interpreter, and it permits the latter to interpret that command in an equitable and liberal spirit, making allowances for the manifold imperfections of language.\textsuperscript{92}

IV. GIFTS TO AN ENUMERATED GROUP, THE NUMBER ERRONEOUSLY STATED

In \textit{re Sharp}\textsuperscript{93} the testator gave the residue to five named persons and to the six children of O. O had had six children but at the time of the death of the testator there was only one. Shall the residue be divided into eleven parts or into six parts? The dominant intent was to benefit whatever children of O existed at the time of testator's death and so it was held that the division should be into six parts. Otherwise also there would be an intestacy as to five parts.

Four situations may exist: (a) The \textit{residue} or an \textit{aggregate} sum may be given and the beneficiaries may be fewer than

\textsuperscript{87} Rickman v. Carstairs, 5 B. & Ad. 651, 663 (K. B., 1833).
\textsuperscript{88} A Treatise on Extrinsic Evidence in Aid of the Interpretation of Wills (2d Am. Ed. by O'Hara, 1872), Sec. 9.
\textsuperscript{89} See Thayer, "A Preliminary Treatise on Evidence at the Common Law" (1898), Appendix C "On the Principles of Legal Interpretation" (1860), by Vaughan Hawkins.
\textsuperscript{90} Hawkins, supra, n. 85 at 582-584.
\textsuperscript{91} See Hawkins' discussion, \textit{ibid.}, p. 585, of three causes for the failure of language to express the intent adequately.
\textsuperscript{92} Hawkins, \textit{ibid.}, p. 598, "Interpretation is a species of equity which interposes to prevent the mischief which would accrue from a severe and rigorous application of the rule of law requiring the meaning of the writer to be completely expressed".
\textsuperscript{93} (1908) 2 Ch. 190.
the number mentioned in the will. There is no violation of the Wills Act here, inasmuch as the court finds by construction that the entire sum was given to the smaller number. (b) The residue or an aggregate sum is given and the number of the claiming beneficiaries exceeds that named in the will. The statement of the number conflicts with the dominant intent to benefit all those answering the description of children and is disregarded. No considerable violence is done to the Wills Statute, however, because no more is given than the testator intended to give. (c) A separate legacy is given to each of a group and the number in the class is smaller than the number expressed in the will. These excess legacies fail. (d) A

4 Berkeley v. Palling, 1 Russ. 496 (Ch., 1826), 38 Eng. Rep. 191 (Divide the residue into 8 parts and dispose as follows: Among the children of R. B.: — 2 shares to each of 2 daughters and 1 share to each of 3 sons. Held, divide into 7 parts, each daughter taking 2 and each son taking 1); In re Sharp (1908), 2 Ch. 190; Kalbfleisch v. Kalbfleisch, 67 N. Y. 354 (1876) (Aggregate sum to my other 8 children. There were only 6 others and the word “eight” was disregarded). See also Regnier v. Regnier, 122 Kan. 59, 251 Pac. 392 (1926).

5 Stebbing v. Walkey, 2 Bro. C. C. 86, 29 Eng. Rep. 48 (Ch., 1786) (Residue of annuities to the two daughters of T. S. He had three. All share); Lee v. Pain, 4 Hare 201, 249 (V. C., 1845), 67 Eng. Rep. 619, 642 (Residue to the three sisters of A. A has four sisters and all share); Matthews v. Foulshaw, 12 W. R. 1141, 11 L. T. 82 (Ch., 1864) (Aggregate sum to nine grandchildren, the three children of A; the three children of B; the two children of C; and one of D. A had four children, two by a former and two by his present wife. All share); Re Stephenson (1897), 1 Ch. 75 (Residue to “my first cousins, the children of my father’s brother, of the name of Cartridge”). The father had two brothers of that name, both of whom left children. The court struck out “children of my father’s brother” and treated the gift as made to “my first cousins named Cartridge”). This case is questioned in In re Stephenson (1897), 1 Ch. 75, as also the rule. The testator gave the residue to the children of the deceased son (named Bamber) of testator’s aunt. She had had three sons by her husband Bamber, all of whom were dead, leaving issue. It was held that the gift failed for uncertainty.

The problem is essentially the same where the erroneous enumeration applies to property rather than to beneficiaries. In Moore v. Moore (1920), 1 L. R. 232, the executor was directed to sell T’s seven houses at a certain location. He had eight houses there and the direction must fail for uncertainty unless all eight are included. The dominant intent affected all the property there. Of., Berger v. Clavel, 42 D. L. R. 771 (Can. Sup. Ct., 1917). In re Wismar’s Estate, 191 N. Y. S. 752 (Surr., 1921), T gave to each of her five sisters, share and share alike, one-fourth of all the residue. Held, each takes one-fifth. Of., Naylor v. Brown, 66 N. Y. S. 729, 32 Misc. 298 (1900); Sleech v. Thornton, 2 Ves. Sr. 560 (Rolls Ct., 1754) (Gift of an aggregate sum to be divided between the two servants living with T at her death. There were three and all share).

6 This is the usual case of lapse. In Selsey v. Lake, 1 Beav. 146, 48 Eng. Rep. 585 (Rolls Ct., 1839), T gave a rent charge to be paid to the five daughters of A for life, to be divided equally between them.
separate legacy is given to each of the class and the number in the class is greater than the number named in the will. Do all the legacies fail or are all the numbers of the class provided for?

It is readily seen that as respects the Wills Act only the fourth situation causes difficulty. The problem here is not only of discovering whom the testator intended should participate, but also how large a total of benefits he meant to give. Thus, where the testator expressly bequeaths to each of three persons who have a common characteristic five hundred pounds, a total of £1500, if nine persons having that common characteristic are substituted for the three, a total of £4500 is required to provide for all. If it were a matter of nine persons instead of three sharing in the residue or aggregate sum the result of providing for each might be justified by applying the test of the dominant intent of the testator. But in the case of separate legacies, to give £3000 more than the will provides for seems to go beyond any known standard of interpretation. There is no gift of £4500 implicit in the gift of £1500. The alternative, that the whole provision fails, seems harsh to the English courts. It is not always necessary, however, to choose between failure of the gift for uncertainty on the one hand and the transfer of more than is called for in the will on the other where some reason appears, from extrinsic proof, for selecting the number so limited, out of a larger number. In such case the stated number prevails. Thus, where a legacy is given to each of the two children of A and A has three children, proof of the fact A had five sons and one daughter. Held, the latter takes the entire rent charge.

7 Tomkins v. Tomkins, cited in 2 Ves. Sr. 564, 28 Eng. Rep. 360 (Ch., 1745) (£50 to each of the three children of A. A had four and each takes); Scott v. Fenoulhett, 1 Cox 79, 29 Eng. Rep. 1071 (1784) (£500 to each of the two daughters of C if either or both of them should survive D. C had three and each takes); Harrison v. Harrison, 1 Russ. & M. 71, 39 Eng. Rep. 28 (Ch., 1829) (Bequest of £500 each to the two sons and the daughter of T. There were one son and four daughters. Each takes); Morrison v. Martin, 3 Hare 507 (V. C., 1846); 67 Eng. Rep. 1012 (Five take instead of two); Yeats v. Yeats, 16 Beav. 170 (Rolls Ct., 1852), 51 Eng. Rep. 742 (Nine take instead of seven); Garvey v. Hibbert, 19 Ves. 125 (Ch., 1812) (£600 to each of the three children of A. There are four and each takes £200); Lane v. Green, 4 De. G. & Sm. 239, 64 Eng. Rep. 314 (Ch., 1851) (£100 to each of the four sons of A. H. A. H. had three sons and one daughter. Each gets £100); Spencer v. Ward, L. R. 9 Eq. 507 (1870) (Legacy of £250 to each of the two children of S. There are three children and each takes £250).

that two of them lived near the testator and the third did not, affords a basis for carrying out A's intention.\(^9\)

It thus appears that a proper construction applied to these cases generally will accomplish testator's intention. Specifically the rule is that where provision such as the gift of the residue or of an aggregate sum is made for a group having a common characteristic (e.g., the children of A) but the testator also declares erroneously the number in the group, which is either larger or smaller than the number named, the numerical restriction will be disregarded.\(^{10}\) It is interesting to note that no American case belonging to the \((d)\) class has been found and one suspects that here the entire provision would fail for uncertainty.

V. IRREGULARITIES RESPECTING ADVANCEMENTS

Not infrequently a testator desiring that his children shall be made equal in the distribution of his property provides that the amount advanced to any one of them shall be charged against his share and shall be brought into hotchpot at final settlement. He may not at the time know the exact amounts already advanced to them severally and he may contemplate future advancements. He may identify the charges as already having been made in his books.\(^{101}\) The desired result may, however, be attained without that degree of definiteness, that is, the books need not be incorporated by reference. Such an advancement may constitute a non-testamentary act which affects the will. Moreover, he may make an erroneous recital in his will of the amount so advanced, or he may insert an erroneous entry in

\(^9\) Wrightson v. Calvert, 1 J. & H. 260, 70 Eng. Rep. 740 (V. C., 1860); Hampshire v. Pierce, 2 Ves. Sr. 216, 28 Eng. Rep. 140 (Ch., 1780) (Legacy to the four children of E. E had six, two being by a former husband, thus a reason for selection is found, but in 1 Jarman 497, note (p), the evidence is regarded as inadmissible); Newman v. Percéy, 4 Ch. D. 41 (1876) (Legacy to each of the three children of A, widow of W. A had three children by first marriage and had remarried and there were six more); In re Mayo (1901), 1 Ch. 404 (Legacies to each of the three children of C born before her marriage. She had three whose paternity was acknowledged by T, but she also had another by another man. Only T's children take); In re Jeffery (1914), 1 Ch. 375 (Legacy to A and his wife B and his daughter. A had five daughters but T was familiar with Phoebe only and had by prior will provided for Phoebe. She alone takes).

\(^{10}\) In re Mayo (1901), 1 Ch. 404. See 3 Jarman, Wills, 1682–1687; 2 Williams, Executors, pp. 744–746.

\(^{101}\) See Evans (1935), Incorporation by Reference, Integration and Non-Testamentary Acts, 25 Col. L. Rev. 879, 892.
his books. Is the beneficiary bound by such erroneous entry or recital? In a leading case, it was declared that there are two situations: (a) one where the language of the will indicates that testator means to deduct only the amount advanced and (b) another where the recital is such that a certain sum must be accounted for before any further distribution can be made to the beneficiary. In the latter case there is no ambiguity. Thus, if the testator erroneously recites that having given certain lands to A and B, he now gives the balance to C and D, there is nothing to be done about it.

It would seem that recitals of an intention to make all the children equal would be sufficient to allow extrinsic evidence of mistake in the entries, inasmuch as an ambiguity exists and the overpaid child should bring his advancement into hotchpot. Some courts, however, have refused to give effect to the expression of the intent of creating an equality and have not seen that equality was inconsistent with an overcharge. Even then

---

102 In re Kelsey (1905), 2 Ch. 485. See note (1905), 19 Harv. L. Rev. 68.

103 Denn v. Cornell, 3 Johns. Cas. 174 (N. Y., 1802) (A and B are said to be estopped to deny that they had received such a conveyance). See also Riley v. Casey, 185 Ia. 461, 170 N. W. 742 (1919) (T gave all of his property to four children, disinheriting two because as he recited, they had received certain property from their grandmothers, for which they had, in fact, paid full consideration); Dödson v. Fulk, 147 N. C. 530, 61 S. E. 383 (1908) (She shall be required to account for $500); Younce v. Flory, 77 Ga. St. 71, 83 N. E. 305 (1907) (To each an equal share subject to the charges against them in my book); Schell's Estate, 3 Pa. D. R. 78 (1891) (T directed that certain sums set down in his account book be deducted from his sons' shares. These were not, in fact, due from them, but held that T may make an arbitrary measure of their shares). See re Willis' Estate, 287 N. Y. S. 165 (Surr., 1936), and note (1937), 14 N. Y. L. Q. R. 119. Cf., also Lavinue v. Lewis, 185 Ark. 159, 46 S. W. (2d) 649 (1932); re Woelk's Estate, 162 Kan. 621, 226 Pac. 359 (1931); Hopper v. Sellers, 91 Kan. 876, 139 Pac. 365 (1914).

104 Jackson v. Payne, 59 Ky. (2 Metc.) 567 (1859) (Divide residue equally. I have made advances to those four, which advances I deem about equal); Musselman's Estate, 5 Watts 9 (Pa., 1836) (so much as shall be charged shall be taken as part of the share allotted and each shall receive as much as shall make him or them equal to that one of the seven who has received most); Hoak v. Hoak, 5 Watts 89 (Pa., 1836) (each to be charged with what I have given them and with which I have charged them. The amount given could be shown to be less than the amount charged, as there was an ambiguity).

105 McAllister v. Butterfield, 31 Ind. 25 (1869) (named amounts were directed to be deducted); Barker v. Comins, 110 Mass. 477 (1872) (this sum, with the advances made to G in his lifetime, will make him share equally with my other sons); Bresler's Estate, 156 Mich. 567, 119 N. W. 1104 (1909) (But evidence was admitted to show the accuracy of the entries); In re Lear's Estate, 146 Mo. App. 642, 124 S. W.
there can, of course, be no correction of the error unless the bringing of advancements into hotchpot was contemplated, accompanied by a distribution of the residue. A sounder result is reached by holding that the direction to deduct stated amounts erroneously entered from such child’s share on final distribution is inconsistent with the declaration of an intent to equalize the shares and that such a direction is equivalent to “or so much as has been advanced.”

VI. IRREGULARITY WITH RESPECT TO THE INSTRUMENT EXECUTED (MISTAKE IN IDENTITY)

This topic is involved among the irregularities only in that the testator has inadvertently executed an instrument which he did not intend to execute, thereby causing himself to fail to execute the one intended. In such a situation the would-be testator leaves no will and the executed instrument has no legal effect. Thus, where husband and wife intend each to sign a will identical with the will of the other mutatis mutandis but each actually signs the instrument intended for the other, their execution is nugatory. So also where a testator signs both the original and a copy and one of his witnesses subscribes the original and the other witness subscribes the copy, the two instruments cannot be construed so as to be an integrated whole. But why may not such instruments be integrated? Physically there exist separate papers. It might be argued that the two

592 (1910) (T said he intended to divide his estate equally and so had prepared accounts in a described book. Mistaken recital of advancements held to be conclusive). Cf., Hopper v. Sellers, 91 Kan. 876, 139 Pac. 365 (1914).

106 In Riley v. Casey, 185 Ia. 461, 170 N. W. 742 (1919) T omitted two children, mistakenly alleging that they had received compensating benefits from their grandmother. See Baker v. Comins, 110 Mass. 477 (1872).

207 In re Taylor’s Estate, L. R. 22 Ch. Div. 495 (1882) (In the first codicil T said he had become security for £3,000 and that so much as had not been repaid should be deducted. In the second codicil T said he had paid out for his daughter’s husband £5,000 and if that sum had not been repaid it was to be deducted.” The two together indicate a desire to deduct only what had been advanced). See In re Aird’s Estate, 12 Ch. D. 291 (1870), contra.

208 Nelson v. McDonald, 61 Hun. 406, 16 N. Y. S. 273 (Sup. Ct., 1891). See also Alter’s Appeal, 67 Pa. 341 (1871) (same); Goods of Hunt, L. R. 3 P. & D. 250 (1875) (same—save that the parties are sisters); In re Estate of Meyer (1908), P. 353 (same). See 3 B. R. C. 341.

209 In re Baldwin’s Will, 146 N. C. 25, 59 S. E. 163 (1907). See also Goods of Hatton, 6 P. D. 204 (1881) (a will was written in duplicate and one copy was signed by T and the other by the attesters).
IRREGULARITIES OF TESTAMENTARY EXPRESSION

Instruments constitute a literary unity, and that it should not be necessary to overemphasize the physical separateness and disregard their significant oneness. The Wills Statute, however, is squarely in the way of such a unification. The converse was accomplished in Goods of Nosworthy. In that case two inconsistent wills were executed, one on one side and the other on the reverse side of a single page. It was held that this instrument was severable and the one intended to be executed could be given effect.

Closely related to such an irregularity of expression is the case where the general form of expression is the one desired by the testator, but he does not intend its legal effect. So also he may sign an instrument, neither intending the words nor their effect. Thus, a will executed by a testator mistakenly believing it to be an instrument giving directions for testator's burial, would undoubtedly be avoided, even if fraud were not present.

VII. KNOWLEDGE OF THE CONTENTS AND UNDERSTANDING OF THE LEGAL EFFECT AND READING OVER

Though the will must be in writing, it is not required that testator's thoughts must be stated fully and clearly. There may be an irregularity of expression to the extent that the exact legal effect is not intended. The statute seems to require implicitly that the instrument express the will of the testator rather than the will of another person and thus a testator is protected in some measure against named but unintended beneficiaries, though his desires respecting intended but unnamed beneficiaries are likely to be thwarted save in those cases where equity is warranted in creating a constructive trust for them, or where restitution in some other form may be awarded.

Professor Wigmore points out that all standards of interpretation are provisional only (popular, local, mutual, individual) and each may in turn be resorted to for help. He assails Wigram's proposition against "disturbing a clear meaning" because it requires a testator's words to be interpreted

---

110 4 Sw. & Tr. 44, 164 Eng. Rep. 1431 (Ecl., 1865).
112 Wigmore, Evidence (2d ed., 1923), Sec. 2460.
by the standard not of the one who used them but by the standard of strangers to them but he agrees that we must not go too far in applying a subjective standard. Thus, in a certain case testator desired to equalize the provisions for his children and intended those who had received advancements to be given smaller portions, and his will was constructed upon that basis. A direction, however, was inserted by the scrivener which resulted in an unequal and undesired distribution, because of his strange misunderstanding of the term "not to cancel" any of the accounts. Policy forbids "not to cancel" to be interpreted as meaning to "cancel". There is the further question whether the will so interpreted would be in writing.

Closely connected with the problem of standard of interpretation to be followed is the question of testator's knowledge of the contents and comprehension of what is written therein. One test of knowledge of the contents is assumed to be discovered by a determination of the question whether the will has been read over by or to the testator. He should measurably understand the effect which technical testamentary language has, in order that the document may be said to constitute his will. Questions often arise with respect to inadvertent omissions and insertions, and careless or ignorant or unusual uses of words and phrases. Testator's knowledge of the contents is to some extent controlled by the matter of reading the will over. It may also

---

114 See Gray, Striking Out of a Will (1913), 26 Harv. L. Rev. 212; 1 Redfield on Wills (4th ed., 1876), 166, fn. "We doubt if the common law will allow of a written will being expressed in a language not understood by the testator"; Hastilow v. Stobie, L. R. 1 P. & D. 64 (1865) (Demurrer to plea that testator did not know and approve the contents of his will, overruled), but see Cunliffe v. Cross, 3 Sw. & Tr. 37, 164 Eng. Rep. 1185 (P. & D., 1863) (such a demurrer sustained); Munnikhuysen v. Magraw, 35 Md. 280 (1872) (Testatrix must know and understand the actual contents though she may have some erroneous opinions as to their legal effect). But see Middlehurst v. Johnson, 30 L. J. 74 (P. M. & A., 1860) ("Indeed it is not necessary that testator be acquainted with the contents. If he had said: "I will execute any will you draw up and a will had been drawn up and he had executed it without more, it would have been a good will. See also Parker v. Felgate, L. R. 3 P. D. 171 (1883) (Will executed according to instructions is valid, though testatrix merely recollects that she has given those instructions and believes that the will she is executing is in accord with them); Clifton v. Murray, 7 Ga. 564 (1849) ("If testator is blind or illiterate it is not indispensable that his will be read over to him. The question is not 'did he know it was his will' but rather 'is it his will?'") In Mahoney v. Grainger, 283 Mass. 189, 186 N. E. 86 (1933), the testatrix directed the draftsman to divide her property among her first cousins equally. He, however, made it provide for her heirs-at-law equally. Her only heir was an aunt. The will was sustained because testatrix had executed it.
be affected by the question whether it is written in or read over in or translated into his native tongue. Even though the testator may have testamentary capacity, his knowledge even where there was a reading over "may be affected by his age and strength, his hearing, his physical condition, and the extent to which he may be under the influence of liquor or opiates. Even under normal conditions, the issue whether testator understood or intended the legal effect of the language used is still often faced by the court.

The consequences of a misuse of ordinary symbols of speech, whether chargeable directly to him,\textsuperscript{115} or to his draftsman,\textsuperscript{116} often cannot be avoided.\textsuperscript{117} The error of the draftsman as to the applicable rule of law is charged to the testator.

Just as it is not in all cases absolutely necessary for the testator to know and approve the contents, so it is not necessary that he should understand its legal effect.\textsuperscript{118} An approximation is all that can usually be attained. There is a clear distinction between mistaken omissions on the one hand and inadvertent insertions on the other, which is somewhat paralleled by mistake in the inducement to execute a will or to give a legacy, in contrast with a mistaken revocation, the consequence of which is often avoided under the doctrine of dependent relative revocation. So the subject matter of omissions cannot be inserted but there are certain situations in which the consequences of an erroneous insertion have been escaped in case leaving out the insertion does not increase any other non-residuary disposition.

Whether a will containing an erroneous insertion was read over to the testator or not has frequently been the test of the

\textsuperscript{115}Elam v. Phariss, 289 Mo. 209, 232 S. W. 693 (1921); Couch v. Eastham, 27 W. Va. 796 (1836).

\textsuperscript{116}Rhodes v. Rhodes, L. R. 7 App. C. 192 (1882).

\textsuperscript{117}Swett v. Boardman, 1 Mass. 258 (1804) (bequest in lieu of dower omitted because he thought there would be the same result without it); Brown v. Selwin (Cas. Temp. Taib. 240), 25 Eng. Rep. 756 (Ch., 1734) (direction by T to forgive the debt of A, A being named executor draftsman, mistakenly believed the debt was extinguished and omitted the bequest); Buck v. St. Louis Union Trust Co., 267 Mo. 644, 185 S. W. 208 (1916) (T meant to cut off his heir but the language of the will did not dispose of a contingent remainder); Knutson's Estate, 144 Minn. 111, 174 N. W. 617 (1919) (T thought will would pass realty).

\textsuperscript{118}Havens v. Mason, 78 Conn. 410, 62 Atl. 615 (1905) (T need not rationally understand its legal effect); O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100 (1897) (Need not comprehend the technical terms used); Conrades v. Heller, 119 Md. 448, 87 Atl. 28 (1918) (same); Beech's Estate (1923), p. 46 (T cannot say "I approve only if the language has the effect I desire").
court's power to omit or disregard it. Thus, where "therein
and" was mistakenly inserted and the words had the effect of
decreasing the provision for the residuary beneficiaries and in-
creasing the value of the principal devises, it was held that the
words could not be stricken because the will had been read over.
But even if they were not read over they should still not be
omitted because an unattested increase would pass to certain
devisees. The court laid down six propositions applicable to the
execution of wills, the fifth being that when a will has been duly
'read over' to a capable testator . . . or its contents have been
brought to his notice in any other way, this fact, together with
the execution of it, should be held conclusive evidence that he
approved as well as knew the contents thereof." This rule
has been followed generally and frequently repeated.120

But a distinct disagreement with the universality of it arose
in 1875 in Fulton v. Andrew.121 In this case the will was drafted
by the residuary legatee—a stranger to the testator. There were
a good many suspicious circumstances, such as procuring not the
usual solicitor as draftsman but another one by the beneficiary
the attesters also being strangers. The beneficiaries as witnesses
at the trial testified that the will had been read over to the testa-
tor. There being no contrary evidence, it was contended that the
rule of conclusive presumption of knowledge and understanding
should apply. The court, however, for the first time questioned
the fact of reading over as conclusive proof of knowledge of the
contents, and left the issue devisavit vel non to the jury, both as
to the whole will and as to the residuary clause. As a conse-
quence, the residuary clause was refused probate. Fulton v.
Andrew has been followed in several cases.

120 Guardhouse v. Blackburn, L. R. 1 P. & D. 109 (1866). See also
("In the county of Hants" restrictive of the devise could not be omitted
for the same reason.) See also Rhodes v. Rhodes, L. R. 7 App. C. 192
(1882), Goods of Snowden, 75 L. T. R. (N. S.) 279 (1896) ("not except-
ing" A, "not" inserted inadvertently); see 26 Harv. L. Rev. 212, 229-236
(1913).

121 Harrison v. Stone, 2 Hagg. Eccl. 537, 162 Eng. Rep. 949 (1829);
Shadbolt v. Waugh, 3 Hagg. 570, 162 Eng. Rep. 1267 (Eccl., 1831);
Munnikuysen v. Magraw, 38 Md. 280 (1872); Wirth v. Wirth, 149 Mich.
687, 113 N. W. 306 (1907); Lutterell v. Olmius, cited in 11 Ves. 636,
(1874), 3 Ch. Div. 27. Cf., Whitlock v. Wardlaw, 7 Rich. L. 453 (S. C.,
1854).

122 L. R. 7 H. L. 448 (1875).
A will, accordingly, may be avoided if the testator is not conscious of the request made by the draftsman to an attester, to attest and subscribe the will.\textsuperscript{122} Doubt may be cast upon the question whether he understood the reading, as in the case where he was very old and propped up in bed. The proponent must sustain the burden of convincing the jury that the testator understood its terms.\textsuperscript{123} So, if the will is written in a tongue foreign to that of the testator the jury may inquire whether the language was understood by him and may go behind the mere reading over and execution.\textsuperscript{124} A hasty reading by him just before an operation, during which he lost consciousness for a time and was under the influence of opiates, may not be sufficient to acquaint him with its terms.\textsuperscript{125} A mere cursory reading may not conclusively establish knowledge of the contents.\textsuperscript{126} In Whitlock v. Wardlaw\textsuperscript{127} it is said that only if the will is read over understandingly, must knowledge be presumed. Sometimes evidence is freely admitted to show that though the will was read over it was not understood.\textsuperscript{128} Though the will may have been read over, evidence may be admitted to show that instructions were not followed, and thus the issue of the testator’s knowledge raised.\textsuperscript{129}

It has been said that a gift may be reduced by striking the unintended excess (assuming no other provision is thereby increased save in the residuary clause),\textsuperscript{130} but it has also been held

\textsuperscript{122} Sanders v. Stiles, 2 Redf. 1 (N. Y. Surr., 1869).
\textsuperscript{123} Ex parte McKie, 107 S. C. 57, 91 S. E. 978 (1917).
\textsuperscript{124} Sansona v. LaRasa, 88 Conn. 136, 90 Atl. 23 (1914); Will of Nadal, 2 Hawaii 400 (1861); Knutson’s Estate, 144 Minn. 111, 174 N. W. 617 (1919); Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289 (1907).
\textsuperscript{125} Lyon v. Townsend, 124 Md. 163, 91 Atl. 704 (1914) (residuary clause not intended and so rejected). Cft., Gaither v. Gaither, 20 Ga. 700 (1866) (Presumption from reading over not conclusive); Ruthford v. Geaves, 31 Tenn. 198 (1 Swan., 1851) (same).
\textsuperscript{126} Karunaratine v. Ferdinandus (1902), A. C. 405.
\textsuperscript{127} Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200 (1906). See dissent in In re Forbes Will, 60 Hun. 171, 14 N. Y. S. 460 (1891), Affd., 123 N. Y. 640.
\textsuperscript{128} Atter v. Atkinson, L. R. 1 P. 665 (1869); Fulton v. Andrew, L. R. 7 H. L. 448 (1875); Goods of Boehm (1891), p. 247; Sheer v. Sheer, 759 Ill. 591, 43 N. E. 334 (1895); Lyon v. Townsend, 124 Md. 163, 91 Atl. 704 (1914); Bradford v. Blossom, 207 Mo. 177, 105 S. W. 289 (1907); Re Gluckman’s Will, 87 N. J. Eq. 638, 101 Atl. 295 (1919); Christman v. Roesch (1909), 116 N. Y. S. 348; Ex parte McKie, 107 S. C. 57, 91 S. E. 978 (1917).
\textsuperscript{129} Anonymous, Godb. 131, pl. 149 (C. P., 1587).
that where a fee was devised, a life estate only being intended, there is no way to reduce the devise to a life estate. The reason why the act of reduction must be so mechanical is difficult to see. The statute requires the will to be in writing, but it does not declare that all that is in writing within the will is part of it. There is no objection to a refusal of probate of matter inserted without testator’s knowledge, where other principal gifts are not affected.

In some cases an inadvertent revocatory clause has been rejected because not read over. Unless the doctrine of dependent relative revocation is applicable, and it probably is not, this method of restoring a revoked will seems highly objectionable in those states which require a re-execution or a republication to restore a revoked will. In Collins v. Elstone, an instrument in substance a codicil, though in form a will, contained such a revocatory clause which had been read over and the effect of which was held unavoidable. A codicil containing a revoking clause should not be construed as revoking the will, of which it forms a part. Such a result is analytically unsound and it does not conform to testator’s intent.

Again where testator referred to his last will of a given date but gave the wrong date, it is possible to reach the desired result on the principle of falsa demonstratio, a conflict between the date named and the words ‘last will’, rather than by striking

---

132 Cf., 23 Ky. L. Jour. 559, 584-586 on the logic of reduction.
133 Vaughan v. Clerk, 87 L. T. R. 144 (1902). The article by Roland Gray, Striking Words Out of a Will (1913), 26 Harv. L. Rev. 212, is pertinent to this entire discussion.
134 Goods of Wray, Ir. R. 10 Eq. 266 (1876). See also Siler v. Jones, 23 K. L. R. 317, 110 S. W. 255 (1908), where an unintended recital of consideration could be overlooked with respect to its bearing upon whether or not the instrument was intended to be a will.
135 Goods of Oswald, L. R. 3 P. & D. 162 (1874); Goods of Wray, Ir. Rep. 10 Eq. 266 (1876); Goods of Moore (1892), p. 228.
136 See Garnett-Botfield v. Garnett-Botfield (1901), p. 335 (court refused to set the revocation aside because it had been read over).
137 (1893), P. 1.
out. A square conflict between hand-written and printed terms of a will, a so-called patent ambiguity, may be resolved by the fact that the testator intends what he writes with his own hand and is likely to overlook the contents of a printed form. This should be true whether the will was read over or not. This is a better procedure than that of striking out.140

In still other situations the English courts reach a result by striking out certain words (where the will was not read over) which could have been reached properly by construction, even if the will had been read over. Thus, in Morrell v. Morrell,141 the testator bequeathed “all my forty shares” of stock. The word “forty” had been erroneously inserted, he having four hundred shares and intending that all should pass. The striking out was expressly based upon the fact that forty was unintended and the will had not been read over. Nothing, however, can be attained by striking out in such cases. All that can legitimately be done is to construe the language. Here the word “my” shares implies “all my shares”. An uncertainty thus arises which may be resolved by other evidence. In Brisco v. Hamilton142 the draftsman mistook the interest of the testatrix in certain land. She had once been a joint tenant of the land devised, but the other joint tenant had died and she now owned the entire property. The draft will devised “all that my undivided moiety” of the premises and it was executed. The court struck out the words “undivided moiety” because they were found not to have been read over by the testatrix at the time of execution, or if read by her, they had never come into her consciousness. Here again the same result could be reached by construction. Her words express an intent to devise her entire interest and the words “undivided moiety” are at war with that expression of intent. If the omitted words must be stricken, then testatrix has not expressed her intent in written words.

Perhaps the only cases where striking out for failure to read over reaches a legitimate result arises where insertions are inadvertently made which, when omitted, do not change the effect

2 Rob. 318, 103 Eng. Rep. 1331 (Eccl., 1852); Goods of Stedham, 6 P. D. 205 (1831), and Whitman v. Whitman, 152 Ind. 263, 53 N. E. 225 (1899).


141 7 P. D. 68 (1882).

142 (1902), P. 234.
of that which remains. It has been held that in such a case a specific gift to A, mistakenly inserted and not read over, which squarely conflicts with another provision in that this specific gift has already been made to B, may be omitted from probate. An equivocation would have arisen if the gift to A and to B had each been either a part of the printed form or in the testator's handwriting.

The solution of the problems arising from irregularities of testamentary expression has been complicated by Bacon's declaration that patent ambiguities cannot be resolved by external evidence. Wigram's plain meaning rule involves a constant war between the requirements of the Wills Statute and the meaning of the testator. The falsa demonstratio non nocet maxim has been given a very limited application in some cases and has been in conflict in some others with the so-called plain meaning rule. Magic phrases have occasionally been employed by courts reaching back to the formalities of generations ago, such, for example, as "It is not what the testator meant to say but rather what he meant by what he said", as if they would constructively aid in the solution of any problem. In spite of the every-day violation of Bacon's doctrine respecting patent ambiguities, and the absurd results reached under Wigram's plain meaning rule, many courts still refer to them as though they were rules of nature. If the plain meaning of words causes an absurd result, something is wrong with the rule, particularly where the language of an untrained draftsman is to be construed. If "monies" is shown to have been used by the testator in the sense of worldly "substance" can it be said that the intent is not in writing sufficient to satisfy the statute? We are entitled to know not merely what the testator meant by what he said but also what he meant to say if that is possible.

---

16 (In two cases there appears a dictum that if a thing is given to A in a will and later is also given to B, A and B become joint tenants of it.) See Whitlock v. Wardlaw, 7 Rich. L. 453 (S. C., 1854); Frelinghuysen v. New York Life Ins. Co., 31 R. I. 150, 77 Atl. 98 (1910). A second alternative is to hold that the provision last written revokes the former one. A third is that both fail for uncertainty, 1 Redfield on Wills (4th ed., 1876), p. 448.
There is a conflict whether or not unobserved omissions should cause a failure of the will. A plain alternative yes or no should not be the invariable answer. If a child were thus pretermitted when a substantial or equal share was intended for him, the issue is quite different from that where a small gift intended for one who was not primarily considered by the testator is omitted. *Fulton v. Andrew* and numerous American cases seem to reach a sound conclusion that the fact of reading over is not necessarily conclusive. If reading over or other method of calling the testator's attention to his will is sufficient to assure his knowledge of its contents, it should also warrant that he has sufficient comprehension of its legal effect. Finally, where a separate legacy is given to each of a numbered group (children of A) and the number is larger than that specified, if each of the actual number is held entitled to a legacy, it must result that a gift or some gifts are awarded which were not attested and subscribed.