nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract. Thus, where certain premises were leased, including a yard, described by metes and bounds, and the question was, whether a cellar under the yard was or was not included in the lease; verbal evidence was held admissible to show, that at the time of the lease the cellar was in the occupancy of another tenant, and therefore that it could not have been intended by the parties that it should pass by the lease.[1] So, where a house, or a mill, or a factory is conveyed, *eo nomine*, and the question is as to what was part and parcel thereof, and so passed by the deed, parol evidence to this point is admitted.[2]

§ 287. Indeed, there is *no material difference* of principle, in the rules of interpretation, *between wills and contracts*, except what naturally arises from the different circumstances of the parties. The object in both cases is the same, namely, to discover the intention. And to do this, the Court may, in either case, *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject-matter.[3] With this view, evidence must

[1] 2 Poth. on Obl. by Evans, p. 185; Doe d. Freeland *v.* Burt, 1 T. R. 701.

[2] Ropps *v.* Barker, 4 Pick. 239; Farrar *v.* Stackpole, 6 Greenl. 154; Post, § 287, cases in note (2). But where the language of the deed was broad enough plainly to include a garden, together with the house, it was held that the written paper of conditions of sale, excepting the garden, was inadmissible to contradict the deed. Doe *v.* Wheeler, 4 P. & D. 273.

[3] Doe *v.* Martin, 1 N. & M. 524; Holsten *v.* Jumpson, 4 Esp. 189; Brown *v.* Thorndike, 15 Pick. 400; Phil. & Am. on Evid. 736; 2 Phil. Evid. 277. The rules of interpretation of Wills, laid down by Mr. Wigram, in his admirable treatise on that subject, may be safely applied, mutato nomine, to all other private instruments. They are contained in seven propositions, as the result both of principle and authority, and are thus expressed: — "I. A testator is always presumed to use the words, in which he expresses himself, according to their strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense; in which case the sense, in which he thus appears to have used them, will be the sense, in which they are to be construed. II. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. III. Where there is nothing in the context of a will, from which it is apparent that a testator has used the words, in which he has expressed himself, in any other than their strict and primary sense, but his words, so interpreted, are insensible with reference to extrinsic circumstances, a Court of Law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable. IV. Where the characters, in which a will is written, are difficult to be deciphered, or the language of the will is not understood by the Court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the Court of the proper meaning of the words. V. For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person, who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs; for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true of every other disputed point, respecting which it can be

be admissible of all the circumstances surrounding the author of the instrument.[1] In the simplest case that can be put,

[1] The propriety of admitting such evidence, in order to ascertain the meaning of doubtful words or expressions in a will, is expressly conceded by Marshall, C. J., in Smith *v.* Bell, 6 Peters, 75. See also Wooster *v.* Butler, 13 Conn. 317. If letters are offered against a party, it seems, he may read his immediate replies; Roe *v.* Day, 7 C. & P. 705; and may prove a previous conversation with the party, to show the motive and intention in writing them. Reay *v.* Richardson, 2 C. M. & R. 422; Ante, § 197.

namely, that of an instrument, appearing on the face of it to be perfectly intelligible, inquiry must be made for a subject-matter to satisfy the description. If, in the conveyance of an estate, it is designated as Blackacre, parol evidence must be admitted to show what field is known by that name. Upon the same principle, where there is a devise of an estate purchased of A., or of a farm in the occupation of B., it must be shown by extrinsic evidence what estate it was that was purchased of A., or what farm was in the occupation of B., before it can be known what is devised.[1] So, if a contract in writing is made, for extending the time of payment of "certain notes," held by one party against the other, parol evidence is admissible to show what notes were so held and intended.[2]

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be shown, that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases — see Proposition VII.) will be void for uncertainty. VII. Notwithstanding the rule of law, which makes a will void for uncertainty, where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning — Courts of law, in certain special cases, admit extrinsic evidence of intention, to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: where the object of a testator's bounty, or the subject of disposition (i. e. person or thing intended) is described in terms, which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." See Wigram on the Admission of Extrinsic Evidence in aid of the Interpretation of Wills, p. 11 – 14. See also Guy *v.* Sharp, 1 M. & K. 602, per Ld. Brougham, C.

[1] Phil. & Am. on Evid. 732; 2 Phil. Evid. 297; Doe d. Preedy *v.* Holtom, 4 Ad. & El. 76, 81, per Coleridge, J.; Sanford *v.* Raikes, 1 Meriv. 653, per Sir W. Grant; Doe *v.* Martin, 4 B. & Ad. 771, per Parke, J. "Whether parcel, or not, of the thing demised, is always matter of evidence." Per Buller, J., in Doe *v.* Burt, 1 T. R. 704, R. acc. in Doe *v.* E. of Jersey, 3 B. & C. 870; Doe *v.* Chichester, 4 Dow's P. C. 65; 2 Stark. Evid. 558 – 561.

[2] Bell *v.* Martin, 3 Harrison, R. 167.

§ 288. It is only in this mode that parol evidence is admissible, (as is sometimes, but not very accurately said,) *to explain written instruments;* namely, by showing the situation of the party in all his relations to persons and things around him, or, as elsewhere expressed, by proof of the surrounding circumstances. Thus, if the language of the instrument is applicable to several persons, to several parcels of land, to several species of goods, to several monuments or boundaries, to several writings;[1] or the terms be vague and general, or have divers meanings, as, "household furniture," "stock," "freight," "factory prices," and the like;[2] or in a will, the words "child," "children," "grandchildren," "son," "family," or "nearest relations," are employed;[3] in all these and the like cases, parol evidence is admissible of *any extrinsic circumstances,* tending to show what person or persons, or what things, were intended by the party, or to ascertain his meaning in any other respect;[4] and this, without

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[1] Miller *v.* Travers, 8 Bing. 244; Storer *v.* Freeman, 10 Mass. 435; Waterman *v.* Johnson, 13 Pick. 261; Hodges *v.* Horsfall, 1 Rus. & My. 116; Dillon *v.* Harris, 4 Bligh, N. S. 343, 356; Parks *v.* The Gen. Int. Assur. Co. 5 Pick. 34; Coit *v.* Starkweather, 8 Conn. 289; Blake *v.* Doherty, 5 Wheat. 359; 2 Stark. Evid. 558 – 561.

[2] Peisch *v.* Dickson, 1 Mason, 10 – 12, per Story, J.; Pratt *v.* Jackson, 1 Bro. P. C. 222; Kelly *v.* Powlet, Ambl. 610; Bunn *v.* Winthrop, 1 Johns. Ch. 329; Le Farrant *v.* Spencer, 1 Ves. sen. 97; Colpoys *v.* Colpoys, Jacob's R. 451; Wigram on Wills, p. 64; Goblet *v.* Beechey, 3 Sim. 24; Barrett *v.* Allen, 1 Wilcox, 426; Avery *v.* Stewart, 2 Conn. 69; Williams *v.* Gilman, 3 Greenl. 276.

[3] Blackwell *v.* Bull, 1 Keen, 176; Wylde's case, 6 Co. 16; Brown *v.* Thorndike, 15 Pick. 400; Richardson *v.* Watson, 4 B. & Ad. 787. The American cases on this head are cited in Cowen & Hill's notes, 939 – 958, to 1 Phil. Evid. p. 532 – 547. See also Wigram on Wills, p. 58; Doe *v.* Joinville, 3 East, 172; Green *v.* Howard, 1 Bro. Ch. C. 32; Leigh *v.* Leigh, 15 Ves. 92; Beachcroft *v.* Beachcroft, 1 Madd. R. 430.

[4] Goodinge *v.* Goodinge, 1 Ves. sen. 231; Jeacock *v.* Falkener, 1 Bro. Ch. C. 295; Fonnereau *v.* Poyntz, Ib. 473; Machell *v.* Winter, 3 Ves. 540, 541; Lane *v.* Ld. Stanhope, 6 T. R. 345; Doe *v.* Huthwaite, 3 B. & Ald. 632; Goodright *v.* Downshire, 2 B. & P. 608, per Ld. Alvanley; Lansdowne *v.* Landsdowne, 2 Bligh, 60; Clementson *v.* Gandy, 1 Keen, 309; King *v.* Badeley, 3 My. & K. 417. So, parol evidence is admissible to show

any infringement of the rule, which, as we have seen, only excludes parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself.

§ 289. In regard to *wills*, much greater latitude was formerly allowed, in the admission of evidence of intention, than is warranted by the later cases. The *modern doctrine* on this subject, is nearly or quite identical with that which governs in the interpretation of other instruments; and is best stated in the language of Lord Abinger's own lucid exposition, in a recent case in the Exchequer.[1] "The object," he remarked,

what debt was referred to, in a letter of collateral guaranty. Drummond *v.* Prestman, 12 Wheat. 515. So, to show that advances, which had been made, were in fact made upon the credit of a particular letter of guaranty. Douglass *v.* Reynolds, 7 Pet. 113. So, to identify a note, which is provided for in an assignment of the debtor's property for the benefit of his creditors, but which is misdescribed in the schedule annexed to the assignment. Pierce *v.* Parker, 4 Metc. 80. So, to show that the indorsement of a note was made merely for collateral security. Dwight *v.* Linton, 3 Rob. Louis. R. 57. See also Bell *v.* Firemen's Ins. Co. Ib. 423, 428, where parol evidence was admitted of an agreement to sell, prior to the deed or act of sale. So, to show what flats were occupied by the riparian proprietor as appurtenant to his upland and wharf, and passed with them by the deed. Treat *v.* Strickland, 10 Shepl. 234.

[1] Hiscocks *v.* Hiscocks, 5 M. & W. 353, 367. This was an action of ejectment, brought on the demise of Simon Hiscocks against John Hiscocks. The question turned on the words of a devise in the will of Simon Hiscocks, the grandfather of the lessor of the plaintiff and of the defendant. By his will, Simon Hiscocks, after devising estates to his son Simon for life, and from and after his death, to his grandson, Henry Hiscocks, in tail male, and making, as to certain other estates, an exactly similar provision in favor of his son John for life; then, after his death, the testator devised those estates to "my grandson John Hiscocks, eldest son of the said John Hiscocks." It was on this devise that the question wholly turned. In fact, John Hiscocks, the father, had been twice married; by his first wife he had Simon, the lessor of the plaintiff, his eldest son; the eldest son of the second marriage was John Hiscocks, the defendant. The devise, therefore, did not, both by name and description, apply to either the lessor of the plaintiff, who was the eldest son, but whose name was Simon, nor to the defendant, who, though his name was John, was not the eldest son.

"in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances, respecting his property and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained, without evidence of all those facts and circumstances.[1] To understand the meaning of any writer, we must first be apprised of the persons and circumstances, that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property, to which the will relates, are undoubtedly legitimate, and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cipher, or in a foreign language. The habits of the testator, in these particulars, must be receivable as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of the will, but either to supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case, in which it appears to us, that this sort of evidence of intention can properly be admitted, and that is, where the meaning of the testator's words is neither ambiguous nor

[1] See Crocker *v.* Crocker, 11 Pick. 257; Lamb *v.* Lamb, Ibid. 375, per Shaw, C. J.

obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof, an ambiguity arises, as to which of the two or more things, or which of the two or more persons (each answering the words in the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor, and evidence of previous intention may be received to solve this latent ambiguity; for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it, by the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to appear by the writing, explained by circumstances, there is no will." [1]

[1] The learned Chief Baron's subsequent commentary on the opposing decisions seems, in a great measure, to have exhausted this topic. "It must be owned, however," said he, "that there are decided cases, which are not to be reconciled with this distinction, in a manner altogether satisfactory. Some of them, indeed, exhibit but an apparent inconsistency. Thus, for example, in the case of Doe *v.* Huthwaite, and Bradshaw *v.* Bradshaw, the only thing decided was, that, in a case like the present, some parol evidence was admissible. There, however, it was not decided, that evidence of the testator's intention ought to be received. The decisions, when duly considered, amount to no more than this, that where the words of the devise, in their primary sense, when applied to the circumstances of the family and the property, make the devise insensible, collateral facts may be resorted to, in order to show, that in some secondary sense of the words — and one in which the testator meant to use them — the devise may have a full effect. Thus, again, in Cheyney's case, and in Counden *v.* Clarke, 'the averment is taken' in order to show which of two persons, both equally described within the words of the will, was intended by the testator to take the estate; and the late cases of

§ 290. From the above case, and two other leading modern decisions,[1] it has been collected,[2] (1.) that, where the descrip-

Doe d. Morgan *v.* Morgan, and Doe d. Gord *v.* Needs, both in this Court, are to the same effect. So, in the case of Jones *v.* Newman, according to the view the Court took of the facts, the case may be referred to the same principles as the former. The Court seems to have thought the proof equivalent only to proof of their being two J. C.s, strangers to each other, and then the decision was right, it being a mere case of what Lord Bacon calls equivocation. The cases of Price *v.* Page, Still *v.* Hoste, and Careless *v.* Careless, do not materially vary in principle from those last cited. They differ, indeed, in this, that the equivalent description is not entirely accurate; but they agree in its being (although inaccurate) equally applicable to each claimant; and they all concur in this, that the inaccurate part of the description is either, as in Price *v.* Page, a mere blank, or, as in the other two cases, applicable to no person at all. These, therefore, may fairly be classed also as cases of equivocation; and, in that case, evidence of the intention of the testator seems to be receivable. But there are other cases not so easily explained, and which seem at variance with the true principles of evidence. In Selwood *v.* Mildmay, evidence of instructions for the will was received. That case was doubted in Miller *v.* Travers; but perhaps, having been put by the Master of the Rolls, as one analogous to that of the devise of all a testator's freehold houses in a given place where the testator had only leasehold houses, it may, as suggested by Lord Chief Justice Tindal, in Miller *v.* Travers, be considered as being only a wrong application to the facts of a correct principle of law. Again, in Hampshire *v.* Peirce, Sir John Strange admitted declarations of the intentions of the testatrix to be given in evidence, to show that by the words, "the four children of my niece Bamfield," she meant the four children by the second marriage. It may well be doubted, whether this was right, but the decision on the whole case was undoubtedly correct; for the circumstances of the family, and their ages, which no doubt were admissible, were quite sufficient to have sustained the judgment, without the questionable evidence. And it may be further observed, that the principle, with which Sir J. Strange is said to have commenced his judgment, is stated in terms much too large, and is so far inconsistent with later authorities. Beaumont *v.* Fell, though somewhat doubtful, can be reconciled with true principles, upon this ground, that there was no such person as Catherine Earnley, and that the testator was accustomed to address Gertude Yardley by the name of

[1] Miller *v.* Travers, 8 Bing. 244, and Doe d. Gord *v.* Needs, 2 M. & W. 129.

[2] By Mr. Wigram, in his Treatise on the Interpretation of Wills, pl. 184, 188. See also Gresley on Evid. p. 203.

tion in the will, of the *person or thing* intended, is *applicable* with legal certainty *to each of several subjects*, extrinsic evidence is admissible to prove, which of such subjects was intended by the testator. But (2.) if the description of the person or thing be *wholly inapplicable* to the subject intended, or said to be intended by it, evidence is admissible to prove whom or what the testator really intended to describe. His declarations of intention, whether made before or after the making of the will, are alike inadmissible.[1] Those made at

Gatty. This, and other circumstances of the like nature, which were clearly admissible, may perhaps be considered to warrant that decision ; but there the evidence of the testator's declarations, as to his intention of providing for Gertrude Yardley, was also received ; and the same evidence was received at Nisi Prius, in Thomas *v.* Thomas, and approved on a motion for a new trial, by the dicta of Lord Kenyon and Mr. Justice Lawrence. But these cases seem to us at variance with the decision in Miller *v.* Travers, which is a decision entitled to great weight. If evidence of intention could be allowed for the purpose of showing, that by Catherine Earnley and Mary Thomas, the respective testators meant Gertrude Yardley and Elinor Evans, it might surely equally be adduced to prove, that by the county of Limerick, a testator meant the county of Clare. Yet this was rejected, and we think rightly. We are prepared on this point (the point in judgment in the case of Miller *v.* Travers) to adhere to the authority of that case. Upon the whole, then, we are of opinion, that in this case there must be a new trial. Where the description is partly true as to both claimants, and no case of equivocation arises, what is to be done is to determine, whether the description means the lessor of the plaintiff or the defendant. The description, in fact, applies partially to each, and it is not easy to see how the difficulty can be solved. If it were res integra, we should be much disposed to hold the devise void for uncertainty ; but the cases of Doe *v.* Huthwaite, Bradshaw *v.* Bradshaw, and others, are authorities against this conclusion. If, therefore, by looking at the surrounding facts to be found by the Jury, the Court can clearly see, with the knowledge which arises from those facts alone, that the testator meant either the lessor of the plaintiff or the defendant, it may so decide, and direct the Jury accordingly ; but we think that, for this purpose, they cannot receive declarations of the testator of what he intended to do in making his will. If the evidence does not enable the Court to give such a direction to the Jury, the defendant will indeed for the present succeed ; but the claim of the heir-at-law will probably prevail ultimately, on the ground, that the devise is void for uncertainty."

[1] Wigram on Wills, pl. 104, 187 ; Brown *v.* Saltonstall, 3 Metc. 423, 426.

the time of making the will, when admitted at all, are admitted under the general rules of evidence, applicable alike to all written instruments.

§ 291. But declarations of the testator, proving or tending to prove a material fact collateral to the question of intention, where such fact would go in aid of the interpretation of the testator's words, are, on the principles already stated, admissible. These cases, however, will be found to be those only, in which the description in the will is unambiguous in its application to any one of several subjects.[1] Thus, where lands were devised to John Cluer of Calcot, and there were father and son of that name, parol evidence of the testator's

[1] Wigram on Wills, pl. 104, 194, 195. This learned writer's *General Conclusions*, as the result of the whole matter, which he has so ably discussed in the Treatise just cited, are — " (1.) That the evidence of material facts is, in all cases, admissible in aid of the exposition of a will. (2.) That the legitimate purposes to which — *in succession* — such evidence is applicable, are two ; namely, *first*, to determine whether the words of the will, with reference to the facts, admit of being construed in their primary sense ; and, *secondly*, if the facts of the case *exclude* the primary meaning of the words, to determine whether the intention of the testator is certain in any other sense, of which the words, with reference to the facts, are capable. And, (3.) That intention cannot be averred in support of a will, except in the special cases, which are stated under the Seventh Proposition ; " (see Ante, § 287, note,) namely, cases " where the object of a testator's bounty, or the subject of disposition, (*i. e.* the *person* or *thing* intended), is described in terms, which are applicable indifferently to more than one *person* or *thing*." Ib. pl. 211, 212, 213, 214. And he insists, — " (1.) That the judgment of a Court, in expounding a will, should be simply *declaratory* of what is *in* the instrument ; — And, (2.) That every claimant under a will has a right to require that a Court of construction, in the execution of its office, shall — by means of extrinsic evidence — place itself in the situation of the testator, the meaning of whose language it is called upon to declare." Ib. pl. 5, 96, 215 ; Doe *v.* Martin, 1 N. & M. 524, per Parke, J. ; 4 B. & Ad. 771, S. C. ; Guy *v.* Sharp, 1 M. & K. 602, per Ld. Brougham, C. See also Boys *v.* Williams, 2 Russ. & M. 689, where parol evidence of the testator's property and situation was held admissible, to determine whether a bequest of stock was intended as a specific or a pecuniary legacy. These rules apply with equal force to the interpretation of every other private instrument.

declarations, that he intended to leave them to the son, was held admissible.[1] So, where a legacy was given to "the four children of A.," who had six children, two by a first, and four by a second marriage, parol evidence of declarations by the testatrix, that she meant the latter four, was held admissible.[2] So, where the devise was, "to my grand-daughter, Mary Thomas of Llechlloyd in Merthyr parish," and the testator had a grand-daughter named Elinor Evans in that parish, and a great grand-daughter Mary Thomas in the parish of Llangam; parol evidence of the testator's declarations at the time of making the will was received, to show which was intended.[3] So, where a legacy was given to Catherine Earnley, and there was no person of that name; but the legacy was claimed by Gertrude Yardley; parol proof was received, that the testator's voice, when the scrivener wrote the will, was very low, that he usually called the legatee Gatty, and had declared, that he would do well by her in his will; and thereupon the legacy was awarded to her.[4] So

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[1] Jones *v.* Newman, 1 W. Bl. 60. See also Doe *v.* Beynon, 4 P. & D. 193; Doe *v.* Allen, 4 P. & D. 220.

[2] Hampshire *v.* Pierce, 2 Ves. sen. 216.

[3] Thomas *v.* Thomas, 6 T. R. 671.

[4] Beaumont *v.* Fell, 2 P. Wms. 140. The propriety of receiving evidence of the testator's declarations, in either of the two last cited cases, was, as we have just seen, (Ante, § 289, note,) strongly questioned by Lord Abinger, (in Hiscocks *v.* Hiscocks, 5 Mees. & Welsb. 371,) who thought them at variance, in this particular, with the decision in Miller *v.* Travers, (8 Bing. 244,) which, he observed, was a decision entitled to great weight. But upon the case of Beaumont *v.* Pell, it has been correctly remarked, that "the evidence, which is confessedly admissible, would, in conjunction with the will itself, show that there was a devise to Catherine Earnley, and that no such person existed, but that there was a claimant named Gertrude Yardley, whom the testator usually called Gatty. In this state of the case, the question would be, whether, upon the principle of *falsa demonstratio non nocet*, the surname of Earnley being rejected, the christian name, if correct, would itself be a sufficient indication of the devisee; and if so, whether Gatty satisfied that indication. Both these questions leave untouched the general question of the admissibility of evidence, to show the process by which Gatty passed into Katty, and from Katty to Catherine." See Phil. & Am. on Evid. p. 729,

also, where a devise was to "the second son of Edward Weld of Lulworth, Esq.," and there was no person of that name, but the testator had two relatives there, bearing the names of Joseph Weld, and Edward-Joseph Weld, it was held, upon the context of the will, and upon extrinsic evidence, that the second son of Joseph Weld was the person intended. So, where a bequest was to John Newbolt, second son of William-Strangways Newbolt, vicar of Somerton; and it appeared *aliunde* that the name of the vicar was William-Robert Newbolt, that his second son was Henry-Robert, and that his third son was John-Pryce; it was held that John-Pryce was entitled to the legacy.[1] So, where the testatrix gave legacies to Mrs. and Miss B. of H., widow and daughter of the Rev. Mr. B.; upon the legacies being claimed by Mrs. and Miss W., widow and daughter of the late Rev. Mr. W. of H., it was held, that they were entitled; it appearing *aliunde* that there were no persons literally answering the description in the will, at its date; but that the claimants were a daughter and grand-daughter of the late Rev. Mr. B., with all of whom the testatrix had been intimately acquainted, and that she was accustomed to call the claimants by the maiden name of Mrs. W.[2] The general principle in all these cases is this, that if there be a mistake in the name of the devisee, but a right description

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note (2). It is not easy, however, to perceive why extrinsic evidence of the testator's declared intentions of beneficence towards an individual is not as admissible, as evidence is, that he used to speak of him or address him as his son, or god-son, or adopted child; when the object in both cases is to ascertain which, of several demonstrations, is to be retained as true, and which rejected as false. Now the evidence of such declarations, in Beaumont *v.* Fell, went to show that "Earnley" was to be rejected as *falsa demonstratio;* and the other evidence went to designate the individual intended by the word "Catherine;" not by adding words to the will, but by showing what the word used meant. See Post, § 300; Wigram on the Interpretation of Wills, p. 128, 129, pl. 166. See also Baylis *v.* The Atto. Gen. 2 Atk. 239; Abbot *v.* Massie, 3 Ves. 148; Doe d. Oxenden *v.* Chichester, 4 Dow's P. C. 65, 93; Duke of Dorset *v.* Ld. Hawarden, 3 Curt. 80.

[1] Newbolt *v.* Pryce, 14 Sim. 354.

[2] Lee *v.* Pain, 4 Hare, 251; 9 Jur. 24.

of him, the Court may act upon such right description;[1] and that if two persons equally answer the same name or description, the Court may determine, from the rest of the will and the surrounding circumstances, to which of them the will applies.[2]

§ 292. It is further to be observed, that the rule under consideration, which forbids the admission of parol evidence to contradict or vary a written contract, is not infringed by any evidence of *known and established usage*, respecting the subject to which the contract relates. To such usage, as well as to the *lex loci*, the parties may be supposed to refer, just as they are presumed to employ words in their usual and ordinary signification; and accordingly the rule is in both cases the same. Proof of usage is admitted, either to interpret the meaning of the language of the contract, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal and obscure.[3] Thus, upon a contract for a year's service, as it does not in terms bind the party, for every day in the year, parol evidence is admissible to show a usage for servants to have certain holidays for themselves.[4] So, where the contract was for

[1] On the other hand, if the name is right, but the description is wrong, the name will be regarded as the best evidence of the testator's intention. Thus, where the testator had married two wives, Mary and Caroline, successively, both of whom survived him; and he devised an estate to his "dear wife Caroline," the latter was held entitled to take, though she was not the true wife. Doe *v.* Roast, 12 Jur. 99.

[2] Blundell *v.* Gladstone, 1 Phil. Ch. R. 279, 288, per Patteson, J.

[3] 2 Poth. on Obl. by Evans, App. No. xvi. p. 187; 2 Sumn. 569, per Story, J.; 11 Sim. 626, per Parke, B.; 4 East, 135, per Ld. Ellenborough; Cutter *v.* Powell, 6 T. R. 320; Vallance *v.* Dewar, 1 Campb. 503; Noble *v.* Kennoway, 2 Doug. 510; Bottomley *v.* Forbes, 5 Bing. N. C. 121; 8 Scott, 866; Ellis *v.* Thompson, 3 M. & W. 445; Post, Vol. 2, § 251. The usage must be general in the whole city or place, or among all persons in the trade, and not the usage of a particular class only, or the course of practice in a particular office or bank, to whom or which the party is a stranger. Gabay *v.* Lloyd, 3 B. & C. 793.

[4] Regina *v.* Stoke upon Trent, 5 Ad. & El. 303, N. S.

performance as an actor in a theatre, for *three years*, at a certain sum *per week*, parol evidence was held admissible to show that, according to uniform theatrical usage, the actor was to be paid only during the theatrical *season*, namely, during the time while the theatre was open for performance, in each of those years.[1] So, where a ship is warranted "to depart with convoy," parol evidence is admissible to show at what place convoy for such a voyage is usually taken; and to that place the parties are presumed to refer.[2] So, where one of the subjects of a charter-party was "cotton in bales," parol evidence of the mercantile use and meaning of this term was held admissible.[3] So, where a promissory note or bill is payable with grace, parol evidence of the known and established usage of the bank, at which it is payable, is admissible, to show on what day the grace expired.[4] But though usage may be admissible to explain what is doubtful, it is not admissible to contradict what is plain.[5] Thus, where a policy was made in the usual form, upon the ship, her tackle, apparel, boats, &c., evidence of usage, that the underwriters never pay for the loss of boats slung upon the quarter, outside of the ship, was held inadmissible.[6] So also, in a libel *in rem* upon a bill of lading, containing the usual clause, "the dangers of

[1] Grant *v.* Maddox, 15 M. & W. 737.

[2] Lethulier's case, 2 Salk. 443.

[3] Taylor *v.* Briggs, 2 C. & P. 525.

[4] Renner *v.* Bank of Columbia, 9 Wheat. 581; where the decisions to this point are reviewed by Mr. Justice Thompson.

[5] 2 Cr. & J. 249, 250, per Ld. Lyndhurst.

[6] Blackett *v.* The Royal Exch. Assurance Co. 2 Cr. & J. 244. So, where the written contract was for "prime singed bacon," and evidence was offered to prove, that by the usage of the trade a certain latitude of deterioration, called average taint, was allowed to subsist, before the bacon ceases to answer the description of prime bacon; it was held inadmissible. Yates *v.* Pym, 6 Taunt. 446. So also, parol evidence has been held inadmissible to prove, that by the words "glass ware in casks," in the memorandum of excepted articles in a fire policy, according to the common understanding and usage of insurers and insured, were meant such ware in open casks only. Bend *v.* The Georgia Ins. Co. Sup. Court, N. York, 1842. But see Gray *v.* Harper, 1 Story, R. 574; Post, § 292, note (1).