EXTRINSIC EVIDENCE AND THE CONSTRUCTION OF WILLS IN CALIFORNIA

The primary rule of construction in the interpretation of wills is to ascertain the testator's intent.[1] This intent is first sought in the language of the will. If the testator's intent is not clear from the language of the will or proves uncertain when applied to the extrinsic facts, the will is said to be ambiguous. The will either must fail for uncertainty or extrinsic evidence must be admitted to resolve the ambiguity. The issue of the admissibility of extrinsic evidence to aid in the construction of a will also arises in cases that do not necessarily involve the resolution of an ambiguity, such as a testator's mistake or his failure to anticipate an eventuality. When and what kind of extrinsic evidence is admissible to construe wills in the foregoing situations is the subject of this Comment.[2]

There is no need to resort to extrinsic evidence when the will is unambiguous and clear on its face.[3] Since the testator's lips are sealed, the courts are reluctant to create a different instrument for him.[4] Thus, the general rule is well established that extrinsic evidence is inadmissible to vary, contradict, or add to the terms of the will.[5]

This policy of excluding evidence that contradicts the will is often expressed in terms of the "plain meaning rule." The unobjectionable view of this rule[6] states that when the language is clear and the beneficiary or property described is easily identified, further extrinsic evidence will not be admitted to oppose this plain meaning.[7] The rule requires that the intention sought be that expressed in the language of the will and not that which existed in the mind of the testator.[8] Thus, the duty of the court is to give effect to the expressed intent without regard to the consequences,[9] no matter how eccentric the result may appear to be.[10] This is true

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[1] CAL. PROB. CODE § 101; Estate of Salmonski, 38 Cal. 2d 199, 238 P.2d 966 (1951); Estate of Lawrence, 17 Cal. 2d 1, 108 P.2d 893 (1941).

[2] This Comment assumes a valid will. Therefore, the admissibility of evidence to resolve issues of revocation, undue influence, and testamentary capacity are not considered. The issue of testamentary intent or *animus testandi* bears only on the validity of the proferred will. This issue is often confused with the testamentary intent sought in the interpretation of a will, and the decisions in the *animus testandi* cases must be distinguished from those in the construction cases.

[3] Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946); see Gore v. Bingaman, 29 Cal. App. 2d 460, 85 P.2d 172 (1938); Estate of Bourn, 25 Cal. App. 2d 590, 78 P.2d 193 (1938).

[4] Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293 (1933); see Estate of Lyons, 36 Cal. App. 2d 92, 96 P.2d 1018 (1939).

[5] 4 BOWE-PARKER, PAGE ON WILLS § 32.7 (1961); Estate of Young, 123 Cal. 337, 55 Pac. 1011 (1899).

[6] For a stricter and more general view of the rule see notes 52–54 *infra* and accompanying text.

[7] 4 BOWE-PARKER, PAGE ON WILLS § 32.10, at 281 (1961). *But see* Estate of Conway, 161 Cal. App. 2d 704, 327 P.2d 173 (1958) (discussed *infra* at note 88); Estate of Gibbs, 14 Wis. 2d 490, 111 N.W.2d 413 (1961). In *Gibbs* the court admittedly disregarded the rule and substituted a new description to correct what it felt was a mistake.

[8] Estate of DeMoulin, 101 Cal. App. 2d 221, 225 P.2d 303 (1950); Estate of Avila, 85 Cal. App. 2d 38, 192 P.2d 64 (1948); Gore v. Bingaman, 29 Cal. App. 2d 460, 85 P.2d 172 (1938); Estate of Maloney, 27 Cal. App. 2d 332, 80 P.2d 998 (1938); Estate of Bourn, 25 Cal. App. 2d 590, 78 P.2d 193 (1938).

[9] Estate of Salmonski, 38 Cal. 2d 199, 238 P.2d 966 (1951); Estate of Spreckels, 162 Cal. 559, 123 Pac. 371 (1912); Estate of Holmes, 191 Cal. App. 2d 285, 12 Cal. Rptr. 629 (1961).

[10] See Pearson v. Hansen, 96 Cal. App. 2d 394, 215 P.2d 529 (1950) (devise split guest house in two).

even if the plain meaning of the language leads to failure of the will, and extrinsic evidence that might save the will is available.[11]

Various presumptions are also used in the construction of a will in order to prevent intestacy.[12] However, when there is no ambiguity, these auxiliary rules of construction may not be used; the testator's intent must be ascertained from the language of the will alone.[13]

I

WHERE THE WILL IS AMBIGUOUS

Lord Bacon laid down certain maxims dealing with the interpretation of written instruments.[14] The most famous and troublesome of these is the maxim that distinguishes between latent and patent ambiguities.[15] Extrinsic evidence, Lord Bacon said, was admissible to resolve a latent ambiguity, but not a patent one. A latent ambiguity is one that is not discovered until the will is applied to the outside world. A patent ambiguity appears on the face of the will. It is doubtful that the construction given to these maxims over the years is the one Lord Bacon intended.[16] Moreover, the construction that has been adopted has led numerous commentators to term their original enunciation as most unfortunate and best forgotten.[17] Nevertheless, their influence has persisted; though the maxims are rarely cited today, they are a major source of the confusion in the rules governing the construction of wills.

One reason for distinguishing between latent and patent ambiguities is that a court has admitted and considered extrinsic evidence in the process of carrying out the terms of the will, and has thus discovered a latent ambiguity. Often, only slightly more extrinsic evidence will resolve the ambiguity. However, with a patent ambiguity the court need never resort to such evidence even to discover the ambiguity, since it appears on the face of the will. The courts have in fact admitted extrinsic evidence to resolve various types of patent ambiguities,[18] and the distinction has proved to be largely meaningless. Nevertheless, the distinction is often stated, if not followed, and has created confusion.[19]

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[11] Estate of Fair, 132 Cal. 523, 64 Pac. 1000 (1901); Estate of Walkerly, 108 Cal. 627, 41 Pac. 772 (1895). Deductions and implications must come from something in the will; there must be more than conjecture. Estate of Swan, 5 Cal. 2d 635, 55 P.2d 1171 (1936).

[12] CAL. PROB. CODE §§ 101–04.

[13] Estate of Blake, 157 Cal. 448, 108 Pac. 287 (1910). The fact that the language leads to total or partial intestacy, because of a failure to name or indicate a beneficiary, does not create an ambiguity. Estate of Beldon, 11 Cal. 2d 108, 77 P.2d 1052 (1938); Estate of DeMoulin, 101 Cal. App. 2d 221, 225 P.2d 303 (1950); Estate of Maloney, 27 Cal. App. 2d 332, 80 P.2d 998 (1938); *cf.* Estate of Buzza, 194 A.C.A. 634, 15 Cal. Rptr. 518 (1961). *But cf.* Estate of Karkeet, 56 A.C. 268, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Estate of Akeley, 35 Cal. 2d 26, 215 P.2d 921 (1950).

[14] BACON, THE ELEMENTS OF THE COMMON LAW OF ENGLAND 3–96 (1639).

[15] *Id.* at 82.

[16] See WIGRAM, EXTRINSIC EVIDENCE IN THE AID OF THE INTERPRETATION OF WILLS 262–63 (2d American ed. 1872).

[17] 9 WIGMORE, EVIDENCE § 2472 (3d ed. 1940); THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 422 (1898). The *Restatement of Property* totally rejects the distinction, and permits extrinsic evidence to clear up any ambiguity. 3 RESTATEMENT, PROPERTY §§ 241–48; see § 241, comment *a* (1940).

[18] See text at note 49 *infra.*

[19] 4 BOWE-PARKER, PAGE ON WILLS § 32.7 (1961).

California has attempted to resolve the issue in large part by statute. California Probate Code section 105 states:

> When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.

The influence of Lord Bacon is apparent in the drafting of this statute. The first half[20] of the statute concerns latent ambiguities. The second half[21] of the statute uses the classic definition of a patent ambiguity, "an uncertainty . . . upon the face of the will." Latent ambiguities must be "corrected," presumably by the free use of extrinsic evidence other than oral declarations of intent by the testator, which are inadmissible. Patent ambiguities can only elicit a search for the testator's intent of the words of the will, "taking into view the circumstances under which it was made," and excluding oral declarations of intent by the testator. Despite the statutory provisions, the California courts have had to deal with much the same problems as have the courts of other states. Moreover, the California courts have not been consistent in their interpretation of the statute and have subjected it to exceptions, justification for which is totally lacking in the statute itself.

The admission of extrinsic evidence where the will is ambiguous may appear to be an exception to the rule barring evidence that adds to the terms of the will. However, this is not a true exception at all. Such evidence when admitted to clear up an ambiguity is not used to change the expressed intent. The evidence is employed merely as an aid in determining what in fact was the expressed intent.[22] The evidence may explain language used, but should not be permitted to show a different intent or object from that disclosed, perhaps obscurely, by the language of the will itself.[23]

Numerous cases lay down a general rule that extrinsic evidence is admissible to explain an ambiguous will.[24] This statement has proved to be too indefinite. The courts must still decide what constitutes an ambiguity, how the existence of an ambiguity is to be established, and what kinds of evidence are admissible to explain different ambiguities.

A. Latent Ambiguities

The principle is firmly established that extrinsic evidence is admissible to resolve a latent ambiguity arising out of extrinsic circumstances.[25] Strictly, a latent ambiguity is only disclosed after extrinsic evidence has been introduced in

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[20] Formerly, CAL. CIV. CODE § 1340.

[21] Formerly, CAL. CIV. CODE § 1318.

[22] Estate of Young, 123 Cal. 337, 55 Pac. 1011 (1899).

[23] Estate of Buzza, 194 A.C.A. 634, 15 Cal. Rptr. 518 (1961); Estate of Sandersfeld, 187 Cal. App. 2d 14, 9 Cal. Rptr. 447 (1960); Estate of Swan, 5 Cal. 2d 635, 55 P.2d 1171 (1936); Estate of Donnellan, 164 Cal. 14, 127 Pac. 166 (1912); Estate of Dominici, 151 Cal. 181, 90 Pac. 448 (1907).

[24] Estate of Willson, 171 Cal. 449, 153 Pac. 927 (1915); see Estate of Kelleher, 202 Cal. 124, 259 Pac. 437 (1927); Estate of Nunes, 123 Cal. App. 2d 150, 266 P.2d 574 (1954).

[25] Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1909); Estate of Heins, 132 Cal. App. 131, 22 P.2d 549 (1933).

an attempt to apply the will to the persons or things to which it relates. The courts have concluded that since the ambiguity is disclosed by extrinsic evidence, it may be removed by extrinsic evidence.[26]

Generally two situations present latent ambiguities.[27] In one there are two or more persons or things exactly measuring up to the description and conditions of the will. This would occur where the testator made a devise to the daughter of his sister Jane, and Jane had two daughters.[28] In the second no person or thing exactly answers the declarations and descriptions of the will, but two or more persons or things do satisfy the description in part, though imperfectly. This would happen where the devise was to a "niece, Mary, who is a resident of New York," when in fact Mary lives in Ireland and another niece named Ann lives in New York.[29] In this situation, with the aid of extrinsic evidence, the misdescription can be struck out, and the person or thing identified from the remaining language of the will.[30]

However, the court may not supply a description that is totally lacking after the false description has been stricken. In *Estate of Lynch*,[31] the testator devised land described as the "south ½ of the N.W. ¼ of section one." In fact he owned the west ½ of the S.W. ¼ of the same section. The devisee sought to strike out the words south and northwest as an erroneous description. The court held that this could be done, but it would leave the description too uncertain to be aided by extrinsic evidence. The devise failed; the court held that there must be enough of a description left to point with certainty to the intended property.[32]

The biggest problem the courts face in dealing with a latent ambiguity is making the original determination that such an ambiguity exists. *Estate of Nunes*[33] is an example of how a court may strain to find an ambiguity in order to consider extrinsic evidence. The devise was to the testator's "nephew," "Joe E. Nunes." The contestant sought the admission of extrinsic evidence to show that a cousin named Joe E. Nunes, to whom the testator often referred as "nephew," was the intended beneficiary. However, the testator did have a nephew named Joseph E. Nunes who was occasionally called "Joe." The court held that the names were not identical. Therefore, an ambiguity was found to exist because no one person

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[26] Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1909); Estate of Nunes, 133 Cal. App. 2d 150, 266 P.2d 574 (1954); Estate of Greenwald, 19 Cal. App. 2d 291, 65 P.2d 70 (1937).

[27] For a third type of ambiguity sometimes classified as latent, see text at notes 47–49 *infra*.

[28] See, *e.g.*, Estate of Frinchaboy, 108 Cal. App. 2d 235, 238 P.2d 592 (1951) (bequest "to my daughter"; testator had two daughters); Estate of Brisacher, 27 Cal. App. 2d 327, 80 P.2d 1033 (1938) (two rings met description, "diamond wedding ring"); Estate of Nessel, 164 Cal. App. 2d 798, 331 P.2d 205 (1958) (two people met description, "Margaret Johnson").

[29] Estate of Donnellan, 164 Cal. 14, 127 Pac. 166 (1912); *accord*, Estate of Little, 170 Cal. 52, 148 Pac. 194 (1915); Estate of Harris, 160 Cal. App. 2d 842, 325 P.2d 683 (1958); Estate of Nunes, 123 Cal. App. 2d 150, 266 P.2d 574 (1954); Estate of Sullivan, 86 Cal. App. 2d 890, 195 P.2d 894 (1948); Estate of Zens, 33 Cal. App. 2d 375, 91 P.2d 960 (1939).

[30] Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351 (1908). This process is also known as the doctrine of false demonstration. Estate of Heins, 132 Cal. App. 131, 22 P.2d 549 (1933).

[31] 142 Cal. 373, 75 Pac. 1086 (1904).

[32] The court noted that if the devise had included the words "my land," and if it could be shown that the testator only owned one tract in that section, the devise would not have failed. In Patch v. White, 117 U.S. 210 (1886), a case very similar on its facts to *Lynch*, the Court held that the obvious mistake could be corrected. See also Estate of Boeck, 160 Wis. 577, 152 N.W. 155 (1915).

[33] 123 Cal. App. 2d 150, 266 P.2d 574 (1954).

exactly fit the description in the will, though a strong argument can be made that Joe and Joseph are essentially the same and no latent ambiguity as to the identity of the beneficiary exists. This case demonstrates the wide discretion courts have in finding the existence of an ambiguity, which in turn determines the admissibility of extrinsic evidence.[34]

The fact that a latent ambiguity is found to exist and extrinsic evidence is admitted to find the testator's intent, does not mean that when that intent is found it must be given effect. The intent must still be discernable from the words of the will read in the light of the admitted evidence.[35] In *Estate of Dominici*[36] there was an imperfect description of a beneficiary and extrinsic evidence was properly admitted. The evidence disclosed that both of the contesting parties were intended beneficiaries. The court held that the gift failed, since to give effect to this intent would do manifest violence to the language of the will. Moreover, it would put the court in the position of making a new will for the testator.[37]

B. Patent Ambiguities

The most obvious type of patent ambiguity is the conflict of two provisions within the will. When the conflict cannot be resolved within the four corners of the will, the court will usually admit evidence of the surrounding circumstances to determine which words used by the testator should be given effect. In *Estate of Owens*[38] there was a bequest to *A* of one-third of the "money left"; a previous clause bequeathed one-third of the "money left" to *B*. It was uncertain on the face of the will whether the portion of the "money left" of which *A* was to receive one-third was to be determined before or after the bequest to *B* had been deducted. Evidence was admitted consisting of the expressed affection that the testator felt for *B*, and his frequently expressed intentions of assisting *B* financially. In *Estate of Akeley*,[39] the testator asserted his intent to bequeath all of the residue, but then gave only twenty-five per cent of the residue to each of three legatees. The conflict between the statements was one of the reasons the court gave for admitting evidence of the surrounding circumstances.[40]

Another type of patent ambiguity arises when, from the language of the will itself, it appears that the identity of some person or thing is indefinite. Probate Code section 105 states that evidence of the surrounding circumstances must be admitted if there is an uncertainty on the face of the will. Moreover, the language of one case asserts that extrinsic evidence is always admissible to explain any

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[34] *Compare* Estate of Nunes, *ibid.*, *with* Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946) ("St. George Hotel" held ambiguous as to the surrounding stores that were not part of the hotel) *and* Pearson v. Hansen, 96 Cal. App. 2d 394, 215 P.2d 529 (1950) (described boundary split a guest house in two; the devise was held not ambiguous).

[35] See notes 31, 32 *supra* and accompanying text.

[36] 151 Cal. 181, 90 Pac. 448 (1907).

[37] See Estate of Zilke, 115 Cal. App. 63, 1 P.2d 475 (1931) (bequest to "Orphans Home of S.F." cannot be construed as "Orphans Homes of S. F."). *But see* Estate of Steinman, 35 Cal. App. 2d 95, 94 P.2d 821 (1939) (name of beneficiary was substantially changed); *cf.* Estate of Moeller, 199 Cal. 705, 715, 251 Pac. 311, 315 (1926).

[38] 62 Cal. App. 2d 772, 145 P.2d 376 (1944).

[39] 35 Cal. 2d 26, 215 P.2d 921 (1950).

[40] The court also relied on the fact that the other 25% of the estate would escheat if the evidence was refused. CAL. PROB. CODE § 104, which expresses a preference for the clearer clause, may be determinative where conflicting clauses are involved. See Estate of Kearns, 36 Cal. 2d 531, 225 P.2d 218 (1950).

ambiguity whether it arises on the face of the will or not.[41] Nevertheless, many of these wills fail for uncertainty though reliable extrinsic evidence is available. In *Estate of Young*,[42] the will directed that two deeds should be delivered to the devisee. The court held the description was inadequate, since deeds to any land would suffice. The ambiguity was on the face of the will and therefore patent; extrinsic evidence was held inadmissible to explain the ambiguity.[43] In *Estate of DeMoulin*,[44] the name of the intended beneficiary was mistakenly omitted. The court refused extrinsic evidence on the ground not that the beneficiary was ambiguously described, but rather that there was a total failure to name or describe him.[45] The court held that supplying the omitted word would place the court in the position of varying the will rather than interpreting words the testator used.[46]

A third type of patent ambiguity exists when the meaning of the language employed is fairly susceptible to more than one interpretation. This kind of ambiguity is sometimes referred to as both patent and latent.[47] The patent ambiguity to which Lord Bacon made reference probably was not intended to include uncertainties in the meaning of the terms themselves when they have more than one meaning.[48] Such ambiguities are not really latent because they arise from an infirmity in the language itself. They are technically patent since the words themselves have an inherently doubtful meaning or are consistent with more than one interpretation. The courts have generally labelled the ambiguity as patent, but have admitted extrinsic evidence to resolve it. This practice conflicts with the general rule, which purportedly excludes extrinsic evidence to resolve a patent ambiguity. The admission of such evidence without clearly distinguishing the type of patent ambiguity involved has led to confusion.[49] The California courts have not been consistent in the classification of this type of ambiguity. However, evidence of the surrounding circumstances has been readily admitted under Probate Code section 105.[50]

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[41] Estate of Torregano, 54 Cal. 2d 234, 352 P.2d 505, 5 Cal. Rptr. 137 (1960) (dicta).

[42] 123 Cal. 337, 55 Pac. 1011 (1899).

[43] The court also held that the description of the deeds was vague and therefore they were not properly incorporated as part of the will for purposes of identification.

[44] 101 Cal. App. 2d 221, 225 P.2d 303 (1950).

[45] *Accord*, Estate of Maloney, 27 Cal. App. 2d 332, 80 P.2d 998 (1938) (failure to indicate object or beneficiary of a testamentary trust).

[46] See Estate of Kelleher, 202 Cal. 124, 259 Pac. 437 (1927); Estate of Lynch, 142 Cal. 373, 75 Pac. 1086 (1904); *cf.* Estate of Swan, 5 Cal. 2d 635, 55 P.2d 1171 (1936); Estate of Zilke, 115 Cal. App. 63, 1 P.2d 475 (1931). *But see* Estate of Johnson, 107 Cal. App. 236, 290 Pac. 314 (1930). Dictum in this case indicated that words may be inserted in certain situations. The court stated that when it clearly appears on the face of the will that words have been omitted and these words are clearly identified, they may be inserted. The words would be supplied to show the intended meaning that was not clearly expressed. However, the words would be inadmissible to change a meaning that has been expressed. *Cf.* Estate of Karkeet, 56 A.C. 268, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Estate of Cowell, 167 Cal. 222, 139 Pac. 84 (1914); Estate of Esterday, 45 Cal. App. 2d 598, 114 P.2d 669 (1941).

[47] Lind (Jenny) Co. v. Bower & Co., 11 Cal. 194 (1858).

[48] *Id.* at 198.

[49] See Peisch v. Dickson, 19 Fed. Cas. 123 (No. 10911) (C.C.D. Mass. 1815) (Story, J.).

[50] Estate of Kurtz, 190 Cal. 146, 210 Pac. 959 (1922); Estate of Sandersfeld, 187 Cal. App. 2d 14, 9 Cal. Rptr. 447 (1960) (meaning of word "home" created a latent ambiguity); Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951) (meaning of word "now" created a latent ambiguity); Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946).

An ambiguity in the meaning of the language used is similar to a latent ambiguity in that the courts are often faced with the basic problem of whether or not an ambiguity exists.[51] In making this determination the court is at times hampered by the "plain meaning rule." Under the strict view of this rule, evidence of a special meaning the testator attaches to words is inadmissible, if the words used have a common or general meaning.[52] This definition has been expressly repudiated by many authorities[53] because it assumes there can be but one real or absolute meaning of a word. In fact, there can be only one person's meaning for the law to seek, and that person is the testator.[54] However, section 106 of the California Probate Code has more or less codified the rule.[55] Therefore, the admissibility of extrinsic evidence to resolve an ambiguity involving ordinary or technical words is dependent on both Probate Code sections 105 and 106.

It is often stated in California cases applying the plain meaning rule that the testator is presumed to use words in their ordinary and primary sense unless it appears from the context of the will that he used them in some other sense, or unless by reference to extrinsic circumstances the use of the words in their primary sense would render the provisions insensible or inoperative.[56] The strictness with which this rule has been applied has in large part depended on who wrote the will. When the will has been drawn by an attorney, the court has usually applied the rule strictly and held the testator to the technical meaning of technical words and excluded any evidence that might show a contrary intention.[57] However, some

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[51] See notes 33, 34 *supra* and accompanying text.

[52] 4 BOWE-PARKER, PAGE ON WILLS § 32.10, at 278 (1961); see, *e.g.*, Estate of Watts, 186 Cal. 102, 198 Pac. 1036 (1921) (heirs); Estate of Spencer, 181 Cal. 514, 185 Pac. 474 (1919) (personal legatees); Estate of Avila, 85 Cal. App. 2d 38, 192 P.2d 64 (1948) (improvements); *cf.* Estate of Buzza, 194 A.C.A. 634, 15 Cal. Rptr. 518 (1961). *But see* Estate of Nunes, 123 Cal. App. 2d 150, 266 P.2d 574 (1954). See generally WIGRAM, EXTRINSIC EVIDENCE IN THE AID OF INTERPRETATION OF WILLS 55 (2d American ed. 1872).

[53] 9 WIGMORE, EVIDENCE § 2461 (3d ed. 1940); RESTATEMENT, PROPERTY § 242, comment *c* (1940). See generally Warren, *Interpretation of Wills—Recent Developments*, 49 HARV. L. REV. 689, 690–96 (1936); Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 384 (1941).

[54] 9 WIGMORE, EVIDENCE § 2462 (3d ed. 1940); 4 BOWE-PARKER, PAGE ON WILLS § 32.10 (1961).

[55] CAL. PROB. CODE § 106:

> The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.

[56] Estate of Willson, 171 Cal. 449, 153 Pac. 927 (1915); Estate of Schedel, 73 Cal. 594, 15 Pac. 297 (1887); see Estate of Johnson, 107 Cal. App. 236, 290 Pac. 314 (1930); *cf.* Estate of Craig, 64 Cal. App. 2d 132, 148 P.2d 100 (1944).

[57] Estate of Hollingsworth, 37 Cal. App. 2d 432, 99 P.2d 599 (1940) (wages); Estate of Bourn, 25 Cal. App. 2d 590, 78 P.2d 193 (1938) (annuity); Estate of Northcutt, 16 Cal. 2d 683, 107 P.2d 607 (1940) (personal property). One case has stated that when the will is drawn by a competent attorney, the presumption that legal terms are used in their legal sense is all but conclusive. Estate of Welsh, 89 Cal. App. 2d 43, 200 P.2d 139 (1948). Intelligently drawn holographic wills may be subject to the same rule. *Cf.* Gore v. Bingaman, 29 Cal. App. 2d 460, 85 P.2d 172 (1938) (next of kin).

language inherently has more than one meaning. Extrinsic evidence is admissible in such a case, without regard to who wrote the will.[58]

Where the testator has made a holographic will, the court will usually find an uncertainty where the words are possibly ambiguous[59] or where the internal structure of the wording of the will makes its meaning uncertain.[60] The courts will freely admit evidence not only to determine who drafted the will, but also to establish whether the testator was acquainted with the technical sense of words used, and if so, whether he intended to use them in the technical sense.[61] An ambiguity will usually be found where the words might conceivably be used in other than their technical sense.[62] Where it appears that a holographic will was drawn by a testator who was lacking in education, the court will at times almost assume that the will is ambiguous on its face in order to reach what the court feels is a just result.[63] Some courts have relied on the presumption against intestacy as the basis for admitting evidence in such situations[64] despite cases that have specifically held this is not a sufficient ground for admitting extrinsic evidence.[65]

Where the will contains precatory words, the courts have been inconsistent

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[58] See Estate of Graham, 49 Cal. 2d 333, 316 P.2d 945 (1957) ("personal property"); Estate of Resler, 43 Cal. 2d 726, 278 P.2d 1 (1954) ("set aside"); Estate of Womersley, 164 Cal. 85, 127 Pac. 645 (1912) ("heirs of Womersley family"); Estate of Douglas, 197 A.C.A. 281, 17 Cal. Rptr. 89 (1961) ("contents"); Estate of Lewis, 126 Cal. App. 90, 14 P.2d 357 (1932) ("5% of the monies received and paid out"); *cf.* Estate of Jones, 55 Cal. 2d 531, 360 P.2d 70, 11 Cal. Rptr. 574 (1961); Estate of O'Farrell, 149 Cal. App. 2d 691, 309 P.2d 60 (1957); Estate of Moore, 135 Cal. App. 2d 122, 286 P.2d 939 (1955).

[59] See, *e.g.*, Estate of Carillo, 187 Cal. 597, 203 Pac. 104 (1921) (cash); Estate of Whitney, 162 Cal. App. 2d 860, 329 P.2d 104 (1958) (money); Estate of MacPherson, 87 Cal. App. 2d 1, 195 P.2d 807 (1948) ("loose money and Bons" [*sic*]); Estate of Chamberlain, 56 Cal. App. 2d 458, 132 P.2d 488 (1942) (cash).

[60] See Estate of Nichols, 199 A.C.A. 815, 19 Cal. Rptr. 93 (1962); Estate of Ford, 169 Cal. App. 2d 174, 336 P.2d 981 (1959); Estate of Monticelli, 107 Cal. App. 2d 90, 236 P.2d 661 (1951); Estate of Lewis, 91 Cal. App. 2d 322, 204 P.2d 898 (1949); Estate of Clippinger, 75 Cal. App. 2d 426, 171 P.2d 567 (1946). A court will occasionally justify the admission of evidence on the ground that it merely supplements and makes more complete a description that the court believes is already sufficiently clear. See Estate of Wolf, 128 Cal. App. 305, 17 P.2d 1052 (1932); *cf.* Estate of Painter, 150 Cal. 498, 89 Pac. 98 (1907).

[61] Estate of Karkeet, 56 A.C. 268, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Estate of Graham, 49 Cal. 2d 333, 316 P.2d 945 (1957); Estate of Barbikas, 175 Cal. App. 2d 285, 345 P.2d 968 (1959); see Estate of Conway, 161 Cal. App. 2d 704, 327 P.2d 173 (1958); Estate of Fuller, 135 Cal. App. 781, 28 P.2d 399 (1933).

[62] See Estate of Akeley, 35 Cal. 2d 26, 215 P.2d 921 (1950); Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948); Estate of Boyd, 148 Cal. App. 2d 821, 307 P.2d 754 (1957); Estate of Clancy, 159 Cal. App. 2d 216, 323 P.2d 763 (1958); Estate of Wierzbicky, 69 Cal. App. 2d 690, 159 P.2d 699 (1945). *But see* Estate of Owens, 62 Cal. App. 2d 772, 145 P.2d 376 (1944); Gore v. Bingaman, 29 Cal. App. 2d 460, 85 P.2d 172 (1938); Estate of Norrish, 135 Cal. App. 166, 26 P.2d 530 (1933); *cf.* Estate of Holmes, 191 Cal. App. 2d 285, 12 Cal. Rptr. 629 (1961).

[63] See Estate of Karkeet, 56 A.C. 268, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Estate of Conway, 161 Cal. App. 2d 704, 327 P.2d 173 (1958). One court stated that it has a duty to bend technical words to the intent disclosed by extrinsic evidence. Estate of Akeley, 35 Cal. 2d 26, 215 P.2d 921 (1950). *But cf.* Estate of Maloney, 27 Cal. App. 2d 332, 80 P.2d 998 (1938).

[64] See Estate of Karkeet, 56 A.C. 268, 363 P.2d 896, 14 Cal. Rptr. 664 (1961); Estate of Akeley, 35 Cal. 2d 26, 215 P.2d 921 (1950); *cf.* Estate of Farelly, 214 Cal. 199, 4 P.2d 948 (1931) (not a holographic will). In *Karkeet* and *Akeley*, the court relied on the fact that if the will failed the estate would escheat to the state, since the testator left no surviving heirs. This would appear to be a dubious exception to the rule that a will is not ambiguous merely because it leads to intestacy.

[65] See notes 11–13 *supra* and accompanying text.

in admitting extrinsic evidence. One court has held that precatory words "almost always" call for the admission of extrinsic evidence to determine whether they direct the creation of a trust or are merely optional words of request attached to an outright gift.[66] Another court admitted that the word "direct" *prima facie* imports a command, but said that it was ambiguous since it was addressed to a legatee.[67] When a holographic will is involved, extrinsic evidence is often admissible,[68] though the courts will just as often exclude such evidence by simply declaring that there is no uncertainty.[69]

C. Surrounding Circumstances

One of the most troublesome problems in the use of extrinsic evidence to construe a will is the admissibility of evidence of the circumstances surrounding the execution of the will. This evidence usually consists of the size of the estate, the property involved, the circumstances of the beneficiaries, and their relation to each other and the testator, all viewed as of the date of execution.[70] The testator's knowledge of the extent of his estate may also be considered.[71] Events occurring or instruments executed after execution of the will or codicil in question would not qualify.[72] However, events occurring before execution, if relevant to the testator's intention at the time of execution, may be included.[73]

Probate Code section 105 indicates that such evidence is admissible when an uncertainty arises upon the face of the will, or when a latent ambiguity is found to exist.[74] Numerous cases have interpreted this section literally and stated flatly that such evidence is admissible only when there is an ambiguity.[75] However, a few cases have stated that the intent of the testator must always be found in the language used, read in the light of the circumstances surrounding execution.[76] The courts adhering to the former view—that the admission of such evidence is dependent on the existence of an ambiguity—lose sight of a basic fact. Evidence of the surrounding circumstances must be received in every case in order to apply

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[66] Estate of Tsheppe, 19 Cal. App. 2d 314, 65 P.2d 830 (1937).

[67] Estate of Farelly, 214 Cal. 199, 4 P.2d 948 (1931).

[68] See Estate of Kearns, 36 Cal. 2d 531, 225 P.2d 218 (1950); Estate of Burris, 190 Cal. App. 2d 582, 12 Cal. Rptr. 298 (1961); Sears v. Rule, 45 Cal. App. 2d 374, 114 P.2d 57 (1941), *aff'd*, 27 Cal. 2d 131, 163 P.2d 443, *cert. denied*, 328 U.S. 843 (1945); Estate of Richards, 69 Cal. App. 2d 780, 141 P.2d 752 (1943).

[69] See Estate of Sargavak, 41 Cal. 2d 314, 259 P.2d 897 (1953); Estate of Doane, 190 Cal. 412, 213 Pac. 53 (1923); Estate of Mitchell, 160 Cal. 618, 117 Pac. 774 (1911); Estate of Price, 138 Cal. App. 462, 32 P.2d 994 (1934).

[70] Estate of Conway, 161 Cal. App. 2d 704, 327 P.2d 173 (1958).

[71] See Estate of Carillo, 187 Cal. 597, 203 Pac. 104 (1921); Estate of Painter, 150 Cal. 498, 89 Pac. 98 (1907).

[72] O'Farrell v. American Trust Co., 149 Cal. App. 2d 691, 309 P.2d 60 (1957).

[73] Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948). *But cf.* Estate of Vanderhurst, 171 Cal. 553, 154 Pac. 5 (1915).

[74] The statute's command that a latent ambiguity must be "corrected" necessarily envisons consideration of the circumstances surrounding the execution of the will.

[75] Estate of Salmonski, 38 Cal. 2d 199, 238 P.2d 966 (1951); Estate of Ryan, 191 Cal. 307, 216 Pac. 366 (1923); Estate of Tompkins, 132 Cal. 173, 64 Pac. 268 (1901); Estate of Holmes, 191 Cal. App. 2d 285, 12 Cal. Rptr. 629 (1961); Estate of Mallon, 28 Cal. App. 2d 106, 81 P.2d 992 (1938).

[76] Estate of Torregano, 54 Cal. 2d 234, 352 P.2d 505, 5 Cal. Rptr. 137 (1960); see Estate of Clary, 98 Cal. App. 2d 524, 220 P.2d 754 (1950); Estate of Tsheppe, 19 Cal. App. 2d 314, 65 P.2d 830 (1937).

the will to the persons and things referred to in it.[77] It is only by introducing such evidence that a latent ambiguity can be shown to exist. Similarly, it is only when the instrument is still uncertain after the language has been brought into contact with the surrounding circumstances that a true patent ambiguity is established. It has been suggested that it was only this class of patent ambiguity that Lord Bacon had in mind.[78] That courts have not agreed what Lord Bacon meant has caused most of the conflict over patent ambiguities in nearly every jurisdiction.

When the court refuses to consider the surrounding circumstances, the court thereby declines to place itself in the position of the testator in construing the language of the will. But until this is done, it is impossible for the court to know whether the will is ambiguous.[79] However, even evidence of the circumstances surrounding execution should not be received for the purpose of showing an intention different from that contained in the will, or to import into a will an intention not therein expressed.[80]

D. Oral Declarations

The general common-law rule is that evidence of the testator's oral declara-

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[77] Estate of Stanford, 49 Cal. 2d 120, 315 P.2d 681 (1957) (dissenting opinion); Estate of Brown, 199 A.C.A. 285, 18 Cal. Rptr. 435 (1962); Estate of McDonald, 191 Cal. App. 2d 565, 12 Cal. Rptr. 823 (1961); Estate of Sandersfeld, 187 Cal. App. 2d 14, 9 Cal. Rptr. 447 (1960); Paley v. Superior Court, 137 Cal. App. 2d 450, 290 P.2d 617 (1955). CAL. CODE CIV. PROC. § 1860 states:

> For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.

CAL. CODE CIV. PROC. § 1856 states:

> When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:
>
> 1. Where a mistake or imperfection of the writing is put in issue by the pleadings;
> 2. Where the validity of the agreement is the fact in dispute.
>
> But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and *wills*, as well as contracts between parties. (Emphasis added.)

These two statutes taken together would appear to resolve the issue of the admissibility of evidence of the surrounding circumstances in the construction of wills. However, in Estate of Carroll, 138 Cal. App. 2d 363, 291 P.2d 976 (1956), the court pointed out that although § 1856 ostensibly includes wills within the term "agreement" and the section had been enacted in 1873, no court had ever applied the section to the interpretation of wills. Thus, the construction of wills is tacitly governed by the Probate Code exclusively, despite the language of CAL. CODE CIV. PROC. § 1856.

[78] JONES, EVIDENCE §§ 1547, 1551 (2d ed. 1926); WIGRAM, EXTRINSIC EVIDENCE IN THE AID OF THE INTERPRETATION OF WILLS 260-61 (2d American ed. 1872). Wigram states that "it is a necessary supposition that the language of the will and the facts with reference to which it was written are to be taken together."

[79] 4 BOWE-PARKER, PAGE ON WILLS § 30.8 (1961).

[80] See notes 22, 23 *supra* and accompanying text.

tions is inadmissible to show his intention.[81] The probable basis for the rule is that because the testator is dead and cannot refute the evidence, there is danger of perjury. Probate Code section 105 specifically declares such evidence to be inadmissible to resolve latent or patent ambiguities.[82] The legislature deliberately chose this, the English rule, despite the difficulties inherent in it.[83] The courts have shown great confusion interpreting this part of section 105.

The California courts have created an exception to the statute in the case of oral instructions given to the scrivener. In *Estate of Dominici*,[84] the court noted that Probate Code section 105 was at variance with the general rule[85] and, therefore, would "not be extended . . . . beyond its actual language."[86] The restriction was only to apply to the "mere incidental fugitive utterances or declarations of intent" as distinguished from the "specific instructions," which may be proved. The court stated that there was a broad difference between a casual remark of intention and positive instructions given to the attorney in the very performance of the testamentary act. The court felt the admission of the latter evidence would not do violence to the statute.

It is unclear whether the exception admitting evidence of oral instructions to the scrivener is available in all cases. *Dominici* involved an imperfect description of a beneficiary, which created a latent ambiguity. And the court concluded its opinion by stating "of course, first there must be a latent ambiguity." But it is open to conjecture whether this last statement was intended to be a prerequisite to the exception, or merely an afterthought. Whichever the view, in most cases the court has either found a latent ambiguity, or analysis of the facts shows that one existed.[87] However in some cases the court's classification as patent or latent could just as logically have been reversed,[88] and in two of these cases the court

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[81] 4 BOWE-PARKER, PAGE ON WILLS § 32.9 (1961); ATKINSON, WILLS 287–88 (2d ed. 1953); 3 RESTATEMENT, PROPERTY § 242, comment *j* (1940).

[82] See text at notes 20, 21 *supra*.

[83] See Note, 1 CALIF. L. REV. 87 (1912).

[84] 151 Cal. 181, 90 Pac. 448 (1907).

[85] *Id.* at 185, 90 Pac. at 450.

[86] *Ibid.*

[87] See Estate of Little, 170 Cal. 52, 148 Pac. 194 (1915); Estate of McDonald, 191 Cal. App. 2d 565, 12 Cal. Rptr. 823 (1961); Estate of Sandersfeld, 187 Cal. App. 2d 14, 9 Cal. Rptr. 447 (1960); Estate of Nunes, 123 Cal. App. 2d 150, 266 P.2d 574 (1954); Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951); Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946) (implying *only* prerequisite is that there be a latent ambiguity); Estate of Craig, 64 Cal. App. 2d 132, 148 P.2d 100 (1944); Estate of Greenwald, 19 Cal. App. 2d 291, 65 P.2d 70 (1937). *But see* Estate of Spencer, 181 Cal. 514, 185 Pac. 474 (1919) (dictum); Estate of Schaetzel, 44 Cal. App. 2d 320, 112 P.2d 324 (1941) (dictum).

[88] See Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951). In this case the bequest was of a car "now owned by me." The testator owned a different car when he died than when he executed his will. The court held that there was a latent ambiguity as to whether the testator intended the word "now" to refer to the date of execution or the date of death. The court might just as logically have held that the use of the word "now" created an ambiguity on the face of the will. See also Estate of Conway, 161 Cal. App. 2d 704, 327 P.2d 173 (1958). This case did not involve oral declarations. However, an ambiguity was found to be "on the face of the will," although it was discovered in identifiying the property devised. See text at note 115 *infra*. *Compare* Estate of Craig, 64 Cal. App. 2d 132, 148 P.2d 100 (1944) (issue of whether children included grandchildren presented a latent ambiguity), *with* Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948) (issue of who was included in term "lawful issue" presented an "uncertainty on the face of the will").

classified the ambiguity as latent only after first talking of an ambiguity on the face of the will.[89]

Many cases have affirmatively held that if the ambiguity is patent, oral declarations to the scrivener are inadmissible.[90] This is consistent with a limitation of the exception to latent ambiguities. However, in *Estate of Pierce*,[91] the court admitted instructions to the scrivener after first stating that the ambiguity appeared on the face of the will.[92] In *Estate of Resler*,[93] the court found an ambiguity "on the face of the will." The testator's oral declarations to the scrivener were admitted on the ground that the *amount of a bequest* was involved. There was absolutely no precedent for this distinction. However, two cases have since repeated the statement in dictum.[94]

Most of the cases in which oral declarations of intent have been admitted involved instructions to a scrivener. This is consistent with the formulation of the exception in *Dominici*. Moreover, one case has excluded oral declarations because they were not instructions given to the scrivener.[95] However, other cases have apparently admitted "conversations" with the scrivener,[96] or even "conversations" with a non-scrivener.[97]

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[89] Estate of Sandersfeld, 187 Cal. App. 2d 14, 9 Cal. Rptr. 447 (1960); Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946). In *Sandersfeld* in question was the meaning of the word "home," where the home was on a small portion of a 4½ acre tract. In *Hotaling* the court had to determine the meaning of the word "hotel," where the devise was of "my real property known as the St. George Hotel." It was not clear whether surrounding stores, not technically part of the hotel, were intended as part of the devise.

There is also dictum in Estate of Carter, 47 Cal. App. 2d 300, 302 P.2d 301 (1956), stating that not only must the ambiguity be latent before oral declarations will be admitted, but that the ambiguity must be one of equivocation. An equivocation is confined to the situation in which the words of the will apply precisely and equally to two persons or objects. 4 BOWE-PARKER, PAGE ON WILLS § 32.9, at 277 (1961). (At common law the testator's oral declarations of intent were admissible in the case of an equivocation. *Id.* at 287–88.) However *Carter* ignores a number of California cases admitting evidence of oral declarations to resolve a latent ambiguity clearly not one of equivocation. See, *e.g.*, Estate of McDonald, 191 Cal. App. 2d 565, 112 Cal. Rptr. 823 (1961) (description conflicted with physical facts and did not apply as it read to any property); Estate of Cooper, 107 Cal. App. 2d 592, 237 P.2d 699 (1951) ("my car," question of ademption); Estate of Craig, 64 Cal. App. 2d 132, 148 P.2d 100 (1944) (does children include grandchildren); Estate of Esterday, 45 Cal. App. 2d 598, 114 P.2d 669 (1941) (testator failed to anticipate an eventuality).

[90] *E.g.*, Estate of Jones, 55 Cal. 2d 531, 360 P.2d 70, 11 Cal. Rptr. 574 (1961); Estate of Lyon, 201 A.C.A. 717, 20 Cal. Rptr. 249 (1962); Estate of McDonald, 191 Cal. App. 2d 565, 12 Cal. Rptr. 823 (1961); Vincent v. Security-First National Bank, 67 Cal. App. 2d 602, 155 P.2d 63 (1945); Estate of Lewis, 126 Cal. App. 90, 14 P.2d 357 (1932).

[91] 32 Cal. 2d 265, 196 P.2d 1 (1948).

[92] *Cf.* Estate of DeMoulin, 101 Cal. App. 2d 221, 225 P.2d 303 (1950).

[93] 43 Cal. 2d 726, 278 P.2d 1 (1954).

[94] Estate of Douglas, 197 A.C.A. 281, 17 Cal. Rptr. 89 (1961); O'Farrell v. American Trust Co., 149 Cal. App. 2d 691, 309 P.2d 60 (1957).

[95] Estate of Douglas, 197 A.C.A. 281, 17 Cal. Rptr. 89 (1961).

[96] See Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946) (court admitted conversations with *and* instructions to the scrivener).

[97] See Estate of McCarthy, 127 Cal. App. 80, 15 P.2d 223 (1932) (only apparent issue the court considered was the credibility of such evidence); *cf.* Estate of Owens, 62 Cal. App. 2d 772, 145 P.2d 376 (1944). In Estate of Nichols, 199 A.C.A. 815, 19 Cal. Rptr. 93 (1962), the court admitted the testator's oral declarations of intent made to various *legatees* in order to resolve an ambiguity that appeared on the face of the will. The court admitted the evidence with no discussion of its character. This case apparently violates both the requirement that the ambiguity be latent, and the requirement that the declarations consist of instructions to the scrivener.

In *Paley v. Superior Court*,[98] the court held that evidence of the surrounding circumstances was always admissible and in fact necessary to identify the beneficiaries or property involved.[99] The oral declarations to the scrivener were admissible as part of this evidence. This is a complete departure from both the statute and the exception since the court admits the evidence here before any kind of ambiguity is found to exist. Moreover, the court placed no emphasis on the fact that the declarations were to the scrivener. The inference could be drawn that they were admissible so long as they met the test of relevancy.

In *Estate of Watts*,[100] the court stated that evidence of oral declarations to aid construction is inadmissible except in the case of a latent ambiguity. The court further limited the admissibility of oral declarations by stating that in no event was the evidence admissible if it was a direct declaration of intent.[101] This statement is consistent with the statute, which bars only declarations of intent. Thus, evidence of which of two rings testatrix referred to as her wedding ring,[102] or what name testator commonly used in referring to his daughter,[103] has been admitted.[104] However, these attempts to adhere to the mandate of the statute only add to the confusion, since they take no notice of the exception in the case of oral declarations of intent made to the scrivener.

Some courts have made the admissibility of the testator's declarations apparently depend upon the time they were made. Thus, in *Estate of Gilmore*,[105] declarations of the testator as to his intent, made five years after execution, were inadmissible because they were "no part of the *res gestae*."[106] The use of the term *res gestae* in this area is not proper.[107] That a declaration was made before or after the execution of the will, if otherwise admissible, would seem to effect only the weight of the evidence and not its admissibility.[108]

To summarize, oral declarations of intent, if made to the scrivener, are generally admissible to resolve a latent ambiguity. They are probably inadmissible to resolve a patent ambiguity. However, it is almost impossible to know whether the courts will label certain ambiguities as latent or patent. Moreover, there are

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[98] 137 Cal. App. 2d 450, 290 P.2d 617 (1955).

[99] See text at note 77 *supra*.

[100] 186 Cal. 102, 198 Pac. 1036 (1921).

[101] *Accord*, Estate of Johnson, 107 Cal. App. 236, 290 Pac. 314 (1930). *But see* Estate of Owens, 62 Cal. App. 2d 772, 145 P.2d 376 (1944). In *Owens*, the ambiguity was clearly patent since it involved conflicting clauses. See text at note 38 *supra*. However, the court admitted the testator's expressed intentions of affection, interest, and desire to help financially. The court admitted this evidence without discussion as to its nature.

[102] Estate of Brisacher, 27 Cal. App. 2d 327, 80 P.2d 1033 (1938).

[103] Estate of Nessel, 164 Cal. App. 2d 798, 331 P.2d 205 (1958).

[104] *Cf.* Estate of Painter, 150 Cal. 498, 89 Pac. 98 (1907); Estate of Holt, 146 Cal. 77, 79 Pac. 585 (1905).

[105] 81 Cal. 240, 22 Pac. 655 (1889).

[106] *Accord*, White v. Deering, 38 Cal. App. 433, 177 Pac. 516 (1918) (letter written nine months after execution of the will); *cf.* Estate of Farelly, 214 Cal. 199, 4 P.2d 948 (1931) (letter written same day as the will is "part of the same transaction"); Estate of Holt, 146 Cal. 77, 79 Pac. 585 (1905); O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076 (1911).

[107] What is said and done when the will is executed may properly be said to be *res gestae* on an issue of undue influence or due execution of the will. However, to refer to nontestamentary declarations as *res gestae* in the construction of the will would seem to imply either that such declarations constitute a part of the will, or that they show a governing intention on the part of the testator independent of the terms of the will.

[108] See Hill v. Thomas, 135 Cal. App. 2d 672, 288 P.2d 157 (1955).

cases that have admitted the evidence where the ambiguity was "on the face of the will," and there are cases where declarations of intent were admitted though not made to the scrivener. Thus, the courts are in the position of being able to admit or reject the evidence while relying on a "rule" and ample precedent. It is almost impossible, therefore, to predict when the evidence will be excluded and when it will be admitted.

II

EXTRINSIC EVIDENCE WHEN THE WILL FAILS TO PROVIDE FOR EVENTS THAT OCCUR

The courts have been inconsistent in allowing extrinsic evidence when the will is entirely silent as to what the testator intended should a certain eventuality occur. In *Estate of Swan*,[109] a trust provided that upon its termination the children of the legatees were to receive the corpus, but if no children survived, the bequest was to go to the residuary estate. The legatees had no children, but the legatees themselves survived the termination of the trust. The court held that the legatees' rights were not ambiguous and refused extrinsic evidence. This was probably the correct result; however, it was obvious that the testator had not anticipated the situation that developed. In *Estate of Esterday*,[110] the income beneficiary bought the remainder interest and sought dissolution of the trust on the grounds of merger. Since the testamentary scheme would obviously not be carried out in full, the court held that extrinsic evidence was admissible to ascertain the testator's intent in the changed circumstances. This evidence, consisting of the testator's instructions to his attorney, disclosed the testator's desire to create a spendthrift trust. Despite the absence of a spendthrift clause in the will, dissolution was not allowed. Significantly, one of the reasons given by the court for admitting the evidence was the *lack* of ambiguous language in the will. There would appear to be little doubt that in so construing the will, the court was adding words to the will, and not merely interpreting the testator's language.[111]

III

EXTRINSIC EVIDENCE TO CORRECT A MISTAKE

The courts try to make a clear distinction between a mistake and an ambiguity. A plea of mistake is far different from one of ambiguity. There usually can be no reformation of the will on the grounds of mistake, accident, or surprise.[112] A strict application of this principle is *Pearson v. Hansen*.[113] The testator in *Pearson* devised "his home and place of residence including surrounding lands." He also fixed the boundaries of the devise fairly precisely. The western boundary

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[109] 5 Cal. 2d 635, 55 P.2d 1171 (1936).

[110] 45 Cal. App. 2d 598, 114 P.2d 669 (1941).

[111] See also Estate of Anderson, 135 Cal. App. 2d 642, 287 P.2d 825 (1955); Estate of Amphlett, 39 Cal. App. 2d 551, 103 P.2d 981 (1940).

[112] See Estate of Buzza, 194 A.C.A. 634, 15 Cal. Rptr. 518 (1961); Symonds v. Sherman, 219 Cal. 249, 26 P.2d 293 (1933); Estate of Callaghan, 119 Cal. 571, 51 Pac. 860 (1898); Vincent v. Security-First National Bank, 67 Cal. App. 2d 602, 155 P.2d 63 (1945); Gore v. Bingaman, 29 Cal. App. 2d 460, 85 P.2d 172 (1938); Estate of Zilke, 115 Cal. App. 63, 1 P.2d 475 (1931). *But cf.* Estate of Cowell, 167 Cal. 222, 139 Pac. 84 (1914).

[113] 96 Cal. App. 2d 394, 215 P.2d 529 (1950).

ran through a guest house and split it in two. Nevertheless, the court held that the description was too certain to permit any change.[114]

Some courts have in fact corrected mistakes under the guise of construction. This usually occurs where the court has misconceived its duty to consider evidence of the surrounding circumstances. This evidence is admissible to identify the beneficiary or property mentioned in the will, or to make clear the meaning the testator attributed to doubtful words or phrases. Once this identification or meaning has been made clear, the duty of the court is to look no further. The court should declare this intent even if it is convinced that the testator has made a mistake, or would have used different words had he foreseen the legal consequences of the words he has chosen.

In *Estate of Conway*,[115] the devise was of "lot 19," which the testator did own. The will made no mention of lots 17 and 18, which the testator also owned. Certain improvements covered lots 17, 18, and 19. The court held that this created an ambiguity under the circumstances. Unless the term "lot 19" can be considered a technical one, and thereby permit construction of the term because the will was holographic, *Conway* is a case in which the court has apparently rectified a mistake. The term "lot 19" does not in itself raise an ambiguity on the face of the will. Evidence of the surrounding circumstances was properly admitted in order to identify the property devised. Since the testator did own "lot 19," there was no real latent ambiguity as to the identity of the property devised, and the court's inquiry should have ended there, if its duty is not to correct mistakes.[116] The inclusion of lots 17 and 18 indicates that the court varied or added to the words of the will and did not confine itself to an interpretation of the words used.

In *Estate of Greenwald*,[117] the bequest was to be reduced by the amount of some notes of the legatee held by the testator at his death. In fact, some of the notes were signed by the legatee for his corporation. Extrinsic evidence disclosed that the testator did not distinguish between the form of the signature. The court held that this raised a "latent ambiguity," though it had to admit that no precedent could be found for such a determination. This would appear to be a totally different type of latent ambiguity, and indistinguishable from an attempt to correct a mistake. The decision stands for the proposition that if the testator did not mean what the will says, there is a latent ambiguity that can be resolved by extrinsic evidence. It is difficult to imagine any situation where a latent ambiguity could not be so established. It would not matter how clear or explicit the language was, so long as it could be shown that the testator made a mistake in using that language.[118]

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[114] In Estate of Tompkins, 132 Cal. 173, 64 Pac. 268 (1901), the testatrix ordered the deduction of certain loans from bequests to debtors. An attempt was made to introduce a letter wherein she had cancelled the debts in order to show that the clause ordering the deduction was included by mistake. The evidence was held incompetent to show that the testatrix meant to give a bequest of a different value or character than that disclosed by the words of the will. *Cf.* White v. Deering, 38 Cal. App. 433, 117 Pac. 516 (1918).

[115] 161 Cal. App. 2d 704, 327 P.2d 173 (1958).

[116] See also Estate of Hotaling, 72 Cal. App. 2d 848, 165 P.2d 681 (1946).

[117] 19 Cal. App. 2d 291, 65 P.2d 70 (1937).

[118] Cases where the court has apparently corrected a mistake are related to those cases where the court does not hold the testator to the technical meaning of technical words. See notes 63, 64 *supra* and accompanying text.

CONCLUSION

The issue of the admissibility of extrinsic evidence in the construction of wills arises in various situations. California's statutory approach to the problem has led to exceptions, inconsistency, and confusion. The courts often enunciate broad rules of construction when dealing with specific aspects of the problem. These rules conflict with one another, and often amount to no more than rationalizations of already determined results. It is impossible to predict when the formal distinctions and technicalities will be invoked and when they will be totally ignored.

California would do well to abandon completely its statutory approach with its historical overtones, and adopt the rule followed in a minority of states denying the existence of any distinction between classes of ambiguities. Logically, and in the light of legal history, there is no reason to predicate the admissibility of evidence on the particular type of ambiguity involved. Extrinsic evidence should not be permitted to *contradict* a will, but the process of *interpretation* should uniformly take into account every indication of the testator's actual meaning including his direct declarations. The only real issue should be the weight that is to be afforded the particular extrinsic evidence that is offered.

Paul D. Weiser