LECTURE VII.

Rule 7. A wrong description does not avoid a bequest.(1)

Falsa demonstratio non nocet: This practically includes the two maxims *Nihil facit error nominis cum de corpore constat*(2), and *Veritas nominis tollit errorem demonstrationis*(3), an illustration of the first maxim is given in illustration (*a*) to s. 63 of the Succession Act which is taken from *Stockdale* v. *Bushby*(4), where the devise was as follows: "I give and bequeath to my namesake Thomas Stockdale the second son of my brother John Stockdale over and above his equal share with his brothers . . . the sum of £ 1,000 . . ." Thus where there was a devise to the "second son of *Edward Weld* of Lulworth" and it appeared there was no such person as *Edward Weld* of Lulworth but it appeared from the evidence as to the state of the family that *Joseph Weld* was the then possessor of Lulworth who had a second son named Thomas it was held that it was a good devise to Thomas.(5) These decisions go upon the principle that there is something either of legitimate extrinsic evidence or of internal evidence, not only to show that the name must have been put wrongly, but also to show who must have been intended.(6)

(1) Succession Act, ss. 63, 65.

(2) 2 Co., 21.

(3) 1 Ld. Raym., 303.

(4) (1815), 19 Ves., 381; *Pitcairne* v. *Brase* (1678), Finch, 403; *Dowson* v. *Sweet*, 1 Amb., 175; *Parsons* v. *Parsons* (1791), 1 Ves. Jun., 266.

(5) *Camoys* v. *Blundell* (1848), 1 H. L. C., 778.

(6) *Per* Lord Cranworth, L. C., *Mostyn* v. *Mostyn* (1854), 5 H. L. C., 155 at p. 162. In that case there was a

Illustrations (*b*) and (*c*) of the section are based on the second of these maxims.(1) Illustration (*e*) is taken from *Garth* v. *Meyrick*, (2) where the testator left the residue to his six grandchildren by name, but the name of *Ann* was repeated, and that of *Elizabeth*, another grandchild, omitted; but it was decreed in favour of all the grandchildren, and that *Ann* took but one share, and *Elizabeth* should be admitted to the share mistakenly given to *Ann* by the repetition of her name.(3)

It has been laid down as a general principle that *primâ facie* the right name is to govern and that the *falsa demonstratio* is not to take away the *veritas nominis*(4), but it is submitted that no hard and fast rule can be laid down and that the construction must depend on the facts of each particular case.(5)

Persona designata is a person pointed out or described as an individual, as opposed to a person

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devise to Samuel, John, and Mary. There was no John but a son named Thomas who was born between Samuel and Mary. It was held however on the evidence that Thomas could not have been meant and that in consequence he took nothing under the devise.

(1) See *Newbolt* v. *Price* (1844), 14 Sim., 354, where there was a bequest to John Newbolt, second son of William Strangways Newbolt, Vicar of Somerton. The Vicar of Somerton was William Henry Newbolt. His second son was Henry Robert and his third son John Price. It was held that John Price Newbolt was entitled to the legacy. *Standen* v. *Standen* (1795), 2 Ves., 589.

(2) (1779), 1 Bro. C. C., 30.

(3) The portion of the decree as regards this declaration ran as follows: Declare that the defendant *E.M.* though not actually named in the said testator's will is nevertheless entitled to a share of the clear residue, &c. A testator in giving instructions for the preparation of his will directed that a bequest of £10,000 should be given to each of his unmarried daughters "Georgiana" and "Florence." By inadvertence the conveyancing counsel in settling the draft inserted the word "Georgiana" in both clauses of the will relating to the gifts to the unmarried daughters so that there were two gifts of £10,000 to "Georgiana" while Florence was left totally unprovided for. This error was repeated in the engrossed copy of the draft which was ultimately executed by the testator. The draft of the will and an epitome of it were taken to the testator but the draft was not read over to him only the epitome in which the names of Georgiana and Florence were correctly given. Probate of the will omitting the name of Georgiana was granted to the executors. *In the Goods of Boehm* (1891), L. R. P., p. 247.

(4) *Garner* v. *Garner* (1860), 29 Beav. at p. 116. See *Giltett* v. *Gane* (1870), L. R., 10 Eq., 29.

(5) See *In re Nunn's Trusts* (1875) L. R., 19 Eq., 331.

ascertained as a member of a class, or as filling a particular character. Thus, if a testator bequeaths property to his children as a class, only those who fill that character at his death, that is, the survivors, can participate in the gift, while if he bequeaths it to them as *personæ designatæ*, the children of such of them as have died during his lifetime will take their parent's shares under the 33rd section of the Wills Act. So property may be given to an illegitimate child as *persona designata*, but not as a child simply.(1)

Where a testator made the following bequest "and as I am desirous of adopting a son, I declare I have adopted *K* ... My wives shall perform the ceremonies according to the Shastras, and bring him up ..... When he comes to maturity the executors shall make over everything to him ..... and it appeared that all the necessary ceremonies for the completion of the adoption had not been performed it was nevertheless held that the devise to *K* was good inasmuch as it was a devise to a designated person. (2) Where a bequest was made to a devisee by name and the testator in his will stated that he had adopted him as his son but it was found that the alleged adoption was as a matter invalid, it was held that as the bequest was to the devisee by name and was not dependent on his adoption, it was a valid bequest. (3)

If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description

(1) Sweet's Law Dict., 602. S. 33 of the Wills Act (7 Will. & 1 Vict., c. 26) is practically the same as s. 96 of the Succession Act, the word 'issue' being used in s. 33 of the Wills Act where the words 'lineal' descendant are used in s. 96 of the Succession Act.

(2) *Nidhoomoni* v. *Saroda* (1876), 3 I. A., 253; 26 W. R., 91. *Subbarayer* v. *Subbamal* (1900), 27 I. A. 163; 24 Mad., 214.

(3) *Bireswar* v. *Ardha* (1892), 19 I. A., 101; 19 Cal., 452.

do not apply, such parts of the description shall be rejected as erroneous and the bequest shall take effect. (1) Section 63 of the Succession Act deals with misdescription of legatees while section 65 deals with misdescription of legacies. This maxim is applicable to a case where some subject-matter is devised as a whole under a denomination which is applicable to the entire land, and then the words of description that include and denote the entire subject-matter are followed by words which are added on the principle of enumeration, but do not completely enumerate and exhaust all the particulars which are comprehended and included within the antecedent, universal or generic denomination. Then the ordinary principle and rule of law, which is perfectly consistent with common sense and reason, is this: that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars of the specific gift. (2) Where the description is made up of more than one part, and one part is true but the other false, there, if the part which is true describe the subject with sufficient legal certainty, the untrue part will be rejected and will not vitiate the devise. (3) The rule is a rule of good sense. If the language is clear, but does not fit because of some of the words

(1) S. 65, Succession Act.

(2) *Per* Lord Westbury, L. A., *West* v. *Lawday* (1865), 11 H. L. A., 375 at p. 384. See *Homer* v. *Homer* (1877), 8 Ch. Div., 758, where a testator devised all his lands "situated at or within *D* in the occupation of *J*." The testator was seized of two farms both in the occupation of *J*. the greater part of each of the farms was within the parish of *D*, but three closes of one and one close of the other were respectively situate in an adjoining parish. In each case the portion which was not in the parish of *D*, immediately adjoined the remainder of the farm, and was only separated from it by the parish boundary, which was, in one case, a high road, and, in the other, a fence. It was held that the devise comprised the four closes adjoining the parish of *D*.

(3) Jarman on Wills, 5th Ed., p. 742, cited with approval by Lindley, M. R. *Cowen* v. *Truefitt* (1899), 2 Ch., 309 at pp. 311, 312.

which have been inserted there, if it is possible to reject the part that makes it inapplicable, the Court will do so. (1) The doctrine is not to be cut down by saying that it is to be limited to cases where the false part of the description follows the true. That would be cutting down what is a rational and useful canon of construction. (2) To adopt the argument that in applying the doctrine of *falsa demonstratio* it is material in what part of the sentence the *falsa demonstratio* is found would be to reduce a very useful rule to a mere technicality. (3) The characteristic of cases within the rule is, that the description, so far as it is false, applies to no subject at all; and so far as it is true, applies to one only. (4) The intention once found the erroneous description is treated as mere surplusage and is rejected following the maxim *utile per inutile non vitiatur.* (5)

Rule 8. If the will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it is not lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

This is section 66 of the Succession Act to which is appended the following explanation: "In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under section 65(6) are to be considered as struck out of the will. It is a well settled canon of construction that

(1) *Cowen* v. *Truefitt* (1899), 2 Ch., 309 at p. 312.
(2) *Per* Sir F. H. Jeune, *ib.*, p. 313.
(3) *Per* Rigby, L. J., *ib.*, pp. 313, 314.
(4) *Per* Alderson, B., *Morrell* v. *Fisher* (1849), 4 Ex., 591 at p. 604.
(5) 3 Rep., 10, Broom Leg. Max., 581
(6) S. 65 has been incorporated in Rule 7.

where a given subject is devised and there are found two species of property, the one technically and precisely corresponding to the description in the devise, and the other not so completely answering thereto, the latter will be excluded; though had there been no other property on which the devise could have operated, it might have been held to comprise the less appropriate subject. (1) Where there is property in respect of which all the facts of the description are found to be true, so that the property exactly fits the description, the whole of that property and nothing more passes. (2) This rule incorporates Lord Bacon's maxim "*non accepi debent verba in demonstrationem falsam quæ competunt in limitationem veram*" which means that if it stand doubtful upon the words whether they import a false reference or demonstration, or whether they be words of restraint that limit the generality of the former words, the law will never intend error or falsehood. If, therefore, there is some land wherein all the demonstrations are true, and some wherein part are true, and part are false, they shall be intended words of true limitation, to pass only those lands wherein the circumstances are true. (3)

Rule 9. Where the words of a will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended. (4)

One mode of obtaining the intention of the testator is by evidence of his declarations, of the instructions given for his will, and other circumstances of the like

(1) Jarman, 5th Ed., p. 749.

(2) *Per* Earle, C. J., *Webber* v. *Stanley* (1864), 16 C. B. N. S., 698 at p. 752. The judgment in this case would appear to have the effect of overruling the judgment of Page Wood, V. A., in *Stanley* v. *Stanley* (1862), 2 J. & H., 491, where the same will was before the Court.

(3) *Per* Anderson, B., *Morrell* v. *Fischer* (1849), 4 Ex., 591 at p. 602. See *Smith* v. *Ridgeway* (1866), L. R., 1 Ex., 331; *Seal* v. *Taylor* (1894), 1 Ch., 316.

(4) Succession Act. s. 68.

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 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 be properly admitted, and that is, where the meaning of the testator's words is neither ambiguous nor 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," *i.e.*, 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. (1) As to those cases in which the description in the will is applicable indifferently to, and correctly describes, more than one subject, the principle upon which they proved may, perhaps, be explained; for in such cases, although the words do not *ascertain* the *very* subject intended,

(1) *Per* Abinger, C. B., *Hiscocks* v. *Hiscocks* (1839), 5 M. & W., 363 at pp. 368, 369. See *Price* v. *Page* (1799), 4 Ves. Jun., 680; *Miller* v. *Travers* (1832), 8 Bing., 244; *Doe d. George Gord* v. *Needs* (1836), 2 M. & W., 129.

they do *describe* it. The effect of evidence is only to confine the language within one of its natural meanings. The Court merely rejects; and the intention which it ascribes to the testator (sufficiently expressed) remains *in* the will. An averment to take away *surplusage* is good, but not to increase that which is defective in the will of the testator. Or, perhaps, the more simple explanation is, that the evidence only determines what subject *was known to the testator* by the name or other description he used.(1) It has been held that when a person has once been fully described by name and description, and then there is a gift to a person of the same name, the first person must be intended, and evidence is therefore not admissible to show that there is another person of the same name.(2) Where there is a devise to a relation and there are two persons answering to the same name as that given in the devise of whom one is legitimate and the other is illegitimate, it is the rule of law that the legitimate relation is to be preferred to an illegitimate one.(3) It is of course obvious that where no person or thing accurately answers the description no equivocation arises.(4)

Rule 10. Where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intention of the testator shall be admitted.(5)

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 admis-

(1) Wigram on Wills, 2nd Ed., pp. 90 & 91. See *Richardson* v. *Watson* (1833), 4 B. & Ad., 787.

(2) *Doe* v. *Westlake* (1820), 4 B. & Ald., 57; *Webber* v. *Corbitt* (1873), 16 Eq., 515. But *see* Theobold on Wills, 7th Ed., who adds (p. 133): It would not be safe to assume that there is such a rule. It must depend upon the circumstance of each case.

(3) *In re Fish Ingram* v. *Rayner* (1894), 2 Ch., 83.

(4) *Drake* v. *Drake* (1860), 8 H. L. C., 172.

(5) Succession Act, s. 68.

sible to prove what the testator intended, and the will (. . . . .) will be void for uncertainty.(1) That is to say that, if a testator's words, aided by the light derived from the circumstances with reference to which they were used, do not express the intention ascribed to him, evidence to prove the sense in which he intended to use them is, as a general proposition, inadmissible—in other words—that the judgment of a Court in expounding a will must be simply *declaratory* of what is *in* the will.(2) That test to be applied in each particular case is this—Do the words of the will, when all the circumstances of the case are known, express the intention of the testator? The Court which interprets the will must be satisfied that they do so, and no other rule can, in the abstract, be laid down.(3)

Where a testator made the following devise in his will "I hereby direct that my executor and trustee shall from out of any of my moneys that he may receive, retain in his hands and control a sum of rupees five hundred, out of which he will disburse various petty pensions to some poor people, who have been mentioned to him by me" it was held that there was a deficiency on the face of the will as to the objects of his bequest, and that by section 68 of the Indian Succession Act no extrinsic evidence could be admitted as to the intention of the testator.(4)

(1) Wigram, Prop. VI, p. 65.
(2) *Ib.* at p. 69.
(3) *Ib.* at pp. 76, 77.
(4) *Admr.-Genl.* v. *Money* (1892), 15 Mad., 448, 473.