LECTURE III. (1).

In addition to the extrinsic evidence allowed by Rules 2 to 5, another description of evidence is admissible to assist the Court in the interpretation of a deed. This evidence helps to explain the sense in which the parties understood the deed at the time they executed it, and the Rule as regards the admissibility of such evidence is embodied in proviso (6) of section 92 of the Indian Evidence Act and may be stated as follows :—

Rule 6. Evidence is admissible of every material fact that will enable the Court to identify the person or thing mentioned in the instrument and to place the Court whose province it is to interpret the deed as near as may be in the situation of the parties.

For the purpose of applying the deed to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, *viz.*, every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court whose province it is to declare the meaning of the words of the instrument as near as may be in the situation of the parties to it. The authorities for this position are numerous ; they are referred to in Vice-Chancellor Wigram's excellent Treatise on the admission of extrinsic evidence under the 5th proposition (p. 53, 3rd Ed.). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its

duty to construe and apply the words of that instrument(1). In that case a settlor conveyed estates upon trust to pay certain sums to such poor and godly preachers for the time being of Christ's Holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of Christ's Holy Gospel as the trustees for the time being should think fit, and extrinsic evidence was admitted to show that the settlor by the words "poor and godly preachers of Christ's Holy Gospel" referred to a sect of Protestant dissenters who called themselves Independents.

Up to a certain point and apart from any question of ambiguity extrinsic evidence would be necessary to point the operation of the simplest instrument. Thus, were it the case of a deed conveying all the lands at *A* in the grantor's occupation, until it was defined by proof what lands were in his occupation, the operation of the deed could not be known. The principle cannot be affected by the construction that a more ample development of circumstances is necessary in one case than another(2). In interpreting any instrument which purports to deal with property, some extrinsic evidence is necessary in order to make the words, which are but signs, fit the external things to which those signs are appropriate. In reality external information is requisite in construing every instrument; but when any subject is thus discovered, which is not only within the words of the instrument, according to their natural custom, but exhausts the whole of those words, then the investigation must stop; you are bound to take the interpretation which entirely exhausts the whole series of expressions used by the author of the instrument, and are

(1) *Per* Parke, B., *Shore* v. *Wilson* (1842), 9 Cl. & F., 355, at p. 556.

(2) Goodeve, Ev., 332.

not permitted to go any further(1). These observations are cited only as illustrative of the principle. Practically, it is upon some imperfection of the instrument, as applied to the facts, that the difficulty as to determining its meaning arises; and nothing is more settled than that evidence is receivable of all the circumstances surrounding the instrument for the purpose of throwing their light on its interpretation. Indeed, it is by these as by a lamp the Court reads the document(2). We have already seen that under Rule 1 evidence of the conduct of the parties is not excluded where such conduct is relevant; and evidence of the subsequent conduct of the parties was held admissible in the case of *Kashee Nath Chatterjee* v. *Chundy Churn Bannerjee* (3) to show whether an instrument which on the face of it purported to be a deed of out-and-out sale was only intended by the parties to operate as a mortgage. In *Daimodee Paik* v. *Kaim Tarida* (4) which was decided by the Calcutta High Court after the Evidence Act had been passed, it was held that section 92 of the Evidence Act had altered the law as laid down in *Kashee Nath Chatterjee's* case and was a bar to the kind of evidence which was held admissible in that case. On the other hand, it has been held by the Bombay High Court (5), by the Madras High Court (6) and by the Calcutta High Court in *Hem Chunder Soor* v. *Kally Churn Dass* (7) and *Kasi Nath Dass* v. *Hurrihur Mookerjee* (8) that section 92 of the Evidence Act does not alter the rule laid down in *Kashee Nath Chatterjee*

(1) *Per* Wood, V. C., *Webb* v. *Byng* (1855) 1 K. & J., v. 580, at pp. 585-586 (1855).
(2) Goodeve, Ev., 382.
(3) 5 W. R., 68 (1866).
(4) 5 Calc., 300-302 (1879). See *Ram Doyal Bajpie* v. *Hura Lall Paray*, 3 C. L. R., 386 (1878)
(5) *Bakshu Lakshman* v. *Govinda Kanji*, 4 Bom., 594 (1880).
(6) *Venkatratnam* v. *Reddiah*, 13 Mad., 494 (1890)
(7) 9 Calc., 528 (1883).
(8) 9 Calc., 898 (1883).

v. *Chundy Churn Bannerjee*, and that the ground upon which the evidence of acts and conduct is admitted is that the Court should not permit the perpetration of a fraud. In addition to the cases cited here, the principle laid down in the last mentioned case have been followed by several other cases. The question came up again before a Full Bench of the Calcutta High Court in the case of *Preo Nath Shaha* v. *Madhu Sudan Bhunja*(1). There it was not contended that the evidence sought to be admitted was inadmissible, and the Court held that in a case where the question is whether a deed which purports to be an out-and-out sale was only intended to operate as a mortgage, the acts and conduct of the parties are admissible to show what the true nature of the deed is.

The principle on which the rule is applied is this, that a party, whether plaintiff or defendant, who sets up a contemporaneous oral agreement, as showing that an apparent sale was really a mortgage, shall not be permitted to start his case by offering direct parol evidence of such oral agreement; but if it appear clearly and unmistakeably, from the conduct of the parties, that the transaction has been treated by them as a mortgage, and not as a sale, the Court will give effect to it as a mortgage and not as a sale; and thereupon, the Court will, for that purpose, allow parol evidence to be given of the original agreement (2). In a suit for redemption of land mortgaged to the defendant, the plaintiffs relied upon a document as containing an acknowledgment of the title of the plaintiff under section 15 of the Limitation Act (XIV of 1859). The document contained an admission by the defendant that he held land upon

(1) 25 Calc., 603 (1898); 2 C.W.N. 564.

(1) *Per* Melvill, J., *Bakshu Lakshman* v. *Govinda Kanji*, 4 Bom., at p. 609 (1880).

mortgage in a specified district from the temple of which the plaintiffs were the trustees. It was held that oral evidence was admissible to apply the document to the land to which it was intended to refer (1). Again, when a letter had been addressed by the defendant to a Mrs. W., containing an acknowledgment of a debt, it was held that evidence was admissible to show that Mrs. S., the plaintiff, was known as Mrs. W. and also for the purpose of identifying the debt to which the acknowledgment referred (2).

This rule to a certain extent embodies the old Latin maxim "*Contemporanea expositio est optima et fortissima in lege*" (3).

The short exposition of the whole matter is, that the knowledge of the external circumstances of which their proof puts the Court in possession, places the judge in the position of the donor, settlor, or other party to the instrument; and it is upon the survey which that position affords him, he exercises the office of an expositor.

Rule 7.—When the words used in a deed are in their literal meaning unambiguous, and when such meaning is not excluded by the context, and is sensible with respect to the circumstances of the parties at the time of executing the deed, such literal meaning must be taken to be that in which the parties used the words (4).

By "*literal meaning*" is intended not necessarily the primary or etymological meaning, but (*a*) the meaning usually affixed to the words at the time of the execution of the deed, by persons of the class to which the parties

(1) *Valampuducherri* v. *Chowakaren*, 5 Mad. H.C.R., 320 (1870).

(2) *Umesh Chundra Mookerjee* v. *E. Sageman*, 5 B.L.R., 633 (n) (1869).

(3) 2 Inst. II. The best and surest mode of expounding an instrument is by referring to the time when, and circumstances under which, it is made.

(4) Norton, 56.

belonged; or (*b*) the meaning in which the words must have been used by the parties, having regard to their circumstances at the time of execution; or (*c*) the meaning which it can be conclusively shown that the parties were in the habit of affixing to the words.

The literal meaning of technical words in a deed relating to the art or science in which such words are used is their technical meaning.

Extrinsic evidence is admissible for the purpose of determining the literal meaning of the words used and for no other purpose.

Hence evidence is admissible to show who the parties to the instrument are, the circumstances under which the instrument was executed and the meaning which they were in the habit of affixing to any words used (1).

Where in a joint conveyance by a widow and the next reversioner in which they conveyed "the whole and entire property absolutely" it was held that they had exercised every power which they possessed, and that they parted with their whole interest whether in possession or expectation, and that the title of the alienee was complete (2). The word "*sontan*" has been construed as meaning "issue" generally and to include daughters (3). The word "*naslan-bad-naslan*" confers absolute ownership (4).

The rule that technical words must bear their technical meaning in instruments relating to the art or science to which they belong, is of the greatest importance in the interpretation of mercantile contracts (5). In construing a *usual* mercantile contract, the question

(1) *Ib.*, 56, 57.

(2) *Mohunt Kishen Geer* v. *Basgeet Roy* (1870), 14 W. R., 379.

(3) *Kisto Kishore* v. *Seetamonee* (1867), 7 W. R., 320.

(4) *Thakur Harihur* v. *Thakur Umam* (1886), 14 I. A., 7; 14 Calc., 296.

(5) Norton, 69.

is, in what sense have the terms been used in similar contracts. In the case of an *unusual* contract, have the terms acquired any, and what, peculiar meaning in general mercantile language or in the particular trade(1) ?

The principle of this rule has been incorporated in section 94 of the Evidence Act which enacts that when language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts. The true construction of an agreement depends upon the ordinary meaning of the words used, and if these words are plain and unambiguous, it is quite clear that they must not be explained away by extrinsic evidence, and still less by mere reasoning from probabilities. There is no duty of a Court of Justice more imperative than that of upholding contracts into which parties have voluntarily entered under no mistake of fact (2). Thus, an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be a conveyance and become a mortgage because there is a right to repurchase (3).

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(1) *Lewis* v. *Marshall* (1844), 7 Man. and Gr., 729. On the present occasion, the question was, whether there was a recognized practice and usage with reference to the voyage and business out of which the written contract, the subject-matter of the action, arose, and to which it related, which gave a particular sense to the words employed in it, so that the parties might be supposed to have used these words in such sense.

The character and description of evidence admissible for that purpose is, the fact of a general usage and practice prevailing in the particular trade or business, not the judgment or opinion of witnesses ; for the contract may be safely and correctly interpreted by reference to the fact of usage ; as it may be presumed that such fact is known to the contracting parties, and that they contract in conformity thereto ; but the judgment or opinion of the witnesses called affords no safe guide for interpretation, as such judgment or opinion is confined to their own knowledge ; *per* Tindal, C. J., *ib.* at p. 744. See *Smith* v. *Ludha* (1892), 17 Bom., 144.

(2) *Alagaiya* v. *Saminada* (1863), 1 Mad. H. C., 264 at p. 269.

(3) *Bhagwan Sahai* v. *Bhagwan Din* (1890), 17 I. A., 98 ; 12 All., 387.

Rule 8.—Where, if the words in a deed are used in their literal meaning, an absurdity or inconsistency appears, such of the other meanings that they properly bear may be placed upon them to avoid that absurdity or inconsistency (1).

When general words are employed, they must be so understood, unless they are accompanied by any expression limiting and restraining their ordinary meaning, or unless such limitation or restriction arises from necessary implication(2). From all the cases upon this subject it appears to be determined, that, however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the Court will limit the operation of the general words. The question, therefore, always has been, whether such an irresistible inference does arise? For if such an inference does arise from concomitant covenants they will control the general words of an independent covenant in the same deed(3). It is, however, incumbent on those who contend for the limited construction to show that a rational interpretation ... requires a departure from that which ordinarily and *primâ facie* is the sense and meaning of the words(4). But general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated (5), and where a deed speaks by general words, and afterwards

(1) This is adapted from Lord Wenshydale's Golden Rule, *Grey* v. *Pearson* (1857), 6 H. L. C., 61, at p. 106.

(2) *Per* Mahmood, J., *Sheoratan* v. *Mahipal* (1884), 7 All., 258 at p. 270.

(3) *Per* Alvanley, C. J., *Hesse* v. *Stevenson* (1803), 3 B. & P., 565 at pp. 574, 575.

(4) *Per* Knight Bruce, V. C., *Parker* v. *Marchant* (1842), Y. & C., 290 at p. 300; 11 L. J. Ch. 223 at p. 226.

(5) *Per* Erle, C. J., *Harrison* v. *Blackburn* (1864), 17 C. B. N. S., 678 at p. 690; 34 L. J. C. P., 109 at p. 112.

descends to special words, if the special words agree to the general words, the deed shall be intended according to the special words (1).

Where under an instrument a debtor allotted to his creditor his "aivaj" on account of Deshpande Hak and Inámi recoverable from the villages and undertook not to meddle till the "aivaj" was paid, and the instrument did not describe the lands mentioned therein by metes and bounds, but only as being in the occupation of certain persons paying so much rent, and contained a clause that the "aivaj" of Rs. 63 (the sum total of rents) had been allotted and that the creditor might take kabuláyats from the occupants and make the recoveries, it was held that the term "aivaj," although capable of meaning property generally, must from the context of the document mean moneys or sums. And it was further held that the language of the instrument showed a clear intention to appropriate the rents as distinguished from the lands themselves, so that even if the transaction were regarded as a mortgage, it could only be a usufractuary mortgage, which would confer no right to have the property sold (2). You must look at the words of a deed with reference to the parties who use them, and the grant must be consistent with that; consistent with the interests of those who make the grant. So where a deed of arrangement and release in the English form, between members of a Hindu family in respect of certain joint estate, claimed by a childless Hindu widow of one of the co-heirs, in her character of heiress and legal personal representative of her deceased husband, declared that she was entitled to the sum therein expressed, as the share

(1) 4 Coke, p. 449, Part VIII, 154—b, *Altham's Case.*

(2) *Hanmant Ramchandra* v. *Babaji Abaji* (1891), 16 Bom., 172.

of her deceased husband, "for her sole absolute use and benefit," it was held that those words were not to receive the same interpretation as a Court of Equity in England would put upon them, as creating a separate estate in the widow; but that the deed must be construed with reference to the situation of the parties and the rights of the widow by the Hindu Law, and that, as the deed recited that she claimed and received the money as her husband's share in the joint estate in her character as his heiress and legal personal representative, such words must be construed to mean, that it was to be held by her in severalty from the joint estate; and as a Hindu widow she had only a life-estate in the *corpus*, the same at her death devolved as assets of her deceased husband upon his personal representative in succession. (1)

Rule 9. Extrinsic evidence may be given to explain a latent but not a patent ambiguity in a deed. (2)

Latent ambiguity, in the more ordinary application of the term, arises from the *existence of facts external to the instrument;* and the creation, by those facts, of a *question not solved by the document itself.* (3) A patent ambiguity is that which exists either,—in the *want of adequate artificiality* in the composition, including under the term, expressions requiring interpretation,—or the *omission of something requisite to give operation to the document.*

Thus, in the *former* case, the language may be not only *inartistic*, but *confused, contradictory, and generally incomprehensible;* or it may exhibit a capacity of *double meaning*, with no adequate solution as to *which*

(1) *Sreemutty Rabutty Dassee* v. *Sib Chunder Mullick* (1854), 6 M. I. A., 1.

(2) Ev. Act., ss. 93, 95.

(3) Goodeve, 390.

meaning was intended; or it may use *terms of art, or terms otherwise not intelligible* without explanation. If, with the aid of such extrinsic evidence as may be necessary to clear up *unintelligible* or *equivocal* expressions, the Court cannot struggle through the maze, the instrument itself must fail for want of adequate expression; and, in attempting to solve the meaning, the Court is not at liberty to indulge in mere conjectural surmise; it must be governed by the ordinary rules of legal construction. In a medium of total darkness the eye could not exercise its power of vision; and the mind would not be allowed to *speculate* on what could not be *seen.*

In the *latter* case we have put, the instrument may *omit the very essence of its intended operation* Thus, a blank may have been left for the *subject* or *person* to be dealt with, or to take, say—in a deed the property intended to be passed; in a contract the thing bought; or, if not a total blank, what is tantamount to it, as a gift to Lady——without saying *what* Lady. Here the blank cannot be supplied.

The province of the Court is to *interpret*, not to *make.* It is to *construe* the expressions which the parties have themselves furnished, not to *supply* others. For cases such as these, extrinsic evidence of mere surrounding facts would, from the nature of things, afford no remedy. Were the Court, by the process of construction, to insert in the blank the property or the thing omitted, *which* of the sons was meant by the gift to one, or *who* was the Lady——this would be to *supply*, not to *interpret;* and, though the law admits evidence to *explain*, it excludes that which would only be to *add to.* Hence it is laid down that, *in a case of patent ambiguity, parol evidence is inadmissible.* (1)

(1) Goodeve, 387, 388.

Where a pattah purports to convey so many beegahs of land "more or less" within certain boundaries, the test of what is really conveyed is not the area of the land but its boundaries. (1) An equivocation arises where no ambiguity is apparent on the perusal of the deed to a person unacquainted with the circumstances of the parties, but after evidence of the circumstances of the parties is obtained, it is discovered that there are several persons or things, or classes of persons or things, to each of which a name or description contained in the deed seems to be equally applicable. (2)

When after all the extrinsic and intrinsic evidence admissible under the preceding rules has been exhausted, a name or description still remains equivocal,—*then and not till then*,—extrinsic evidence of what was passing in the minds of the parties to the deed at the time of execution is admissible for the purpose of determining which of the several persons or things, or classes of persons or things, described by the equivocation the parties intended, and for no other purpose whatsoever. (3)

But if one part of the description applies to one object, and another part applies to another object, but the description as a whole applies to no object, the case is similar to that of a patent ambiguity, and direct evidence of intention is not admissible. (4)

(1) *Sheeb Chunder Maneeah* v. *Brojonath Aditya* (1870), 14 W. R., 301; *Esan Chunder Ghose* v. *Protab Chunder Roy* (1873), 20 W. R., 224. See *Virjwandas* v. *Mahomed Ali* (1880), 5 Bom., 208.

(2) Norton, 96.

(3) *Ib.*, 104.

(4) *Ib.*, 110.