CONSIDERATIONS PRELIMINARY TO THE PRACTICE OF THE ART OF INTERPRETING WRITINGS—MORE ESPECIALLY WILLS

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In performing the process of interpreting writings, three steps preliminary to the practice of the art of interpretation must be taken: (1) the subject matter to be interpreted must be precisely defined; (2) the standard of interpretation in the given case must be determined; (3) the sources from which the tenor of that standard is to be derived must be ascertained.

SUBJECT MATTER OF INTERPRETATION

Inducement distinguished from legal act—The writing constituting the legal act is the only subject matter of interpretation: A testator or settlor in the effort to express himself has two mental reactions. He first desires to accomplish a certain object and to do so may have the will or purpose to use certain words according to a given standard, such as their ordinary and general usage. All this is preliminary, or by way of inducement, to his legal act of using certain words according to some standard. Then comes the decisive step of completing or making final a legal act in writing in which certain words are used with reference to a standard of meaning.

If the words of the legal act, according to the standard used, express perfectly the purpose or object of the inducement, we have no occasion to consider whether the words used or the inducement is the subject matter of interpretation or to distinguish between them for any purpose of interpretation. If, however, words are missing from the legal act or if the wrong word is used so that what was willed to be expressed is not, in fact, expressed, we are at once required to choose between two possible subjects matter of interpretation—the object and purpose of the inducement or the words used.

Conceivably, of course, a system of law might exist where the courts endeavored to give effect to the objects and purposes of the inducement which were sought to be expressed in the formal act reduced to writing. In such a system, the writing might be used merely as evidence—no doubt often *prima facie* correct—of the objects and purposes of the inducement to the act. In such a system the subject matter to be interpreted would be the objects and purposes of the inducement to the writing—the "will" or "desire" of the actor. Whether for good or ill the common law did not take this course. It

has unequivocally made the writing the legal act which is enforced, and in consequence it is the writing *alone* which constitutes the subject matter to be interpreted. That which is unequivocally withdrawn as a subject matter of interpretation is the inducement. This is uncompromisingly fundamental.

It follows that nothing can be inserted in the writing which is not there.[1] No word not in the writing can be substituted for one that is there.[2] These rules apply with special force where the legal act is required by law to be in writing. They apply, however, as well where the legal act is, in fact, in writing, though not required to be. This is the result of the rule of law as to writings that where a legal act is expressed in writing (though not required to be) it may, and in most cases must, by a necessary inference that the party so wills, be taken as the sole memorial of the act.[3]

With the rise and development of equity and its jurisdiction to remedy mistakes the court of chancery might conceivably have provided a remedy to rectify the mistake of a testator or settlor in a unilateral instrument of devise or gift, due to the omission of a word or phrase or the insertion of the wrong word. This, however, it has refused to do.[4]

It may, therefore, be stated generally that (apart from exceptional cases, if any, where a remedy is given to reform a unilateral instrument because of mistake and by this process to give effect to the objects and purposes of the inducement) the only subject matter of interpretation is the legal act of the party or parties contained in the words of the writing as distinguished from the inducement to the legal act. It makes no difference whether the legal act is required by law to be in writing or not, or whether the question arises at law or in equity. To this proposition, there is general agreement, though it is stated in a variety of ways. Wigram distinguished, "What the testator meant" from "What is the meaning of his words."[5] "Intent" has been distinguished from "meaning."[6] Mr. Wigmore distinguishes "will" from "sense."[7] All alike are merely attempting to find suitable expressions for distinguishing the inducement to the legal act from

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[1] 4 Wigmore, *Evidence,* sec. 2459; Thayer, *Preliminary Treatise on Evidence,* 411-412; *Bond v. Moore* (1908) 236 Ill. 576, 86 N. E. 386.

[2] *Kurtz v. Hibner* (1870) 55 Ill. 514.

[3] 4 Wigmore, *Evidence,* secs. 2401, 2425 *et seq.*

[4] *Newburgh v. Newburgh* (1820, Eng. V.-C.) 5 Madd. 364; *Miller v. Travers* (1833, Eng. C. P.) 8 Bing. 244.

[5] Wigram, *Extrinsic Evidence in Aid of the Interpretation of Wills,* Introductory par. 9.

[6] Parke, J., in *Doe v. Gwillim* (1833, K. B.) 5 B. & Ad. 129; Denman, C. J. in *Rickman v. Carstairs* (1833, K. B.) 5 B. & Ad. 663; Lord Wensleydale in *Grey v. Pearson* (1857) 6 H. L. C. 106.

[7] 4 Wigmore, *Evidence,* sec. 2459.

the legal act itself for the purpose of emphasizing the fundamental rule that the latter only is the proper subject matter of interpretation.

STANDARDS OF INTERPRETATION

1. Wigmore's three standards applicable to unilateral acts: So far as unilateral acts—such as wills or settlements by way of gift *inter vivos*—are concerned, Mr. Wigmore sets out three possible standards of interpretation:[8] 1st. "The standard of the normal users of the language of the forum, the community at large, represented by the ordinary meaning of words"; 2d. "The standard of a special class of persons within the community"; 3d. "The standard of an individual actor who may use words in a sense wholly peculiar to himself."

2. Mr. Justice Holmes' single standard of interpretation: Mr. Justice Holmes seems to be of opinion that one standard only is used—that of a normal speaker of English, using them [the words in question] in the circumstances in which they were used."[9] Justice Holmes does not quite make it clear whether he is merely asserting a fact or a rule of law. Does he say that all the so-called possible standards really reduce themselves to one? Or does he say that the law allows only the one? Perhaps he means that the law allows only the one and that the different standards so far as they appear to be available are really reducible to the one?[10] Mr. Wigmore, on the other hand, asserts: "All the standards are provisional only, and therefore each may be in turn resorted to for help";[11] and "a unilateral act may be interpreted by the individual standard of the actor";[12] the point being to find out which standard is used.

Suppose, for instance, the testator wrote his will in a cipher which made sense as the words stood according to common usage, could it be shown that he had used a cipher or special individual standard of interpretation so that his words would, for the purpose of determining their legal consequences, bear a different meaning? Judge Holmes

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[8] 4 Wigmore, *Evidence,* secs. 2458, 2461.

[9] *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV., 417.

[10] That would explain the following passage in *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV., 417, 420: "I do not suppose that you could prove, for purposes of construction as distinguished from evidence, an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church. On the other hand, when you have the security of a local or class custom or habit of speech, it may be presumed that the writer conforms to the usage of his place or class when that is what a normal person in his situation would do."

[11] 4 Wigmore, *Evidence,* sec. 2461.

[12] *Ibid.* sec. 2467.

indicates that he would answer this in the negative.[13] Would Mr. Wigmore answer in the affirmative,[14] or would he avoid making a decision in the case put decisive of his theory by advocating a special rule that, on grounds of policy, the individual standard differing from that of common usage would not be permitted in the special case?

3. The "will" or "intention" of the inducement as a standard of interpretation: There is still another possible standard of interpretation—the inducement of the testator to his act,—what he intended to accomplish by his legal act. Why should not his words be interpreted in the light of such "intention" as a standard? It would seem that Hawkins may have contended for some such view,[15] and that perhaps Thayer followed him in it.[16] Certainly Mr. Phipson[17] more recently so interpreted Hawkins' and Thayer's views and appears to have agreed with them and to have thought that some authorities went so far. It is believed that no authority has ever consciously adopted such a view. To do so would be in effect to make the inducement the subject matter of interpretation in the guise of considering it as an appropriate standard for determining what the words used mean. There is little practical difference between taking the words used as the subject of interpretation while at the same time using the inducement to them as a standard, and taking the inducement as the subject matter of interpretation and then considering whether the words used express the meaning which is found in the interpretation of the inducement. If the inducement is to be kicked out of the front door as the subject matter of interpretation, it should not be taken in at the back as the standard of interpretation.

SOURCES FOR ASCERTAINING THE TENOR OF THE STANDARD OF INTERPRETATION

1. The instrument itself: The instrument itself not infrequently on its face indicates what standard of interpretation is to be used. It may disclose on its face that it was written in cipher. Most frequently, of course, the instrument shows that the words employed were used in their usual and ordinary meaning. Indeed, it may be laid down that you are *prima facie* to take the popular or common usage standard. A mistake may have been made. The testator may have inadvertently used the wrong word, but the face of the instrument may show that he was not consciously putting any unusual meaning upon the language

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[13] See note 10, *supra.*

[14] See 4 Wigmore, *Evidence,* sec. 2462, p. 3481.

[15] Hawkins, *Principles of Legal Interpretation,* 2 Jurid. Soc. Papers 298, reprinted in Thayer, *Preliminary Treatise on Evidence,* App. C.

[16] Thayer, *Preliminary Treatise on Evidence,* 412, 480.

[17] *Extrinsic Evidence in Aid of Interpretation* (1904) 20 L. QUART. REV. 245, 253.

used. It may show that he was using the word which he did use by mistake according to the standard of the normal user of English. For instance, if he devises "section thirty-one," there may be evidence showing that his object was to devise "section thirty-two" and that he made a mistake in using "thirty-one," but the evidence may still be conclusive that the testator when he used "thirty-one," was not making use of a code in which "thirty-one" meant "thirty-two," but that he was using "thirty-one" in its usual sense. The interpretation of what he said is, therefore, plain, according to his words and the standard which he employed. If there is any relief, it is to correct a mistake and not to effect a different interpretation of the instrument.[18]

2. Extrinsic evidence—Introductory: All evidence which is relevant to complete or ascertain the tenor of the standard of interpretation to be applied and which is not excluded by any special rules of exclusion, is admissible and must be considered.

(1) According to Mr. Justice Holmes[19] the standard is that of "a normal speaker of English" using words in the "circumstances in which they were used." If, however, the "circumstances" are part of the test they must be carefully defined. Apparently Judge Holmes means by "circumstances" those which the courts, proceeding on an entirely different theory,—namely that the individual standard of the writer may be used,—have been accustomed to admit for consideration.

(2) According to Mr. Wigmore (following, it is believed, the usual view of the courts), the individual standard of a testator or settlor may be used. Hence extrinsic evidence of that standard may be considered if it is not excluded by some rule of evidence. Always, however, the ultimate fact to be proved is whether the testator or settlor had an individual standard and if so, what it is. Never is the interpreter permitted to use the extrinsic evidence to prove the object and purposes of the inducement as a standard of interpretation.

(a) In some cases, extrinsic evidence tends to prove an individual standard and does not, at the same time, tend to prove the objects and purposes of the inducement. In such cases the use of the extrinsic evidence does not run the danger of introducing the immaterial and improper issue of what are the objects and purposes of the inducement. Extrinsic evidence of this sort is, therefore, admitted. Thus, evidence that the testator habitually called a devisee by a particular name would tend to prove the use of an individual standard in the use of that name by the testator, and so with regard to habits of speech generally. If a will were on its face in cipher, the testator's key to the cipher would be relevant to show the individual standard in the use of the words and the inducement would be untouched by the evidence.

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[18] *Kurtz v. Hibner* (1870) 55 Ill. 514; see *post*, 46.

[19] *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417.

(b) In most cases, however, any effort to go into extrinsic circumstances in order to establish an individual standard of the testator without, at the same time, showing the objects and purposes of the inducement to the legal act is impossible. The ultimate facts regarding the objects and purposes of the inducement and the ultimate facts as to the individual standard are usually founded upon the same extrinsic evidence. The two issues are inextricably mixed. Take, for instance, "the knowledge and surrounding circumstances of the testator" or "his treatment of and relations with particular persons" or "his mode of enjoying and dealing with property."[20] It is precisely out of evidence along these lines that the objects and purposes of the testator may be built up and used as a standard of interpretation. At the same time, evidence on these lines often tends with varying degrees of probative value to show that the testator was using words according to a standard peculiar to himself.

In *Charter v. Charter,*[21] for instance, the testator having only two sons, William Foster Charter and Charles Charter, appointed as his executor "my son, Foster Charter." The testator's habits of speech were allowed to be proved, *i. e.,* that he called his first son "William" or "Willie," but never Foster. Evidence was also considered that William had quarreled with the testator and had left the house. Other evidence was considered of the testator's treatment of and feelings toward his sons. Now such evidence may be of very slight or remote relevancy in determining whether the testator had a special individual standard of interpretation in writing Foster so that it referred to a son named Charles, but that it had *some* probative value in that connection should not be open to doubt. Proof of an inducement or "will" or "desire" to make Charles executor would tend to show either mistake in using the wrong name or else that the name used was to be interpreted with reference to a special individual standard of interpretation. It is probative of either fact. It is, therefore, at least relevant to prove a special individual standard of interpretation. Sir James Stephen asks[22] "How can any amount of evidence to show that the testator intended [*i. e.,* "willed" or "desired"] to write Charles, show that what he did write means Charles?" The answer is simple. What the testator "willed" or "intended" by way of inducement to say, tended to prove that what he did say was so said with reference to an individual standard of interpretation in which "Foster" designated the person named Charles. It must, therefore, be conceded that what a testator "wills" or "intends" by way of inducement, will frequently be of some probative value in determining whether or not

[20] *Extrinsic Evidence in Aid of Interpretation of Wills* (1904) 20 L. QUART. REV. 257.

[21] (1874) L. R. 7 H. L. 364.

[22] *Digest of Evidence,* note 33.

he has used words according to some special individual standard.[23] Here, then, is the Achilles' heel of the subject for the interpreter who wishes to use the inducement to control the meaning of the legal act. Here we have a theoretically correct issue upon which all evidence of the inducement,—the "will," "desire" or "intention"—of the testator, may be received if not excluded by any rule of evidence. The logical pursuit of sound theory has, therefore, brought us to an investigation of the theoretically forbidden field of the inducement to the legal act. The situation is a practical theoretic dilemma. A theory founded upon the fact that it is the legal act which is to be interpreted, which tolerates no competition by the purposes and objects of the inducement, either as a subject matter of the interpretation or as a standard of interpretation, is faced with a perfectly logical ground upon which the whole inducement may be gone into by way of showing an individual standard of interpretation.

In this situation, the courts have done the only thing that could be expected. They have allowed experience to dictate several rules which have the effect of excluding to a considerable extent, but not wholly, inquiries into the "inducement" or "will" or "intent" of the testator. In short, an effort has been made to allow *some* proof of the inducement of the testator in order to ascertain the tenor of an individual standard of interpretation without, at the same time, throwing the whole subject of the inducement open to proof and thus, in practical effect, making the inducement the subject matter to be interpreted or the standard of interpretation. Such a course is a practical solution of the theoretic dilemma. It cannot be called illogical or unsound in theory because the theory of interpretation, itself, pressed to its logical conclusion, results in a hopeless theoretic dilemma. The practical solution of a theoretic dilemma means that of two completing theoretically correct results one gives way before the other. It remains, then, to consider the special rules by means of which evidence of the objects and purposes of the inducement,—the "will" or

[23] It should be observed that other writers, perceiving that some of the evidence of surrounding circumstances considered by the courts was relevant to prove the "intent" of the inducement, have insisted that it was not relevant to prove that the testator used any special individual standard, and that, therefore, such cases prove that the inducement was a real and proper factor in the process of interpretation. Thus, Mr. Phipson in (1904) 20 L. QUART. REV. 245, 252) after accepting the view that the evidence of the testator's treatment of and feelings toward his sons in *Charter v. Charter* was relevant only to show the testator's "intention" by way of inducement, says: "The issue or object, then, could not have been to ascertain the meaning of the words 'Foster Charter' according to either general or special standards; apparently, therefore, it must have been to ascertain their meaning according to the actual intention of the testator, for otherwise the evidence would have been irrelevant." The fallacy here is the assertion that the evidence would otherwise "have been irrelevant."

"desire" of a testator—is excluded when offered to prove that the testator had a special individual standard of interpretation and what that standard was.

3. *The rule against "disturbing a clear meaning":* This is embodied in Wigram's Proposition II as follows:[24]

> "Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."

The practical operation of this rule was to forbid the resort to any surrounding circumstances or to any individual standard where the words used in their primary sense were "sensible with reference to extrinsic circumstances." In such cases the rule cut off the interpreter from the opportunity to build up the inducement and use that as a standard of interpretation. This, so far as it tends to prevent the objects and purposes of the inducement from being used as a rival subject matter of interpretation or a rival standard of interpretation, is theoretically sound. So far as it prevents proof of the use by the testator of an individual standard of interpretation, it is theoretically unsound. A theoretic dilemma is presented. It has been solved by the application of practical considerations. The rule against disturbing a plain meaning rests in the last analysis upon grounds of practical expediency which support one theoretically correct result at the expense of another. Its only basis is the practical danger to the whole theory of interpretation in letting in the intent of the inducement to be used as a competing subject matter or standard of interpretation. There is no use in saying that it would not compete but would only furnish the basis for ascertaining the individual standard of the testator. Practically it would compete. Counsel are quick to build up a whole structure of inducement and to use it as a subject matter or standard of interpretation in order to overthrow the meaning of the words according to the standard which the testator has in most cases actually used. Practically, counsel would use the inducement for the purpose of so molding the process of interpretation as to correct mistakes. When the door had been opened that wide we would enter the realm of false, exaggerated and speculative claims. The inconvenience and

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[24] Wigram, *Extrinsic Evidence in Aid of the Interpretation of Wills,* Introductory par. 14.

expense of uncertainties in conveyancing and the handling of trust estates would arise and multiply. No cause would be hopeless and no cause secure. Suits to construe or for the protection of trustees or purchasers would multiply. Questions which ought to be settled inexpensively without litigation would have to go through the courts for a final determination as to the proper meaning of the writing. In determining the force to be given to these practical considerations the opinions of a writer like Wigram and of judges and lawyers having the most considerable experience in the construction of wills and settlements are entitled to much weight.

There have been in recent times at least two views as to the rigidity of this rule against disturbing a plain meaning. Wigram laid it down as a rule of law—"an inflexible rule of construction"—to be obeyed as other rules of law are obeyed. This view of the rule has been held and enforced in England and to some extent in this country.[25] Lord Bowen, on the other hand, declared the rule to be not so much "a canon of construction as a counsel of caution"—not so much a rule of law as a reminder to judges that they were "not to give weight to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lend a reasonable man to a distinct conclusion."[26] How far Lord Bowen's suggestion as to the character of the rule should prevail is again a practical question. In the hands of judges with the special training which success in practice at the English chancery bar furnishes, a "counsel of caution" might be sufficient to achieve all the best results of the more rigid rule and still leave some margin for the special case. Suppose, however, among judges of far less specialized training the "counsel of caution" comes to mean merely the absence of any rule against disturbing a plain meaning and complete freedom to proceed as if no such rule existed. Such a condition continuing for a generation means that all suggestion of the rule would disappear and that judges and counsel alike would assume the freest right to consider all the extrinsic evidence, not excluded by recognized rules, in order to build up the inducement and to use it as the standard of interpretation. If that is the result of turning the rule against disturbing a plain meaning into a mere "counsel of caution," then the rule against disturbing a plain meaning has not only been wholly lost but the supreme effort of the common law to keep the inducement from becoming the subject matter or a controlling standard of interpretation has to a large extent failed.

4. Direct declarations by the testator or settlor—Such declarations as relate to the standard of interpretation used, when they do not also disclose the objects and purposes of the inducement, should be received: Thus if a writing is apparently in cipher the declarations of the writer

[25] 4 Wigmore, *Evidence*, secs. 2462, 2463.

[26] Bowen, L. J. in *Re Jodrell* (1890, C. A.) 44 Ch. D. 590.

which reveal the key should be received. They are relevant. There is no rule of exclusion. If they are regarded as hearsay, then the exception which permits declarations showing the state of the declarant's mind is applicable. So declarations of a testator which show his "habits of speech" should be received on the same ground. They preponderate to show the actual, individual standard. They may have practically no effect in indicating the objects and purposes of the inducement.

5. Declarations of the testator or settlor which disclose the objects and purposes of the inducement: These are relevant in determining the individual standard used. They are not excluded by the hearsay rule because they fall within a well recognized exception. They are excluded because they are too certain to be used improperly to make the objects and purposes of the inducement the subject matter of interpretation or the standard of interpretation.[27] They give more comfort to the false and improper issue than they give aid to the proper one.

5a. Exception in the case of equivocation: To the general rule excluding such declarations there is an exception in the case where the term to be interpreted, upon application to external objects, is found to fit two or more equally.[28] The basis of this is the fact that upon a balance of all the considerations the objections to not using the evidence overcome the dangers from its use. For instance, if the evidence be not used, the gift may fail entirely for uncertainty. In such a situation, any evidence of the actual individual standard of interpretation used ought to be resorted to. Mr. Justice Holmes makes the acute suggestion[29] that "while other words may mean different things, a proper name means one person or thing and no other." Hence (though this is not quite the way Mr. Justice Holmes puts it)[30] the declaration of what the testator meant is in the highest degree probative of the individual standard of interpretation which he has, in fact, used.

It has been argued that because in one case you can put in direct declarations which show the objects and purposes of the inducement,

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[27] Nichols, *Extrinsic Evidence in the Interpretation of Wills,* 2 Jurid. Soc. Papers 352: "There is a kind of evidence to which both of these reasons [securing certainty of title and preventing fraudulent proof] and the analogy of the law requiring the will to be in writing, must strongly apply; I mean, of course, the species of evidence which we have called direct evidence of intention; and which, if admitted, would consist for the most part of declarations and informal written memoranda of the testator, and of instructions given by him to the persons employed in the preparation of the formal instrument. Evidence so nearly allied in character to that furnished by the will itself, presents an aspect of rivalry to the will, which raises a prejudice against its reception.

[28] 4 Wigmore, *Evidence,* sec. 2472.

[29] *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417, 418.

[30] He says: ". . . recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said."

such objects and purposes are theoretically proper facts to be considered in the process of interpretation. The present exposition is made for the purpose of pointing out the danger of adhering to such a statement. The objects and purposes of the inducement are not in and of themselves either the proper subject matter of interpretation or a proper standard of interpretation. They are, as such, and in accordance with our legal theory, rigidly excluded. Indeed, even when evidence of the objects and purposes of the inducement tends to show an individual standard of interpretation, it is still excluded because of the danger arising in permitting any opportunity for the objects and purposes of the inducement to become a competing subject matter or standard of interpretation. To a slight extent, evidence which tends to reveal the objects and purposes of the inducement is let in because it also tends to prove an individual standard of interpretation. That is the true basis for the exception which lets in direct declarations of intention in the case of equivocation.

Some controversy has arisen as to whether the rule excluding direct declarations of intention and the exception which admits them in the case of equivocation are rules of the substantive law of evidence or of the substantive law of interpretation. This is a debate over the names to be given to ideas. It is a profitless field of discussion except so far as it offers the opportunity to again state essential differences. The rule which excludes objects and purposes of the inducement as a subject matter of interpretation or as a standard of interpretation is a rule of the substantive law of interpretation. Hence, so far as direct declarations of intention, which show the objects and purposes of the inducement, are excluded because they are irrelevant, the application is of the substantive law of interpretation. So far as direct declarations of intentions tend to prove an individual standard of interpretation the substantive law of interpretation makes them relevant. When they are still excluded merely because they are of slight probative value to the proper issue and almost certain to be used improperly to make the objects and purposes of the inducement a subject matter of interpretation or a standard of interpretation, a rule of the substantive law of evidence is being applied. When this general principle of exclusion becomes inapplicable in the case of equivocation, we simply have a well defined situation where the principle of the substantive law of evidence upon which the rule of exclusion is founded becomes inapplicable. The results, therefore, logically reached by applying the rules of the substantive law of interpretation to determine what is relevant, coupled with the absence of any rule of exclusion, are produced. It is futile to spend time debating whether the failure of the general rule of exclusion to operate in the particular case is a mere application of the rule of the substantive law of interpretation, coupled with an absence of any rule of the substantive law of evidence requiring exclusion, or whether it is a part

of the rule of exclusion of the substantive law of evidence which determines when the general rule of exclusion does not operate.

6. Even where extrinsic evidence (other than direct declarations of the testator or settlor) tends to prove an individual standard of interpretation in cases of ambiguity under Wigram's Proposition II, it may still be excluded because it is of slight and remote probative force to establish any standard of interpretation on the one hand and is likely to be used improperly to establish the inducement as a rival subject matter or standard of interpretation: Wigram,[31] so far as he went, was exactly correct when he said, "Any evidence is admissible, which, in its nature and effect, *simply* explains what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing *merely* what he intended to have written." His error was in assuming that evidence presented tended to prove merely one thing or the other. The fact is that most extrinsic evidence tends to prove both things—namely, that the testator used an individual standard and that he intended to accomplish certain objects and purposes by his words. Wigram's error in refusing to notice that the same evidence might be relevant on both issues, and, indeed, that because it tended to prove the intent of the inducement it tended to prove the special individual standard of the testator, made it difficult for him to explain some cases where extrinsic evidence was, in fact, admitted. At the same time, Hawkins, whose views would seem to require that the intention of the inducement be regarded practically as a standard of interpretation, finds many apparent difficulties in the cases where the evidence of extrinsic circumstances tending to prove the intent of the inducement were excluded. The true view, however, and the one which will best reconcile all the cases is this: In determining that the testator has used a special individual standard, you may go into evidence of the intention of the inducement, but in so doing it must be remembered that there is danger of the evidence of the "intention" of the inducement being used as in and of itself a standard of interpretation or a rival subject of interpretation. This is to be avoided as improper. Hence, on a familiar principle (believed by the writer to be a rule of the substantive law of evidence, but this is wholly inconsequential), facts which tend only very remotely to prove the "intention" of the inducement and therefore, still more remotely, to prove any special standard of interpretation, is of such slight and remote value regarding the proper issue and so likely to be used in an improper way to make the intention of the inducement a subject matter or standard of interpretation, that courts have refused to consider it at all and have, therefore, excluded

[31] Wigram, *Extrinsic Evidence in Aid of the Interpretation of Wills,* Preliminary Observations, Pars. 9 and 10.

it.[32] On the other hand, in many cases the extrinsic evidence (other than direct declarations) has much probative force to show an individual standard of interpretation and are weak and indirect in their tendency to show the objects and purposes of the inducement. Typical cases of this sort are those where the extrinsic evidence relates to "the knowledge and surrounding circumstances of the testator," or "his treatment of and relations with particular persons," or "his mode of enjoying and dealing with property."[33] Clearly the determination of whether a particular item of extrinsic evidence which tends to prove the intention of the inducement does so to so slight a degree as to be excluded as evidence of a special individual standard lies largely in the discretion of the court. All courts and all judges would not rule the same in every case and the facts of the different cases are infinitely various. It is enough to have pointed out the actual line of reasoning upon which the difference in results rests. It is not to be supposed that all results can be reconciled or that any generalization can be made under which they could be reconciled.

LEADING CASES ILLUSTRATING THE APPLICATION OF SOME OF THE FOREGOING PRINCIPLES

The central point in the entire theory of legal interpretation is whether the objects and purposes of the inducement—what Wigram calls the "meaning of the testator" as distinguished from "what his

[32] Examples of such rulings will be found in Mr. Phipson's article in (1904) 20 L. QUART. REV. 245, at 258, as follows: "In *Maybank v. Brooks* (1780) 1 Bro. C. C. 84, A left a legacy to 'B, his executors administrators and assigns' but, B having died before the date of the will, B's representative claimed the legacy, tendering evidence that A knew of B's death when making the will, in order to show that A meant the legacy to be transmissible. Lord Thurlow held proof of A's knowledge to be evidence of intention and inadmissible. Again, in *Neale v. Neale* (1898, C. A.) 79 L. T. 629, A, a widow, having settled property on certain trusts to arise after the 'solemnization of her intended marriage,' B, a beneficiary, claiming that these trusts had arisen, tendered evidence that the settlement was made in contemplation of a marriage, which had in fact taken place, although known by the parties to be invalid, between A and her deceased husband's brother. These facts were held to be evidence of intention and rejected. 'The intention of the parties cannot,' Smith, L. J., held, 'be taken into account for the purpose of construing the plain words of a deed,' which here clearly referred to a valid and not an invalid union. Lastly, in *Higgins v. Dawson* [1902] A. C. 1, the question being whether the words 'residue and remainder,' in a will, referred to the surplus of two sums recited to have been lent by the testator on mortgage, or to the surplus of his whole estate, proof that the mortgage debts were all the property the testator possessed at the time of the will was tendered as favoring the former view, but held to be evidence of intention and rejected. 'The purpose and effect of the evidence,' Lord Shand remarked, 'is to supply a basis for inferring the intention of the testator.'"

[33] See Mr. Phipson's article, *ibid.* at 257.

words mean," what others have called the "intent" as distinguished from "meaning," what Mr. Wigmore calls the "will" as distinguished from the "sense"—may be used as the subject matter of interpretation or as a standard of interpretation, or to what extent they may be used to prove a special individual standard of interpretation. Many leading cases might be examined and re-analyzed with reference to these questions. But quite enough by way of illustration may be found in two—*Kurtz v. Hibner,*[34] and *Patch v. White.*[35]

1. Kurtz v. Hibner: Here a testator devised to James "The south half of the east half of the south quarter, Section 31, in Township 35, Range 10, containing forty acres, more or less." In a suit for partition by one of the heirs at law of the south half of the south half of the south-*east* quarter of Section *32,* Township 35, Range 10, containing forty acres, James offered to prove that at the time of the death of the testator he was in the actual possession of the forty-acre tract sought to be partitioned as tenant of the deceased and "that the draftsman of the will, by mistake, inserted the word 'one' after the words 'Section thirty' instead of 'two' so as to bequeath to James land in Section thirty-*one* instead of Section thirty-*two.*" The evidence was rejected and this ruling was affirmed. It is submitted that the result reached is a correct application of the principles already set out.

In the first place, it should be noted that the description as written does not refer in any way to the land described as land *belonging to the testator.* Hence there is no ambiguity arising from the face of the writing taken in connection with the external facts. The testator has devised forty acres in Section 31 and there was such land as he described. The offer of proof was merely an offer to show that the objects and purposes of the inducement sought a different result. But such objects and purposes were not relevant as a subject matter of interpretation or as a standard of interpretation. Nor, as they were offered, were they relevant to indicate that the testator in using the figure 31 was employing any special individual standard of interpretation—as if he had been using 31 as a sort of cipher code number for 32. Indeed the evidence was in terms offered to prove "mistake" by the testator which meant that the offerer admitted that the testator had used the figure 31 in its ordinary and usual meaning but had done so by mistake. No question, therefore, of interpretation of the writing arose as a result of the offer. The only question presented was whether a will can be reformed in equity for mistake. The court assumed that this could not be done.

2. Patch v. White: A testator devised to his brother "Lot num-

[34] (1870) 55 Ill. 514.
[35] (1886) 117 U. S. 210, 6 Sup. Ct. 617.

bered six in Square four hundred three together with the improvements thereon erected and appurtenances thereto belonging." The will, itself, and the extrinsic facts disclosed the following: The testator referred to the lots devised as his own property in the opening words of the will as follows: "and touching worldly estate, wherewith it has pleased the Almighty God to bless me in this life, I give, devise, and dispose of the same in the following manner and form." It appeared that the lot described did not belong to the testator and never had and that there were no improvements upon it. Plainly, therefore, the description taken altogether was inapt. An ambiguity arose. The first thing the court had to do was to decide what part of the description was false and what part true. It naturally decided that that part was false which referred to lot six in square four hundred three. The false part of the description having been rejected, the devise stood as the devise of a lot owned by the testator at the date of his will, number — in square — which was improved. Now the difficulty which arose was whether this was a sufficiently certain description to make identification of any lot possible. If the devise, as quoted, had stood alone with nothing else in the instrument it would certainly have been too uncertain to enable any lot to be identified and the devise would, therefore, have failed. From the rest of the will, however, it appeared that every other lot which the testator owned at the date of the will was specifically devised and expressly described with the exception of lot three in square four hundred six and that this lot was improved with a dwelling house. It also appeared that by a subsequent clause of the will the testator had devised the balance of his real estate which he believed to consist of certain lots, describing them, thereby contributing an expressed declaration in the will that the descriptions of the lots devised covered every lot he then owned. The further residuary clause related only to personalty. Under these circumstances a devise of lot — in square — having improvements was as sufficient to identify the lot as if it had said "my only remaining lot" or "my only lot left." The court very properly held, therefore, that the will was properly interpreted to convey lot three in square four hundred six.

It should be noticed that the court did not use any evidence of the objects and purposes of the inducement, either as a subject of interpretation or as a standard of interpretation. Indeed, the extrinsic evidence used can hardly be said to have been evidence of the objects and purposes of the inducement at all. Nor did the court construe "lot six, square four hundred three" as meaning "lot three square four hundred six." To have done so the court must have found that "lot six square four hundred three" was a code expression for something entirely different—that the testator was using the figures according to an individual code standard. There was no evidence at all of anything of the sort. The inference was that the testator had used

the figures in their ordinary and usual significance and that he had done so by mistake. This mistake, as such, could not be rectified by a court of equity. In spite of some inadvertent phrases about the "correction" of errors or "slips of attention" the court did not undertake the establishment of any jurisdiction in equity to correct mistakes in wills. What the court did do was this: it found a description which, taken altogether, did not fit the extrinsic facts. Then it rejected that which appeared on the evidence to be false and inapplicable. After this it still found sufficient in the whole instrument to describe and identify "lot three square four hundred six" as the property devised.

COMMENTS UPON THE "OBJECT OF INTERPRETATION" AND UPON "STRICT" AND "LIBERAL" CONSTRUCTIONISTS

1. *The object of interpretation—What part does the "intention" of the inducement play:* Wigram's view was that the object of interpretation was to find "the meaning of the testator's words" as distinguished from "what he meant." He attempted rigidly to exclude all references to the "intent" of the inducement as irrelevant and immaterial. Then came Hawkins who insisted that the "intent" of the inducement was a relevant and material element of interpretation of the words used. Both are right, and yet both positions are so far incomplete as to be misleading if not actually incorrect.

(1) The subject matter of interpretation is the writing or the words used and not the inducement to the writing. So far Wigram is right and Hawkins, if he means to assert the contrary, is wrong.

(2) The standard of interpretation may be either that of the normal user of the language or a special, individual standard of the writer himself. It cannot be the inducement to the writing. Again Wigram is correct and, if Hawkins means to assert the contrary, he is wrong.

(3) In ascertaining whether the writer has used a special individual standard and what the tenor of that standard is, the intent of the inducement may become a relevant and material fact. So far as Hawkins recognizes that the intention of the inducement is relevant to the process of interpretation in this precise way he is right. Wigram, if he refuses to recognize, even as a theoretical proposition, any use of the intent of the inducement for this purpose, was in error.

(4) The intent of the inducement having become relevant and material to determine whether the testator has used a special standard of interpretation and to determine what that standard might be, the courts have, for practical reasons, limited the scope of the inquiry into that intent. In the statement of the practical rules which limit the scope of the court's inquiry into the "intent" of the inducement as they have been worked out by the English cases, Wigram excels.

(5) The objects of interpretation of unilateral writings are thus happily phrased by Professor Graves:[36]

> "What is it that the judicial expositor seeks to ascertain—is it the meaning of the words or the meaning of the writer? The question is frequently put in this way, as if the disjunction were complete, and the answer must be either the one or the other. We answer, neither. Not the meaning of the words alone, nor the meaning of the writer alone, but the meaning of the words as used by the writer. It is not the meaning of the words in the abstract, for the meaning of words varies with the circumstances under which they are used; and not the meaning of the writer apart from his words, for the question is one of interpretation, and what the writer meant to have said, but did not, is foreign to the inquiry. * * * * We must seek the meaning of the writer, but we must find it in his words; and we must seek the meaning of the words, but it must be the meaning of his words—of the words as he has used them—the meaning which they have 'in the mouth of this party' to use the language of C. B. Eyre."

This, however, does no more than repeat the proposition that the individual standard of the testator may be used. That is an important beginning, but it is only a beginning. The moment one attempts to produce proof of the individual standard by extrinsic evidence he runs into the difficulty that he is in most cases in fact introducing the object and purposes of the inducement as a rival subject matter or standard of interpretation. The real problem of the whole subject is to determine how far the individual standard may be shown and the inducement still be prevented from becoming the real subject matter or standard of interpretation.

2. Strict and liberal constructionists: "Strict" and "liberal" as applied to persons interpreting written instruments are not much more than epithets provoked in the heat of controversy.

In the practice of the art of interpretation, there must, in many cases, be a fair ground of difference of opinion by two experts, both adhering strictly to all the rules and principles imposed upon them by the substantive law of interpretation and the substantive law of evidence. This is true because much of the art in reaching a conclusion depends upon the skilful discovery and balancing of considerations on each side. It would be improper to say of those who did not agree because of differences arising upon the balancing of all the considerations on each side, that one was "liberal" and the other "strict." Both might be equally "liberal" or equally "strict." The fact is they merely differ in their judgment of the weight to be given opposing considerations on each side.

The judge who regards the rule against disturbing a plain meaning

[36] (1894) 28 AM. L. REV. 321, 323.

as a rule of law (following Wigram) might perhaps be called a strict constructionist, although he is not so much a strict constructionist as he is a believer in the correctness of a certain rule of law of construction. His associate who accepts Lord Bowen's view that the rule against disturbing a plain meaning is merely "a counsel of caution" might perhaps be regarded as a "liberal" although he is, after all, only a believer in a different rule regarding the substantive law of interpretation.

There is, however, a wide gulf between some judges who call themselves "liberal" and those whom "liberal" judges call "strict constructionists." The so-called strict constructionist is frequently one who is attempting to practice the art of interpretation according to the rules of the substantive law of interpretation and the rules of the substantive law of evidence which have become settled. If the law is settled against the rule which forbids the use of extrinsic evidence to disturb a plain meaning, he accepts that as the rule of law and acts accordingly whether he thinks the law should be otherwise or not. When a rule of law of interpretation tells him that the "intention" of the inducement must not be made the subject matter of interpretation or used as a standard of interpretation he seeks to obey that rule, whether he personally approves of it or not. The so-called "liberal," on the other hand, is too often attempting to find a way to beat the recognized rules of the law of interpretation and the recognized rules of the law of evidence. While giving lip service to these rules he may yet violate the most fundamental of them all. He may, in fact, use all the extrinsic circumstances that can be secured in the case, and frequently a few conjectures besides, to build up a plausible "intention" of the inducement, which becomes, under the assertion that "the intention of the testator is the pole star in the construction of wills," a rival subject matter of interpretation, or at least, a rival standard of interpretation. That one practicing the art of interpretation under the rules of law should, while acting thus, whether in a slight degree or unconsciously or to an extreme degree and brazenly, be permitted unchallenged to shelter himself under the title of "liberal" is a tribute to the paucity of our epithetical vocabulary.