

**The interpretation of deeds
and wills at common law,
c. 1536–*c.* 1616**

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This thesis is submitted for
the degree of Doctor of Philosophy

April 2019

DECLARATION

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text.

It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text.

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ABSTRACT

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This thesis explores common law approaches to the interpretation of deeds and wills between approximately 1536 and 1616. It identifies the rules and principles used by lawyers to understand these documents, and explores the wider forces that influenced their development. The methodology of the thesis is primarily doctrinal: it is principally based on an examination of contemporary law reports and legal treatises.

The thesis demonstrates that common lawyers in this period took a sophisticated approach to the interpretation of private documents. They sought to strike a balance between interpreting a document according to the apparent meaning of its words, and interpreting it according to the writer's presumed intentions. They also appealed to reason to guide them to the right meaning of a document. Different kinds of document required different approaches to interpretation, due to differences in the nature and purpose of each.

This thesis argues that common lawyers' attitudes to interpretation underwent a significant shift during the second half of the sixteenth century. Lawyers became less willing to prioritise a writer's intention over the proper signification of the words he had used. They developed a preference for resolving cases in accordance with rules and maxims, or with the authority of previously-judged cases. They also became more anxious about the possibility of misinterpreting a document. These changes took place in a wider context of concern about legal documents, litigation, and legal uncertainty.

The interpretation of private documents was an issue that both lawyers and laymen cared about fiercely in this period. This thesis will improve our understanding of legal interpretation in a foundational period for its development in England.

ACKNOWLEDGEMENTS

Firstly, my thanks go to the Selden Society, who generously funded the research for this thesis through their Studentship in English Legal History. A visit to the Huntington Library to examine Thomas Egerton's papers was funded by a Huntington Library Francis Bacon Foundation Fellowship in Renaissance England and by the Maitland Fund at the University of Cambridge. The thesis was completed after I took up a lectureship at the University of Bristol, and I am grateful to the Law School for its support during this period.

I am also grateful to my supervisor, David Ibbetson, whose boundless wit and wisdom have enriched the writing of this thesis enormously. I am very fortunate to have had Neil Jones, another exceptionally able guide, as my advisor.

It would not have been possible to write this thesis without the generosity of many other friends and colleagues. My particular thanks go to Sir John Baker, Jacob Currie, Lorenzo Maniscalco, Jeffrey Thomson and Ian Williams, for their invaluable help with paleography and with Latin and French translations. Lorenzo was also unfailingly patient in responding to my queries about canon law, as was David Foster with questions about the Chancery. I am indebted to Andrew Bell and Andreas Televantos for many helpful discussions, and for plying me with cake at regular intervals. Andrew, Shreya Atrey, Talitha Kearey and Jane Sancinito have been tireless sources of encouragement and inspiration.

Finally, but most of all, I am grateful for the love and support of my family. I couldn't have done any of this without them.

STYLE

Law French has been translated. The original language has not been included, purely for reasons of space. Where they are available, I have generally adopted the standard English translations of case reports, as printed in the English Reports. If I felt that this translation did not accurately reflect the original French text, I provided my own translation and explained this in a footnote. Where Latin is used, both the original language and a translation have been provided.

Spelling and capitalisation have been modernised throughout, and punctuation has occasionally been altered to clarify meaning. Where there were multiple contemporary spellings of a name, I have chosen a representative spelling for the avoidance of confusion.

This thesis will use male pronouns when referring to parties in general, since, although women were involved in lawsuits on interpretation, the overwhelming majority of parties at the time were male.

I have followed the dates given in individual case reports. The year has been taken to start in January.

The following abbreviations have been used:

D	Digest of Justinian
I	Institutes of Justinian
VI	Liber sextus

BL Add MS	British Library Additional Manuscript
CUL MS	Cambridge University Library Manuscript
Hunt MS El	Huntington Library Ellesmere Manuscript
Hunt RB	Huntington Library Rare Book

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1. INTRODUCTION

1.1. Legal interpretation in early modern England

In the mid-sixteenth century, writes Ian Maclean, Europe experienced an ‘interpretation boom.’¹ Works on interpretation abounded in all disciplines, as scholars became newly interested in methods for the understanding of texts.² The common law was no exception. L. W. Abbott observes that ‘from the evidence of both printed and manuscript reports it is clear that the courts were increasingly concerned with interpreting legal instruments of all types.’³ Questions of interpretation began to dominate the law reports, and the first English literature on the subject was produced.⁴ ‘Interpretation as a conscious activity was being systematised’ by common lawyers.⁵

Previous generations of English lawyers had not been very interested in enunciating theories of interpretation. As Samuel Thorne puts it, they saw the reading of documents as ‘an incidental, routine function of judicial administration.’⁶ When lawyers invoked principles of interpretation, they did so haphazardly and without discussing the intellectual foundations that underlay them. John Baker characterises medieval judges as referees, whose role was simply to apply rules in a predictable way, and who were not expected to explain the reasons for their decisions.⁷

By the Tudor period, however, attitudes were shifting. A combination of procedural changes and the influence of humanist scholarship meant that judges were increasingly likely to

¹ Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge University Press 1992) 35.

² *ibid* 1.

³ LW Abbott, *Law Reporting in England 1485-1585* (Athlone Press 1973) 229.

⁴ See, for example, Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (Huntington Library 1942), composed c. 1565 and probably attributable to William Fleetwood (see 1.2. below); and *A Treatise Concerning Statutes, or Acts of Parliament, and the Exposition Thereof* (Tonson 1677), composed c. 1575 and usually attributed to Christopher Hatton.

⁵ Abbott (n 3) 229.

⁶ Thorne in Thorne (n 4) 3.

⁷ JH Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (Oxford University Press 2003) 49. For a different view, see Paul Brand, ‘Judges and Juries in Civil Litigation in Later Medieval England: The Millon Thesis Reconsidered’ (2016) 37 *Journal of Legal History* 1.

provide reasoned decisions and to discuss matters of legal principle in banc.⁸ The common law was also becoming more text-based, as its oral tradition diminished in significance.⁹ Judges engaged in more rigorous textual analysis, critically probing all kinds of legal documents.¹⁰ As Lorna Hutson explains, common lawyers were developing ‘a more intricate and sophisticated sense of the textual form of argument.’¹¹ With the advent of printing, they were also prepared to place more reliance on authoritative copies of written materials.¹² It is thus unsurprising that lawyers of this period sought to establish the rules and principles by which legal texts were to be interpreted.

In the existing academic literature, this transformation is primarily discussed in relation to statutes. In the fourteenth century, to interpret a statute meant to perpetrate a kind of fraud upon it.¹³ By the sixteenth century, however, the courts were eagerly developing sophisticated theories of statutory interpretation.¹⁴ Commentators have linked this new focus on interpretation to the changing role of legislation. Before the sixteenth century, statutes were regarded as ‘essentially isolated rulings’¹⁵ that could be extended, restricted or disregarded as a judge saw fit.¹⁶ During the reign of Henry VIII, however, legislation grew in both scope and sophistication. The size of the statute book almost doubled, and Parliament began to involve itself in new areas of life as it sought to effect sweeping social change.¹⁷ Statutes were increasingly detailed and precise,¹⁸ and this affected their treatment by the courts.¹⁹ Newly

⁸ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 385.

⁹ See generally Richard J Ross, ‘The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640’ (1998) 10 *Yale Journal of Law and the Humanities* 229.

¹⁰ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 28.

¹¹ Lorna Hutson, ‘Rhetoric and Early Modern Law’ in Michael J Macdonald (ed), *The Oxford Handbook of Rhetorical Studies* (Oxford University Press 2017) 400.

¹² See generally Ian Williams, ‘“He Creditted More the Printed Booke”: Common Lawyers’ Receptivity to Print, c. 1550-1640’ (2010) 28 *Law and History Review* 39.

¹³ TFT Plucknett, *Statutes & Their Interpretation in the First Half of the Fourteenth Century* (Cambridge University Press 1922) 164.

¹⁴ See generally Georg Behrens, ‘Equity in the Commentaries of Edmund Plowden’ (1999) 20 *Journal of Legal History* 25.

¹⁵ Thorne (n 4) 9.

¹⁶ *ibid* 5.

¹⁷ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 35–37.

¹⁸ *ibid* 37.

¹⁹ See, for example, *Foxe v Collyer* (1581) Hunt MS El 482 f149, f149.

bold assertions of Parliamentary sovereignty prompted lawyers to develop theories of statutory interpretation based on the intentions of the legislator.²⁰

However, statutes were not the only kind of legal document that grew in significance during the early modern period. C. W. Brooks writes that ‘late sixteenth and seventeenth century English people of almost every social station lived in a matrix of parchment and paper.’²¹ Even a humble farmer would be a party to deeds relating to his land, and would make a will at the end of his life.²² Private legal instruments were just as ubiquitous in the lives of the illiterate lower classes as they were in the affairs of the country’s elites.²³ As Amy Erickson observes, ‘legal “evidences”—deeds, bonds, charters, contracts, wills and so forth—were enormously important at all levels of early modern society.’²⁴ This was also recognised by contemporary lawyers. Edward Coke noted that the interpretation of deeds concerned ‘every man (for, for the most part, every man is a lessor or a lessee).’²⁵ He later reiterated that the courts’ approach to the construction of leases was ‘necessary to be known of all men, because in effect it concerneth all.’²⁶

Cases involving private documents like deeds and wills accounted for a vast and growing proportion of the common law’s routine business. Cases that required the courts to construe deeds and wills were orders of magnitude more common than those involving statutory interpretation.²⁷ Such documents also lay behind significant legal controversies. Following the Statute of Uses 1536, it had become possible to make new kinds of conveyance, the rules governing which remained unsettled.²⁸ The common law was also getting to grips with its new jurisdiction over wills of freehold land, conferred by the Statute of Wills 1540.²⁹ Given lawyers’ sophisticated treatment of statutes, it would be surprising if they were not also developing principles for the interpretation of these private instruments.

²⁰ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 37.

²¹ CW Brooks, RH Helmholz and P Stein, *Notaries Public in England since the Reformation* (Society of Public Notaries 1991) 84.

²² *ibid.*

²³ *ibid.*

²⁴ Amy Louise Erickson, *Women and Property in Early Modern England* (Routledge 1995) 22.

²⁵ *Walker’s Case* (1587) 3 Co Rep 22a, 23a.

²⁶ *The Reports of Sir Edward Coke*, vol V (Joseph Butterworth and Son 1826) 10 Co Rep xvii.

²⁷ See 1.2. below.

²⁸ 27 Hen VIII c. 10.

²⁹ 32 Hen VIII c. 1.

Yet we know startlingly little about the courts' approach to the interpretation of these documents. Most studies of this period have focused on statutory interpretation, with comparatively little interest in the courts' treatment of other written instruments.³⁰ Stefan Vogenauer's history of statutory interpretation in England and continental Europe includes, by way of background, some material on other kinds of interpretation. However, this is necessarily brief, and the discussion of deeds in the English courts is confined to two paragraphs.³¹ Ian Maclean has examined the law of interpretation in the contemporary *ius commune*, but his short treatment of English law relates only to statutory interpretation³² and to defamation.³³

Other writers have dealt with the interpretation of deeds when surveying the history of English contract law. Alexander Lüderitz's comparative study of contractual interpretation makes occasional reference to sixteenth-century English authorities.³⁴ Most authors give the impression that interpretation in this period simply involved enforcing the letter of the deed, perhaps injected with a dose of common sense. A. W. B. Simpson, for example, remarks that conditions of bonds were to be 'strictly construed,' though, if their meaning was 'not plain,' they would be interpreted 'sensibly.'³⁵ Similarly, David Ibbetson explains that formal written contracts were interpreted 'literally,' with the application of 'straightforward canons of construction.'³⁶ However, neither gives much detail as to how this worked in practice. Meanwhile, many modern writers on contractual interpretation simply adopt John Henry Wigmore's view that the law of this period was marked by 'a stiff and superstitious formalism.'³⁷

³⁰ See, for example, Thorne (n 4); Behrens (n 14); Stefan Vogenauer, *Die Auslegung von Gesetzen in England Und Auf Dem Kontinent: Eine Vergleichende Untersuchung Der Rechtsprechung Und Ihrer Historischen Grundlagen* (Mohr Siebeck 2001); Ian Williams, 'Dr Bonham's Case and "Void" Statutes' (2006) 27 *Journal of Legal History* 111.

³¹ Vogenauer (n 30) 778–779.

³² Maclean (n 1) 181–6.

³³ *ibid* 193–202.

³⁴ See, for example, Alexander Lüderitz, *Auslegung von Rechtsgeschäften: Vergleichende Untersuchung Anglo-Amerikanischen Und Deutschen Rechts* (C F Müller 1966) 66, 71, 248, 344.

³⁵ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1st edn, Oxford University Press 1975) 102.

³⁶ David Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (1997) 18 *Journal of Legal History* 1, 7; see also David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 2002) 84.

³⁷ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol 9 (3rd edn, Little, Brown and Company 1940) 187. See, for example, Gerard McMeel, *The Construction of Contracts* (2nd edn,

As for other forms of interpretation, M. C. Mirow's work on early modern wills emphasises the importance of the testator's intentions for the construction of wills in both the canon law and the common law. Again, however, the treatment is cursory.³⁸ Ian Williams' PhD thesis on English legal reasoning touches on many topics relevant to the law of interpretation, which is, however, expressly excluded from its ambit.³⁹

There is therefore no work that fully deals with the history of the interpretation of private documents in English law. This thesis is a step towards filling that gap. Its aim is to explore common law approaches to the interpretation of deeds and wills between approximately 1536 and 1616. It identifies the techniques used by lawyers to understand these documents, and examines the wider forces that influenced their development.

The period chosen is one in which interest in interpretation was particularly intense. It opens after the enactment of the Statute of Uses and closes at the end of Coke's judicial career. However, material that pre-dates and post-dates this period will also be used. Where it is helpful to contextualise legal developments, reference will be made to the medieval law. Similarly, later treatises will be referred to where they provide useful information about the law of our period.

The thesis will focus on the common law, and will not examine the practice of the courts of equity or the ecclesiastical courts. This is, firstly, for reasons of space, and, secondly, because the existing records were considered unlikely to contain much in the way of relevant legal reasoning. The thesis will not cover the interpretation of statutes, on which much has already been written. Nor will it deal with letters patent. To a significant extent, patents were interpreted in a similar way to other deeds. However, special rules did apply to them: for example, they were to be construed most favourably for the Crown unless expressed to be made '*de gratia speciali, ex certa scientia, et mero motu*' [of special grace, from certain knowledge,

Oxford University Press 2011) 22; Jonathan Morgan, *Contract Law Minimalism* (Cambridge University Press 2013) 229; Sir Kim Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015) 6; Donald Nicholls, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 *Law Quarterly Review* 577, 577.

³⁸ MC Mirow, 'Last Wills and Testaments in England 1500-1800' (1993) 60 *Recueils de la Societe Jean Bodin pour l'Histoire Comparative des Institutions* 47, 69-70.

³⁹ Ian Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (PhD thesis, University of Cambridge 2008) 2.

and mere motion].⁴⁰ This was because of the monarch's position as the head of the commonwealth.⁴¹ The construction of patents therefore raises questions about the authority of the Crown which are beyond the scope of this thesis.⁴²

This study will make three main contributions to the scholarship on early modern English law. Firstly, it will improve our understanding of legal interpretation in this period. As Williams has noted, discussions of statutory interpretation inevitably involve implicit questions of constitutional theory.⁴³ If statutory interpretation is examined in isolation, it may be difficult to separate general theories of legal interpretation from particular theories about, for example, the authority of Parliament. This thesis should therefore help to distinguish ideas that were specific to statutes from those that were common to all kinds of interpretation. Furthermore, cases on private documents were much more common than those on statutes, and involved a wider cross-section of society. By extending our study of interpretation to these cases, we are likely to achieve a more realistic picture of the law than by focusing on the comparatively scanty and unrepresentative statutory material.

Secondly, this thesis will contribute to our understanding of formal agreements in a critical period for the development of English contract law. Assessments of the intellectual state of contract theory before around 1800 have been scathing.⁴⁴ Simpson notes the 'dearth of treatises dealing with the subject,' lamenting that contract law 'lacked a literature.'⁴⁵ Indeed, according to James Gordley, 'before the 19th century... the common lawyers did not think in terms of contracts, let alone in terms of contract theory. They thought in terms of writs or forms of action.'⁴⁶ But they also thought in terms of documents. It is true that only the developed action of *assumpsit* ultimately provided the basis for a general theory of contract

⁴⁰ See, for example, *The Case of Mines* (1568) Plow 310, 330–2; *The Dean and Chapter of Chester's Case* (1578) Hunt MS El 482 f32, f34; *Whites v Farmor* (1599) BL Add MS 25203 f56, f56v.

⁴¹ (1493) YB Trin 8 Hen VII pl 1, f1a-5a, f1a; *Arthur Legat's Case* (1612) 10 Co Rep 109a, 113b.

⁴² The validity of letters patent was also controlled by statute: 31 Hen VIII c. 13, s 16; 34 & 35 Hen VIII c. 21, s 3.

⁴³ Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (n 39) 2.

⁴⁴ See, for example, JH Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2007) 350; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 221.

⁴⁵ AWB Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 250.

⁴⁶ James Gordley, *Foundations of Private Law* (Oxford University Press 2006) 288.

law in England.⁴⁷ However, this thesis will demonstrate that early modern lawyers took a unified and sophisticated approach to the interpretation of all kinds of deed, including formal contracts. As Peter Tiersma explains, ‘any valid approach to interpretation must be informed by a theory regarding the nature of the text that it purports to interpret.’⁴⁸ By examining principles of interpretation, we can gain an insight into lawyers’ understanding of formal contracts. Indeed, this period is ripe for such an analysis. Brooks observes that

the expansion of the legal profession in the sixteenth century, the sheer ubiquity of written agreements, and the deep interest in jurisprudential matters which was inherent in the humanist movement, meant that the sixteenth and seventeenth centuries produced some of the most fascinating statements about the nature of legal instruments which exist in the English tradition.⁴⁹

Formal contracts were a major subset of these legal instruments. Furthermore, since this thesis examines the interpretation of both deeds and wills, it will be possible to compare the interpretation of formal contracts made by deed with that of other documents. Thus, any distinctive attitudes to written contracts in this period can be drawn out.

Finally, an awareness of interpretive issues is a necessary basis for understanding many controversies in the land law of this period. Cases like *Colthirst v Bejushin* (1550),⁵⁰ *Newis v Lark* (1571),⁵¹ *Shelley’s Case* (1581)⁵² and *Mildmay’s Case* (1605)⁵³ are often discussed as though they only laid down substantive rules of land law.⁵⁴ In fact, much of the argument in all of these cases concerned questions of interpretation. If we focus only on the substantive rules, we will miss the centrality of interpretation to these disputes, and take a distorted view of their significance.

⁴⁷ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 146. Many of the basic principles of this theory had their roots in the medieval law: *ibid* 135.

⁴⁸ Peter M Tiersma, *Parchent, Paper, Pixels: Law and the Technologies of Communication* (University of Chicago Press 2010) 46.

⁴⁹ Brooks, Helmholz and Stein (n 21) 85.

⁵⁰ *Colthirst v Bejushin* (1550) Plow 21.

⁵¹ *Newis et Ux v Lark and Hunt* (1571) Plow 403.

⁵² *Shelley’s Case* (1581) 1 Co Rep 93b.

⁵³ *Sir Anthony Mildmay’s Case* (1605) 6 Co Rep 40a.

⁵⁴ See, for example, AWB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 208–41; Lloyd Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement* (Cambridge University Press 1983) 11–45.

The law of interpretation was a common thread running through all kinds of legal debate in this period. By following it, we will better understand the development of the surrounding law, whether that concerned the role of Parliament, the nature of contracts, or the powers of settlers over their land. Even when these issues were not discussed explicitly, lawyers' attitudes to interpretation may indicate where their wider intellectual commitments lay.⁵⁵ The law of interpretation, then, provides us with a new lens through which to view the key issues of the early modern common law.

1.2. Sources

The methodology of this thesis is primarily doctrinal. It seeks to identify the rules and principles used by common lawyers to interpret private documents in court. As a result, it is principally based on contemporary law reports. These include the reports now available in print in the English Reports series, and two Selden Society volumes of James Dyer's reports.⁵⁶ They also include a set of manuscript reports attributed to Thomas Coventry, which supplements the printed material.⁵⁷ Coventry's reports, as the best of the late sixteenth-century manuscript reports,⁵⁸ were deemed to be the most likely to include significant material on interpretation. Use has also been made of manuscripts of Thomas Egerton's draft legal arguments.⁵⁹ Perhaps uniquely, these provide direct evidence of arguments prepared for court, unfiltered through the intermediary of a reporter.

It is certainly clear that our reporters had very different interests in, and perspectives on, the law of interpretation. To some extent, this simply reflects their different styles of reporting. Coke and Edmund Plowden, for example, offered full summaries of the argument in each case, while reporters like Dyer recorded only the essential issues.⁶⁰ As a result, Plowden's report of a case like *News v Lark* runs to 18 pages as printed in the English Reports, covering

⁵⁵ Brooks argues that questions about the nature of legal documents were closely connected to questions about political theory in the sixteenth and seventeenth centuries: Brooks, Helmholz and Stein (n 21) 90.

⁵⁶ JH Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (Selden Society 1993); JH Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer*, vol 2 (Selden Society 1994).

⁵⁷ See generally David Ibbetson, 'Coventry's Reports' (1995) 16 *Journal of Legal History* 281. A number of collections of reports in this series have been identified. This thesis has used BL Add MS 25203, the most complete collection. It covers Michaelmas term 1598 to Hilary term 1604: *ibid* 282.

⁵⁸ Ibbetson, 'Coventry's Reports' (n 57) 281.

⁵⁹ Hunt MS El 482.

⁶⁰ Abbott (n 3) 90.

the pleadings; the arguments of counsel on a wide variety of interpretive issues; the conclusions and reasoning of the judges on these questions of law; and the abatement of the writ upon the discovery of a fault in its wording.⁶¹ Dyer's report of the same case is much shorter. His first note covers the facts and some discussion of the pleadings,⁶² while his second reports the judgment of the court in a few terse paragraphs.⁶³ William Bendlowes' report, meanwhile, takes up a page in the English Reports, and records only the facts of the case and the abatement of the writ.⁶⁴

Each reporter also had his own ideas about what were the most important points to note in an interpretation case. Plowden, for example, was fond of 'grandiloquent' pronouncements about the nature of equity.⁶⁵ Dyer enjoyed somewhat pedantic discussions of grammar and often made notes about the meaning and history of words.⁶⁶ Coke, meanwhile, had a tendency to distill everything into pithy Latin maxims, either borrowed or of his own invention.⁶⁷ The same case may therefore be presented very differently by each reporter. For example, Plowden's report of *Throckmerton v Tracy* (1555) focused on the general principles discussed by the serjeants and judges, especially where they emphasised the importance of the parties' intentions. Dyer, arguing for the plaintiff, warned that 'to cavil about the propriety of words, when the intent of the parties appears, is not commendable.'⁶⁸ Plowden reported that Saunders J gave similar advice,⁶⁹ while Stanford J 'laid down three rules for the understanding of deeds.'⁷⁰ Broke CJ, meanwhile, strongly rejected their arguments.⁷¹ Dyer, however, began his report of the same case by introducing his own views.⁷² He did not record such high-flown statements of principle as Plowden, but devoted a greater proportion of his report to the

⁶¹ *News et Ux v Lark and Hunt* (n 51).

⁶² *News v Larke* (1571) Dyer's Notebooks (109 SS) 198.

⁶³ *News v Larke* (1571) Dyer's Notebooks (110 SS) 235.

⁶⁴ *News v Lark & Hunt* (1570) Old Benloe 196.

⁶⁵ Sir Carleton Kemp Allen, *Law in the Making* (7th edn, Clarendon Press 1975) 453.

⁶⁶ Baker, *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (n 56) xxi.

⁶⁷ TFT Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown and Company 1956) 283; Samuel Thorne, 'Sir Edward Coke, 1552-1952', *Essays in English Legal History* (Hambledon Press 1985) 227.

⁶⁸ *Throckmerton v Tracy* (1555) Plow 145, 159.

⁶⁹ *ibid* 161.

⁷⁰ *ibid* 160.

⁷¹ *ibid* 162.

⁷² *Throgmorton v Tracey* (1555) Dyer 124b, 125a.

meaning of the word ‘reversion,’ noting its etymology and its use in statutes, writs and fines.⁷³ At the end of his discussion, he simply noted the judges who had agreed and disagreed with his argument.⁷⁴ When examining cases, then, we must be aware that we are seeing the arguments and judgments through the eyes of a particular reporter. Either consciously or unconsciously, they are likely to have put their own slant on the proceedings, presenting only the arguments they found most interesting or persuasive.⁷⁵

A reporter may have been particularly inclined to present material that supported his own view of interpretation when he was writing for publication.⁷⁶ Both Plowden and Coke prepared their own reports for the press,⁷⁷ and both have been accused of some bias in the presentation of their material. Plowden was renowned in his time as a careful and accurate reporter, and took significant pains to corroborate his notes with colleagues.⁷⁸ The accuracy of his reports can generally be confirmed by comparison with other reports of the same cases.⁷⁹ However, as Alan Cromartie has observed, Plowden’s method ‘left plenty of scope for shaping by selection.’⁸⁰ He was highly selective in terms of the cases he chose to report. He also distilled the arguments of judges and counsel, discarding material that he judged to be ‘refuse.’⁸¹ Coke’s reputation amongst his contemporaries was less glowing than Plowden’s,⁸²

⁷³ *ibid.*

⁷⁴ *ibid.* 126b.

⁷⁵ David Ibbetson, ‘The Arguments in Calvin’s Case (1608)’ in Troy L Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 216.

⁷⁶ See Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 39) 3. Even material that was not apparently prepared for publication could be widely shared. Leonard’s reports, for example, include a copy of ‘the argument of Egerton, Solicitor-General’ in *Butler v Baker*, ‘under his own hand’: *Butler and Baker’s Case* (1591) 3 Leo 271. This closely corresponds with Egerton’s draft argument in *Butler v Baker* (1591) Hunt MS El 482 f286.

⁷⁷ Abbott (n 3) 206, 248.

⁷⁸ Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden* (Catharine Lintot and Samuel Richardson 1761) v; see also Abbott (n 3) 216; Geoffrey de C Parmiter, *Edmund Plowden: An Elizabethan Recusant Lawyer* (Catholic Record Society 1987) 115.

⁷⁹ Plowden’s report of any case is usually the most comprehensive available. However, his report of *Brett v Rigden* (1568) Plow 340 compares favourably with a more detailed manuscript report of part of the argument in Egerton’s papers. See *Le Serjaunts Case* (1567) Hunt MS El 482 f3.

⁸⁰ Alan Cromartie, *The Constitutionalist Revolution: An Essay on the History of England, 1450-1642* (Cambridge University Press 2006) 108.

⁸¹ Plowden (n 78) iv.

⁸² Damian Powell, ‘Coke in Context: Early Modern Legal Observation and Sir Edward Coke’s Reports’ (2000) 21 *Journal of Legal History* 33, 43.

although at least part of this may be attributable to professional rivalry.⁸³ The chief difficulty with Coke's reports is his failure to distinguish between the judgment of the court and his own opinion.⁸⁴ However, if the reader is aware of these tendencies, both sets of reports can usefully be taken to indicate the arguments that their authors considered to be particularly important, whatever their provenance happened to be.

As we have seen, the interpretation of documents was a key issue in the law of this period. However, there are a relatively small number of cases in which the reporter extensively discussed principles of interpretation. For this reason, some key cases will recur throughout this thesis. In many other cases, points of interpretation are resolved without a full explanation of the relevant issue. In one case, for example, Edmund Anderson reported that the judges had spoken extensively about rules of construction, but neglected to record what they had actually said.⁸⁵ This thesis will attempt to elucidate principles of interpretation even when they are not explicitly set out in the cases. However, the focus will be on cases reported by those lawyers with a particular interest in the law of interpretation, who explained the issues and their resolution in full.

Five key figures will therefore dominate our discussion. The first is Plowden, whose *Commentaries* span the period 1550 to 1579. Plowden has been described as 'perhaps the most learned lawyer in a century of learned lawyers,'⁸⁶ but he was never a serjeant or judge, due to his refusal to renounce his Catholic faith.⁸⁷ His first volume of reports was published in 1571, with a second volume appearing in 1579.⁸⁸ These were the first contemporary law reports to be printed since the 1535 Year Books.⁸⁹ Immediately put into use by both students and practitioners, Plowden's reports remained influential for centuries.⁹⁰ They were highly praised by contemporaries;⁹¹ Coke, for example, described them as 'exquisite and elaborate.'⁹²

⁸³ Abbott (n 3) 252.

⁸⁴ Baker, *An Introduction to English Legal History* (n 44) 183; Abbott (n 3) 252; Powell (n 82) 44.

⁸⁵ *Baldwyn v Marton* (1589) 1 And 223, 225.

⁸⁶ Sir William Holdsworth, *A History of English Law*, vol 5 (3rd edn, Methuen 1966) 372.

⁸⁷ Abbott (n 3) 199. Plowden was appointed as a serjeant by Mary, but the writ abated on Elizabeth's accession to the throne and was never revived: *ibid* 201.

⁸⁸ Abbott (n 3) 207.

⁸⁹ Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (n 39) 46.

⁹⁰ Abbott (n 3) 217.

⁹¹ *ibid*; Parmiter (n 78) 117.

⁹² *The Reports of Sir Edward Coke*, vol II (Joseph Butterworth and Son 1826) 3 Co Rep viii.

Plowden's 'peculiar fascination' with legal interpretation is obvious throughout.⁹³ About a third of his 63 case reports involve a point of statutory interpretation,⁹⁴ while a further eight focus on the construction of deeds and four on the interpretation of wills. The *Commentaries* are justly famous for elaborating a theory of statutory interpretation based around the legislator's intentions.⁹⁵ As we will see, however, the interpretation of legal instruments in general was a major theme of Plowden's reports. Plowden's focus on interpretation brought the topic to the forefront of legal thought,⁹⁶ and his theories influenced many later judges and treatise writers.⁹⁷

Dyer's reports span a period roughly contemporary to those of Plowden, covering his legal career between about 1532 and 1581.⁹⁸ Dyer was appointed as a serjeant in 1552;⁹⁹ as a judge of the Common Pleas in 1557; and as Chief Justice of the same court in 1559.¹⁰⁰ His reports, published posthumously by his nephews in 1585,¹⁰¹ soon ranked alongside Plowden's in importance, and were consistently cited in the following decades.¹⁰² William Fulbecke recommended both reporters to law students, writing that Plowden and Dyer had 'by a several and distinct kind of discourse... both laboured to profit posterity.'¹⁰³ Some preferred 'Plowden for his fullness of argument,' while 'others do more like Dyer, for his strictness and brevity.'¹⁰⁴ Indeed, Dyer's reports were much less full than those of Plowden. Intended for his personal use, they had not been edited for publication, and consisted only of 'working notes as taken down in the course of a busy life.'¹⁰⁵ They therefore have less thematic unity than the *Commentaries*, and there is a much smaller proportion of cases relating to interpretation. Of 1120 cases,¹⁰⁶ only about a dozen concern a point of statutory interpretation, while over 70 involve the interpretation of deeds and almost 30 that of wills. Owing to Dyer's less

⁹³ Allen (n 65) 455.

⁹⁴ *ibid* 229.

⁹⁵ *ibid* 230–239; Behrens (n 14).

⁹⁶ Abbott (n 3) 238.

⁹⁷ *ibid* 230.

⁹⁸ Baker, *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (n 56) xxiii.

⁹⁹ *ibid* xxiv.

¹⁰⁰ *ibid* xxv.

¹⁰¹ *ibid* xxxv.

¹⁰² Abbott (n 3) 158.

¹⁰³ William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 26v.

¹⁰⁴ *ibid* 27.

¹⁰⁵ Baker, *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (n 56) xxxvi.

¹⁰⁶ Abbott (n 3) 162.

discriminate method of reporting, it seems likely that these proportions were more representative of practice. Dyer was certainly interested in questions of interpretation, and particularly in matters relating to grammar and etymology.¹⁰⁷ ‘His love of textual scholarship,’ notes Baker, ‘is obvious,’ and he had a detailed knowledge of the history of the common law and its language.¹⁰⁸

The period following the careers of Plowden and Dyer was dominated by Coke, one of the common law’s greatest personalities. He was appointed as Solicitor-General in 1592 and Attorney-General in 1594,¹⁰⁹ before being created serjeant-at-law and Chief Justice of the Common Pleas in 1606.¹¹⁰ He was elevated to Chief Justice of the King’s Bench in 1613.¹¹¹ However, following a series of conflicts with the Crown,¹¹² he was removed from office three years later.¹¹³ He began to publish his reports in 1600, issuing eleven volumes by 1615. Two further volumes were published posthumously.¹¹⁴ Coke’s reports cover the period from 1572 to 1616, beginning in earnest in 1581.¹¹⁵ Baker has described them as ‘the single most influential series’ of nominate reports in the common law.¹¹⁶ Even Coke’s great rival, Francis Bacon, admitted that, without his reports, the common law would be ‘almost like a ship without ballast.’¹¹⁷ Coke was profoundly interested in interpretation, to the extent that he remains an authority on the subject today.¹¹⁸ We have already noted his recognition that the interpretation of leases was important to ‘every man.’¹¹⁹ This was borne out by the cases he chose to report. Of close to 500 cases,¹²⁰ about a third involve a point of interpretation. These include over 70 on deeds, 15 on wills, and 65 on statutes. He made many more comments on

¹⁰⁷ Baker, *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (n 56) xxi.

¹⁰⁸ *ibid* xxviii.

¹⁰⁹ Holdsworth, *A History of English Law* (n 86) 426.

¹¹⁰ *ibid* 428.

¹¹¹ *ibid* 438.

¹¹² *ibid* 429–441.

¹¹³ *ibid* 440.

¹¹⁴ TFT Plucknett, ‘Genesis of Coke’s Reports’ (1942) 27 *Cornell Law Review* 190, 201.

¹¹⁵ *ibid*. For more details on Coke’s reports, see JH Baker, ‘Coke’s Note-Books and the Source of His Reports’ in JH Baker, *The Legal Profession and the Common Law: Historical Essays* (The Hambledon Press 1986).

¹¹⁶ Baker, *An Introduction to English Legal History* (n 44) 183.

¹¹⁷ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 13 (Cambridge University Press 2011) 65.

¹¹⁸ For example, he is quoted half a dozen times in Lewison (n 37).

¹¹⁹ *Walker’s Case* (n 25) 23a.

¹²⁰ Plucknett, ‘Genesis of Coke’s Reports’ (n 114) 201.

interpretation in the prefaces to the various volumes of his reports. In 1628, he also published his *Commentary upon Littleton*, the first of his four *Institutes of the Laws of England*, which contained further material on legal interpretation.¹²¹

As we have noted, Coke's reports may not be a wholly reliable guide to the law of his period. The reports of his contemporary, Francis Moore, therefore act as a useful counterbalance. Like Dyer's reports, they are relatively concise.¹²² While Moore's reports span the period from 1512 until his death in 1621, he was not actually born until 1558. He therefore plainly took many of his early reports from another source, probably Bendlowes.¹²³ The reports that pre-date Moore's entry to Middle Temple in 1580 are generally cursory, and few were found to be useful for the purposes of this thesis. Aside from these, Moore's reports appear to have been based largely on his personal observations.¹²⁴ They were already circulating in manuscript during his lifetime, but were not printed until 1663.¹²⁵ Moore was a prominent barrister at the turn of the century, and was well-known for his conveyancing skills.¹²⁶ He was created serjeant in 1614.¹²⁷ Moore's reports include almost 100 cases on the interpretation of deeds, over 40 on wills, and about a dozen on statutes.

Our final figure is Moore's patron, Egerton.¹²⁸ Egerton was appointed as Solicitor-General in 1581,¹²⁹ Attorney-General in 1592,¹³⁰ Master of the Rolls in 1594,¹³¹ Lord Keeper in 1596,¹³² and Lord Chancellor in 1603.¹³³ He was a close associate of Francis Bacon and a supporter of

¹²¹ *ibid* 212.

¹²² Moore's 1308 case reports occupy a total of 600 pages in the English Reports, while Coke takes 2400 pages to report just over a third of that number.

¹²³ Abbott (n 3) 97 fn 175; JW Wallace, *The Reporters Arranged and Characterized with Incidental Remarks* (4th edn, Soule and Bugbee 1882) 122.

¹²⁴ Abbott (n 3) 243.

¹²⁵ Wilfrid R Prest, 'Moore, Sir Francis' [2008] Oxford Dictionary of National Biography <<https://doi.org/10.1093/ref:odnb/19107>> accessed 22 March 2019.

¹²⁶ He is credited with inventing the device of the lease and release: *ibid*.

¹²⁷ *ibid*.

¹²⁸ In 1603, Egerton was created Baron Ellesmere: Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press 1977) 35. For the avoidance of confusion, he will be referred to as Egerton throughout this thesis.

¹²⁹ *ibid* 13.

¹³⁰ *ibid* 28.

¹³¹ *ibid* 29.

¹³² *ibid*.

¹³³ *ibid* 35.

James I's constitutional claims. As a result, and because of jurisdictional disputes between the common law courts and the Chancery, Egerton frequently clashed with Coke.¹³⁴ While Egerton did not publish law reports, this thesis makes use of his draft arguments, which are found amongst a bundle of Egerton's legal manuscripts in the Huntington Library.¹³⁵ Egerton has only dated some of these arguments: those dated fall between Hilary term 1577¹³⁶ and Trinity term 1590.¹³⁷ Where Egerton has noted the court in which the case was heard, it is most often the King's Bench. Like his rival, Coke, Egerton had a strong interest in the law of interpretation. His commonplace books included two copies of the first English treatise on legal interpretation, *A Discourse upon the Exposition & Understandinge of Statutes*.¹³⁸ This was attributed to Egerton himself by T. F. T. Plucknett,¹³⁹ although Baker has recently identified the author as William Fleetwood.¹⁴⁰ Nonetheless, it was clearly valued highly by Egerton, and, some years after copying the original, he wrote an abbreviated and updated version.¹⁴¹ His printed books are also filled with marginal notes on interpretation.¹⁴² Of Egerton's draft arguments, seven cases involved the interpretation of deeds; six, statutes; three, wills; and three, letters patent. The relatively high incidence of cases involving statutes and patents can probably be explained by Egerton's role as Solicitor-General during the 1580s. Perhaps the most idiosyncratic feature of Egerton's approach to interpretation was his frequent citation of theologians, philosophers, and lawyers of the *ius commune*. It is clear that, for Egerton, legal interpretation could not be seen in isolation from the interpretation of all other kinds of document.

Although the writings of these five men will dominate this thesis, they were by no means the only reporters to deal with issues of construction. Material from the reports attributed to Anderson, Coventry, George Croke, John Godbolt, John Goulesborough, Henry Hobart, William Leonard, Thomas Owen, John Popham and John Savile will also be used.

¹³⁴ Allen D Boyer (ed), *Law, Liberty and Parliament: Selected Essays on the Writings of Sir Edward Coke* (Liberty Fund 2004) ix, 12, 275, 298.

¹³⁵ Hunt MS El 482.

¹³⁶ *Marburye v Wyrrell* (1577) Hunt MS El 482 f64.

¹³⁷ *Wade v Prestall* (1590) Hunt MS El 482 f284.

¹³⁸ Hunt MS El 496; Hunt MS El 2565.

¹³⁹ TFF Plucknett, 'Ellesmere on Statutes' (1944) 60 *Law Quarterly Review* 242, 244.

¹⁴⁰ JH Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge University Press 2017) 232–7.

¹⁴¹ Thorne (n 4) 97–99.

¹⁴² See, for example, *Magna Charta Cum Statutis Quae Antiqua Vocantur* (Richard Tottell 1556) Hunt RB 59487; as well as Hunt RB 59643 and Hunt RB 61003, both compilations of Year Books.

The contemporary treatise literature will also be examined. In their treatises, lawyers sought to explain and reflect on the principles laid down in the case law. Treatises therefore provide a useful insight into lawyers' understanding of the law of interpretation. There were no treatises written on the interpretation of private documents in our period. However, issues of interpretation are touched on in a number of more general works. These include books of drafting precedents;¹⁴³ introductory texts for students;¹⁴⁴ and works of legal theory¹⁴⁵ and comparative law.¹⁴⁶ Some important figures in our period, notably Coke and Bacon, would later write treatises dealing with interpretive issues.¹⁴⁷ Although strictly falling outside our period, these will be used in order to shed light on their authors' views about interpretation. Finally, some later treatises will also be used to confirm points from the case law of our period.¹⁴⁸ Questions of interpretation also arose in contemporary moots and readings at the Inns of Court. For reasons of space, however, these have not been studied in detail.

1.3. Summary

To discuss interpretation in this period is inevitably somewhat anachronistic. Common lawyers were only beginning to use the terminology of interpretation.¹⁴⁹ In the Year Books

¹⁴³ Thomas Phayer, *A New Boke of Presidentes* (Edward Whytchurche 1543); William West, *The First Part of Symboleography* (Thomas Wight and Bonham Norton 1598); William West, *The Second Part of Symboleography* (Thomas Wight 1601).

¹⁴⁴ John Perkins, *A Verie Profitable Booke* (Richard Tottell 1555); Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 103). See also two institutional works: Henry Finch, *Nomotechnia* (Societie of Stationers 1613) and John Cowell, *The Institutes of the Lawes of England, Digested into the Method of the Civill or Imperiall Institutions* (Thomas Roycroft 1651), first published in Latin in 1605.

¹⁴⁵ Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton eds, Selden Society 1974), first published in 1528, 1530 and 1531/2; Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, Yale University Press 1953), composed in the late sixteenth century.

¹⁴⁶ William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1601); William Fulbecke, *The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1602).

¹⁴⁷ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628); James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 327-87. Coke also discussed interpretation in the prefaces to the various volumes of his reports.

¹⁴⁸ For example, William Sheppard, *The Touch-Stone of Common Assurances* (M Lee, M Walbancke, D Pakeman and G Bedell 1651); William Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (Lee, Pakeman et al 1656).

¹⁴⁹ Thorne (n 4) 3.

period, they spoke most frequently of understanding or taking a document,¹⁵⁰ and occasionally of adjudging¹⁵¹ or construing it.¹⁵² Plowden used all of these terms, but also spoke of expounding¹⁵³ and interpreting¹⁵⁴ an instrument. At the end of the sixteenth century, Fulbecke discussed understanding,¹⁵⁵ taking,¹⁵⁶ and interpreting¹⁵⁷ legal texts. In this thesis, interpretation is taken to cover all of these processes.¹⁵⁸ In a broad sense, it refers to the ascertainment of the meaning of a document, and of its legal effect.¹⁵⁹ Interpretation should, however, be distinguished from the application of rules of substantive law.¹⁶⁰ Principles of interpretation are guides to the meaning of a document, while rules of law override the search for meaning and compel the realisation of a particular outcome.¹⁶¹ The result in *Shelley's Case* (1581), for example, may have been arrived at through a process of interpretation,¹⁶² but the 'rule in *Shelley's Case*' soon ossified into a substantive rule of law.¹⁶³ Such rules are better suited to a discussion of substantive land law than of legal interpretation.

This thesis will argue that common lawyers of the sixteenth and early seventeenth centuries took a coherent and sophisticated approach to the interpretation of private documents. The argument will proceed as follows. In chapter two, we will examine the tools used by common

¹⁵⁰ See, for example, (1442) YB Mich 21 Hen VI pl 16, f6a-7b, f7a; (1469) YB Pas 9 Edw IV pl 13, f3b-4a, f4a.

¹⁵¹ See, for example, (1345) YB Pas 19 Edw III pl 17, RS 43-47, 45; (1460) YB Mich 39 Hen VI pl 15, f9a-12a, f10a.

¹⁵² See, for example, (1456) YB Mich 35 Hen VI pl 25, f15b-17b, f17b; (1506) YB Pas 21 Hen VII pl 15, f23b-24b, f24a.

¹⁵³ See, for example, *Browning v Beston* (1555) Plow 131v, 137; *Chapman v Dalton* (1565) Plow 284, 288; *Newis et Ux v Lark and Hunt* (n 51) 412.

¹⁵⁴ See, for example, *Throckmerton v Tracy* (n 68) 153, 161; *Newis et Ux v Lark and Hunt* (n 51) 413.

¹⁵⁵ Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 103) 29v.

¹⁵⁶ *ibid* 30.

¹⁵⁷ *ibid* 33v, 34v.

¹⁵⁸ In modern law, interpretation and construction are sometimes considered to be separate processes: E Allan Farnsworth, "'Meaning" in the Law of Contract' (1967) 76 *Yale Law Journal* 939, 939-40. In this thesis, however, the two will be treated as synonymous.

¹⁵⁹ Compare McMeel (n 37) 4; Lewison (n 37) 28.

¹⁶⁰ Lewison (n 37) 119.

¹⁶¹ For example, the maxim '*cujus est solum, ejus est usque ad caelum*' [whose is the soil, it is his up to the sky] was classed by Sheppard as a rule for expounding deeds, but seems rather to be a rule of property law: Sheppard, *The Touch-Stone of Common Assurances* (n 148) 90.

¹⁶² *Shelley's Case* (n 52). See 6.4. below

¹⁶³ AWB Simpson, *Leading Cases in the Common Law* (Oxford University Press 1995) 40.

lawyers to identify the meaning, or signification, of a document's words. They largely relied on the rules of grammar to do so, having recourse to dictionaries and to experts in grammar. They also referred to common law texts as sources of linguistic meaning, and to previous cases in which words had been expounded. However, lawyers were well aware that a word could have more than one meaning. Where the meaning of the words was unclear, the intentions of the writer would have to be considered.

Chapter three will explore the balance struck by lawyers between interpreting a document according to the 'proper signification' of its words and interpreting it according to the writer's presumed intentions. It will be argued, firstly, that this balance varied depending on the kind of document at issue. When lawyers were interpreting a deed, they placed more weight on the meaning of the words than they did when interpreting a will. The balance also varied depending on the part of the document at issue: for example, more weight was placed on the words of a condition than on the words of other terms in a deed. Secondly, it will be argued that this balance shifted over time. In the mid-sixteenth century, the writer's intentions were generally agreed to be paramount, even in the interpretation of a deed. However, by the end of the century, lawyers were more likely to prioritise the meaning of the words, even when interpreting a will.

Chapter four interrogates the nature of the intentions that the courts were seeking. It investigates the time at which the relevant intentions must have been formed, and the parties whose intentions were relevant to the interpretation of the document. It concludes that there was a fundamental difference between the intentions that were used to interpret wills and those used to interpret deeds. For wills, only the testator's intention was taken into account. For deeds, however, the court generally considered the intentions of all of the parties to the deed, even if its terms were made on behalf of only one of them.

In chapter five, we ask how the courts identified these intentions. When interpreting a will, the courts relied heavily on the testator's own declarations of his intentions; on the context in which the will had been made; and on the general presumption that he had intended his will to be valid. Although they took it for granted that a testator was a reasonable person, this did not provide much assistance in identifying his intentions. When interpreting a deed, however, the courts made greater use of reason to identify the intentions of the parties. It will be argued that this was because interpreting a deed involved considering the intentions of more than one party. This meant that the courts were able to construct a notional common intention for the parties, based on presumptions about what reasonable parties would have intended their document to mean.

Chapter six further explores the role played by reason in the process of interpretation. Reason was both a means of identifying the parties' intentions and a substantive value in its own right. This chapter argues that the role of reason changed throughout our period. In the mid-sixteenth century, lawyers made broad appeals to *a priori* reason when interpreting documents. By the end of the century, however, they were increasingly disinclined to do so. Instead, they preferred to rely on authority to establish what the reason of the law required. They also made greater use of interpretive maxims to explain the precise requirements of reason. This chapter includes case studies of two popular maxims of interpretation, which illustrate some of these points further.

Finally, in chapter seven, we will take stock of wider legal changes in this period, and their influence on the developing law of interpretation. It will be argued that lawyers were becoming more conscious of their own active role in the interpretive process. Simultaneously, they were growing anxious about the possibility of misinterpreting legal documents. During our period, litigation rates had increased, legal texts had proliferated, and new kinds of legal instrument had emerged. The law of interpretation became a focal point for concerns about all of these developments. By the end of our period, lawyers were increasingly worried about legal interpretation, fearing that it created uncertainty and could be manipulated to destabilise the whole common law.

Throughout this thesis, then, it will be argued that lawyers' attitudes to interpretation underwent a significant shift during the second half of the sixteenth century. A number of closely-related developments will be identified. In chapter three, we will see that lawyers became increasingly reluctant to prioritise the intentions of the writer over the proper signification of the words he had used. In chapter six, we will examine the courts' growing preference to rely on previously-judged cases or rules and maxims for guidance on interpretation. And in chapter seven, we will identify a new recognition that an interpreter could impose his own values on a document, creating meanings that its writer might not have intended. All of these changes formed part of the same shift, reflecting lawyers' increased anxiety about the law and legal documents.

In the remainder of this introductory chapter, we will set out some background for the main part of the thesis. Some fundamental features of deeds and wills will be identified, as will the uses to which they could be put and the contexts in which they might fall to be interpreted by the common law courts.

1.4. Deeds: introductory remarks

A deed was a formal written document, which had been sealed by its maker or makers and delivered to a beneficiary.¹⁶⁴ As Coke put it, there were ‘three things of the essence and substance of a deed, that is to say, writing in paper or parchment, sealing and delivery.’¹⁶⁵ Until the late twelfth century, there had been various ways of authenticating a deed, but it was then established that only sealing could turn a mere ‘writing’ into a deed.¹⁶⁶ Baker describes deeds as ‘defined partly by their physical characteristics.’¹⁶⁷ If a document did not have a seal, it no longer constituted a deed; indeed, one common means of cancelling a deed was to remove the seal.¹⁶⁸ It was also vital that the deed be written on paper or parchment. Coke explained that this was because ‘the writing upon them can be least vitiated, altered or corrupted.’¹⁶⁹

A deed had a special status as evidence at common law: it could not be contradicted by a parol averment.¹⁷⁰ In *Waberley v Cockerel* (1541), for example, Edmond Cockerel and Henry Huttost had acknowledged their indebtedness to John Waberley in a deed. Waberley brought an action of debt against Cockerel, who pleaded that the debt had already been fully paid; that the deed had been returned to him as an acquittance; and that Waberley had stolen it back from him.¹⁷¹ Sjs Stamford and Bromley argued that this was irrelevant. It was a ‘maxim in law’ that a deed ‘cannot be avoided and answered by naked matter, but it must be by matter of as high a nature as the obligation is,’ that is, by another deed.¹⁷² As they explained,

although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law: for if matter in writing may be so easily defeated, and avoided by such

¹⁶⁴ JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 8.

¹⁶⁵ *Goddard’s Case* (1584) 2 Co Rep 4b, 5a.

¹⁶⁶ Kaye (n 164) 14. See also Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (n 148) 401.

¹⁶⁷ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 822.

¹⁶⁸ *ibid*; see, for example, *Peeres v Bishop* (1555) Dyer 112a.

¹⁶⁹ Coke (n 147) 35v.

¹⁷⁰ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 96.

¹⁷¹ *Waberley v Cockerel* (1541) Dyer 51a, 51a.

¹⁷² *ibid*.

surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact.¹⁷³

A deed, then, could only be challenged by impugning its status as a deed. Since a deed took effect on its delivery,¹⁷⁴ the defendant could claim that the deed had not been delivered to the plaintiff, or had been delivered as an escrow that had not yet taken effect.¹⁷⁵ The defendant could also allege that the deed had been altered since it was made,¹⁷⁶ or that he was illiterate, and its contents had been misrepresented to him.¹⁷⁷ A deed obtained by duress was voidable.¹⁷⁸

All parties to a deed were required to have sufficient capacity to contract.¹⁷⁹ Corporations could make deeds.¹⁸⁰ Prior to the dissolution of the monasteries, there had been complex rules as to when monks could enter into transactions, but these were becoming otiose in our period.¹⁸¹ The deed of an infant, a person under 21 years old, was either void or voidable, unless it was made to provide for necessaries.¹⁸² A deed was voidable if it was made by a party who was *non compos mentis*, but he would be prohibited from stultifying himself by pleading his own disability to avoid it.¹⁸³

¹⁷³ *ibid.*

¹⁷⁴ Kaye (n 164) 13. See 4.2.2. below.

¹⁷⁵ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 100; Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 829. See, for example, *Morice v Leigh* (1537) Dyer 34b.

¹⁷⁶ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 830. See, for example, *Whelpdale's Case* (1604) 5 Co Rep 118a, 119b.

¹⁷⁷ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 98; Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 830. See, for example, *Thoroughgood's Case* (1582) 2 Co Rep 9a, 9b.

¹⁷⁸ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 99; Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 829. See, for example, *Thoroughgood's Case* (n 177) 9b.

¹⁷⁹ Coke (n 147) 35v.

¹⁸⁰ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 550–1; West, *The First Part of Symboleography* (n 143) s 46.

¹⁸¹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 608–10.

¹⁸² Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 540–4; West, *The First Part of Symboleography* (n 143) s 4; Perkins (n 144) 3v–5.

¹⁸³ *Beverley's Case* (1603) 4 Co Rep 123b, 123b; Perkins (n 144) 5. This point was controversial: see *Beverley's Case* 125b–128a.

Unmarried women had the same legal capacity as men,¹⁸⁴ but a married woman was subject to the laws of coverture and was subsumed into her husband's legal personality.¹⁸⁵ A *feme covert* had no chattels, and no right to dispose of her real property.¹⁸⁶ If she purported to do so by deed, the deed would be void.¹⁸⁷ Furthermore, a married woman had no independent will of her own.¹⁸⁸ As Spelman J put it in *Jordan's Case* (1535), 'a *feme covert* does not have any will, but the will of the husband is her will.'¹⁸⁹ She therefore had no capacity to make contracts of her own;¹⁹⁰ if she made a bond, for example, it would be void.¹⁹¹ With her husband's consent, she could make informal contracts on his behalf, since 'by this agreement it is the grant or sale of the husband' and not the wife.¹⁹² It is possible that married women were also involved in negotiating deeds on behalf of their husbands. However, as Simpson points out, the deed would simply name the husband as principal and the wife's involvement would leave no trace.¹⁹³

A significant section of the population was illiterate in our period. David Cressy, for example, estimates that, in the 1640s, around 70% of adult men living in rural England were illiterate, though literacy levels seem to have been higher in towns.¹⁹⁴ While the gentry and clergy were almost universally literate, husbandmen, labourers and women were 'massively illiterate.'¹⁹⁵ Few parties would be able to write, or even read, their own deeds. Most deeds would therefore have been drafted by professionals. Scriveners were professional writers who could

¹⁸⁴ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 617; Craig Muldrew, "'A Mutual Assent of Her Mind'?" Women, Debt, Litigation and Contract in Early Modern England' (2003) 55 *History Workshop Journal* 47, 49; West, *The First Part of Symboleography* (n 143) s 4.

¹⁸⁵ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 618.

¹⁸⁶ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 545.

¹⁸⁷ Kaye (n 164) 185. Her land could only be alienated by fine: *ibid* 186; see *Beckwith's Case* (1589) 2 Co Rep 56b.

¹⁸⁸ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 98, 546–7.

¹⁸⁹ *Jordan's Case* (1535) YB Mich 27 Hen VIII pl 3, f24a-26a, f25a.

¹⁹⁰ (1505) YB Mich 21 Hen VII pl 64, f40b, f40b.

¹⁹¹ (1413) YB Hil 14 Hen IV pl 39, f30b-31a, f31a. See also *Clarel v Aldewyncl* (1330) YB Hil 4 Edw III pl 231, 98 SS 568-570.

¹⁹² (1505) YB Mich 21 Hen VII pl 64, f40b, f40b. See Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 547–50.

¹⁹³ *ibid* 552.

¹⁹⁴ David Cressy, *Literacy and the Social Order: Reading and Writing in Tudor and Stuart England* (Cambridge University Press 1980) 72.

¹⁹⁵ *ibid* 106.

draw up straightforward contracts and conveyances¹⁹⁶ as well as non-legal documents like letters.¹⁹⁷ Members of the legal profession were also involved in drafting deeds.¹⁹⁸ William West, for example, who wrote ‘the first systematic treatise’ on the drafting of legal instruments, was a Yorkshire attorney.¹⁹⁹ There was a significant overlap between the professions of scrivener and attorney, and some men practised as both.²⁰⁰

Lawyers often praised deeds for establishing certainty about parties’ legal rights. Reporting a judgment of Popham CJ, for example, Coke contrasted ‘the certain truth of the agreement of the parties,’ as preserved in their deed, with the ‘dangerous’ and ‘uncertain testimony of slippery memory.’²⁰¹ Elsewhere, Coke observed that it was better to settle an important matter in a deed, rather than to ‘leave it to the sliding and slippery memory of men, which would be lost in a short time.’²⁰² Some lawyers went even further. In the preface to his book of precedents, Thomas Phayer explained that ‘writings of record’ were of ‘great utility and assurance’ to parties,

for by such evidence... are matters in the law continually decided, truth is made open and falsehood detected, right advanced and wrong suppressed, matters of doubt are put out of question, and by such evidence is justice and equity to every man yielded, suit and contention avoided, unity and concord induced, virtuous and politic order observed, finally love and amity increaseth, with all kind of goodness in quiet, which is the chief part of felicity or happiness in this life.²⁰³

‘No man,’ he continued,

can be sure of his own livelihood without help of evidence, which as a trusty anchor, holdeth the right of every man’s possessions safely and surely against all

¹⁹⁶ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 442.

¹⁹⁷ HC Gutteridge, ‘The Origin and Historical Development of the Profession of Notaries Public in England’ in GG Alexander, *Cambridge Legal Essays* (W Heffer & Sons 1926) 128.

¹⁹⁸ Brooks, Helmholz and Stein (n 21) 82, 94.

¹⁹⁹ CW Brooks, *Pettyfoggers and Vipers of the Commonwealth: The ‘Lower Branch’ of the Legal Profession in Early Modern England* (Cambridge University Press 1986) 44.

²⁰⁰ *ibid.*

²⁰¹ *The Countess of Rutland’s Case* (1604) 5 Co Rep 25b, 26a.

²⁰² *Dowman’s Case* (1586) 9 Co Rep 7b, 9a. Compare, in the context of law reporting, *The Reports of Sir Edward Coke*, vol I (Joseph Butterworth and Son 1826) 1 Co Rep xxv; Plowden (n 78) iii.

²⁰³ Phayer (n 143) Ai v.

troubulous and stormy tempests of injuries, not of men only but of time also, the consumer of all.²⁰⁴

There were two kinds of deed: deeds poll and indentures. A deed poll was a single deed, sealed only by its maker and delivered to the beneficiary.²⁰⁵ An indenture was a deed made in duplicate. Some indentures took the same form as a deed poll, but were made in two copies, one of which was sealed by each party. Other indentures were made and sealed by both parties.²⁰⁶ If a transaction involved reciprocal grants, the parties could use either an indenture or two deeds poll, one made by each party.²⁰⁷ The differences between deeds poll and indentures will be discussed further in chapter four.²⁰⁸

A number of situations might call for the making of a deed. Firstly, deeds were commonly used for conveyancing. Although land could be transferred by livery of seisin without any accompanying documents, it was still useful to record the terms of the transaction in a deed,²⁰⁹ especially in case of subsequent litigation.²¹⁰ Indeed, the deed seems to have been regarded as the main component of the transaction since the early thirteenth century, with livery of seisin increasingly seen as a mere technicality.²¹¹ After the Statute of Uses permitted land to be transferred without livery, deeds took on an even greater importance.²¹² Other interests in land had never been susceptible to livery of seisin: for example, incorporeal interests such as advowsons or reversions. Such interests could only be transferred by making a deed of grant.²¹³ Standard forms for many kinds of conveyance had emerged by the mid-thirteenth century, although there was a significant amount of variation.²¹⁴ Common terms included the premises, which identified the property and contained words of grant;²¹⁵ the *habendum*,

²⁰⁴ *ibid* Aii v.

²⁰⁵ Kaye (n 164) 8.

²⁰⁶ *ibid*.

²⁰⁷ *ibid* 10.

²⁰⁸ See 4.2.1. below.

²⁰⁹ Kaye (n 164) 2; Simpson, *A History of the Land Law* (n 54) 120.

²¹⁰ Sir William Holdsworth, *A History of English Law*, vol 3 (5th edn, Methuen 1966) 225.

²¹¹ Kaye (n 164) 61; Sir William Holdsworth, *A History of English Law*, vol 7 (2nd edn, Methuen 1966) 355.

²¹² Holdsworth, *A History of English Law* (n 211) 354.

²¹³ Kaye (n 164) 2; Simpson, *A History of the Land Law* (n 54) 121.

²¹⁴ Kaye (n 164) 4, 255.

²¹⁵ *ibid* 64.

specifying the estate granted;²¹⁶ the *tenendum*, indicating the tenure;²¹⁷ and the *reddendum*, providing for any services or rent.²¹⁸ These might be accompanied by a variety of conditions and covenants, as well as a clause of warranty.²¹⁹

A deed might also be used if the parties wished to make a promise or agreement that was enforceable at common law. Deeds had long been used in mercantile transactions,²²⁰ but, as Baker observes, ‘the variety of subject-matter was limitless.’²²¹ Deeds were used to record contracts to buy and sell goods, perform services, hire apprentices, instruct in trades, charter ships, and even marry.²²² This was because a deed was a prerequisite for the two main ‘contract’ actions in the common law courts.²²³ First was the writ of covenant, which could be used to enforce a promise made by the defendant to the plaintiff.²²⁴ Since the fourteenth century, this writ had only been available at common law where the plaintiff could produce a deed as evidence of the promise.²²⁵ A covenant was not considered to convey any immediately enforceable rights to the promisee. Rather, it made some future conduct wrongful which would otherwise have been lawful.²²⁶ While a deed was not needed to create a lease for years, such leases were often made by deed so that the parties would be able to sue each other in covenant.²²⁷

²¹⁶ *ibid* 70.

²¹⁷ *ibid* 79.

²¹⁸ *ibid* 86.

²¹⁹ Holdsworth, *A History of English Law* (n 210) 229.

²²⁰ MM Postan, *Medieval Trade and Finance* (Cambridge University Press 1973) 29–34.

²²¹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 819.

²²² *ibid* 820.

²²³ The sixteenth-century common law courts would also enforce contracts that had not been made by deed. They had begun to allow plaintiffs to claim for the non-performance of an informal promise using the action on the case for *assumpsit*: see generally Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 199–315; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 126–151; Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 839–874. It remained the case, however, that few such cases were brought in our period. In Trinity term of 1572, for example, the Common Pleas dealt with 503 contested actions of debt sur obligation, and only three of *assumpsit*: Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 125.

²²⁴ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 9.

²²⁵ *ibid* 10–13; see generally JH Baker, ‘Covenants and the Law of Proof 1290-1321’ in JH Baker, *Collected Papers on English Legal History*, vol 3 (Cambridge University Press 2013).

²²⁶ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 19; Ibbetson, ‘Fault and Absolute Liability in Pre-Modern Contract Law’ (n 36) 2.

²²⁷ Holdsworth, *A History of English Law* (n 210) 249.

Since the late fourteenth century, however, the action of covenant had been relatively little used.²²⁸ Instead, the vast majority of contract actions were actions of debt sur obligation.²²⁹ The writ of debt was available for the recovery of a definite sum of money,²³⁰ and debt sur obligation was brought on a deed in which the defendant had acknowledged his debt.²³¹ Such a deed was known as a bond or obligation.²³² The popularity of debt sur obligation was due to the prevalence of the conditioned bond as a means of contracting. In a simple covenant, the defendant would, for example, promise to repair the plaintiff's roof. In a conditioned bond, the defendant would acknowledge his indebtedness to the plaintiff if he had not repaired the roof by a certain day. The condition would be written in a separate part of the instrument, usually on the back.²³³ It did not have to be sealed.²³⁴ Using a conditioned bond gave the plaintiff greater security, as it simplified the process of recovering from the defendant if he failed to perform.²³⁵ It also guaranteed him a fixed sum of money, rather than damages as assessed by the jury.²³⁶ By 1606, writs of debt accounted for 80% of the business of the Common Pleas and 46% of the business of the King's Bench.²³⁷ Nine out of ten such writs were brought on an obligation.²³⁸

A bond was conceptualised somewhat differently to a deed that evidenced a covenant. A bond was not evidentiary, but dispositive. It was not just proof of the defendant's obligation: it was the obligation.²³⁹ Furthermore, unlike a covenant, a bond did not just entitle the plaintiff to some future action by the defendant. Rather, it granted him an immediate right to the debt.²⁴⁰ This fragmentation of contract actions meant that lawyers had little opportunity to develop general theories on the nature of contractual terms.²⁴¹

²²⁸ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 28.

²²⁹ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 88.

²³⁰ *ibid* 61.

²³¹ *ibid* 88.

²³² *ibid*.

²³³ *ibid* 91.

²³⁴ *ibid* 92.

²³⁵ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 29.

²³⁶ *ibid* 30.

²³⁷ Brooks (n 199) 69.

²³⁸ *ibid* 67.

²³⁹ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 95.

²⁴⁰ *ibid* 80; Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (n 36) 1.

²⁴¹ Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 36.

It might be expected, then, that bonds would be treated differently to other kinds of deed when it came to questions of interpretation. This does not, however, seem to have been the case. Lawyers frequently used cases on the construction of bonds as authority for their approach to the construction of other kinds of deed, without remarking on the differences between them.²⁴² In *Saunders v Stanfourde*, for example, Egerton examined the meaning of a condition in a lease. He referred to a previous case involving a similar condition in an obligation,²⁴³ observing that ‘this case greatly resembles this our case.’²⁴⁴ Similarly, in *The Dean and Chapter of Chester’s Case*, he gave examples of both bonds and deeds of feoffment as examples of the courts’ approach to the interpretation of deeds.²⁴⁵ The converse was also true. In *Bold v Molineux* (1536), a case involving the construction of a bond, Fitzherbert and Baldwin JJ gave examples of cases involving ordinary covenants and leases²⁴⁶ as well as conditioned bonds.²⁴⁷ In fact, at no point in our period did the courts distinguish between the general principles for the construction of bonds and those for the construction of other kinds of deed.²⁴⁸ In this thesis, therefore, all kinds of deed will generally be examined together.

Cases brought on the actions of covenant or debt sur obligation were relatively likely to raise points of construction, since they involved few principles of substantive law.²⁴⁹ As we have seen, a defendant could attempt to impugn the status of the purported deed. Aside from this, his only real option was to challenge the plaintiff’s interpretation of the deed and argue that he had not breached his promise, properly understood.²⁵⁰ However, it would be misleading to focus too closely on covenant and debt when examining the interpretation of deeds. Questions of a deed’s meaning did not arise only in contract actions. Indeed, while cases of debt sur

²⁴² In contrast, when comparing the interpretation of deeds and wills, it was common to add a disclaimer. See 3.3.1. below.

²⁴³ *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f75.

²⁴⁴ *ibid* f75v.

²⁴⁵ *The Dean and Chapter of Chester’s Case* (n 40) f38v, f40v.

²⁴⁶ *Bold v Molineux* (1536) Dyer 14b, 18a.

²⁴⁷ *ibid* 17b.

²⁴⁸ William Sheppard wrote that, while there were some specific rules for different kinds of deed or term, others were ‘universally observed’ for ‘all parts of all kinds of deeds’: Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (n 148) 415.

²⁴⁹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 824.

²⁵⁰ *ibid*.

obligation were extremely common, they did not usually raise points of general principle, and were rarely reported.²⁵¹

Much more interesting to reporters were cases involving conveyances of land. Conveyances often included ambiguous or conflicting terms,²⁵² the interpretation of which could prove crucial for establishing title to the land. Titles were often tried in actions of trespass *quare clausum fregit*, and, from the sixteenth century, ejectment.²⁵³ Thus, of the eight cases in Plowden's *Commentaries* that turned on the construction of a deed, only one was brought on an action of covenant,²⁵⁴ and none were cases of debt. In contrast, four were brought on writs of trespass²⁵⁵ and one each on writs of ejectment,²⁵⁶ replevin²⁵⁷ and second deliverance.²⁵⁸ In Coke's reports, cases involving the interpretation of deeds were brought on a variety of actions, including trespass, replevin, ejectment, second deliverance, novel disseisin, covenant and debt.²⁵⁹

In a dispute over the terms of a lease, the reversioner's first course of action would generally be to exercise his right to distrain or re-enter. This would then provoke a lawsuit on a real action to determine whether or not the lessee had a good title under the lease. *Colthirst v Bejushin* was a typical case. Matthias Colthirst brought an action of trespass against Peter Bejushin. Bejushin pleaded that he had initially been in possession of the land, but had been put out by Colthirst. Bejushin had then re-entered on Colthirst, who sued.²⁶⁰ It ultimately emerged that the question was whether or not Bejushin had complied with the terms of his

²⁵¹ *ibid* 391.

²⁵² Kaye (n 164) 19–21.

²⁵³ Simpson, *A History of the Land Law* (n 54) 45, 145–7.

²⁵⁴ *Chapman v Dalton* (n 153).

²⁵⁵ *Colthirst v Bejushin* (n 50); *Kidwelly v Brand* (1551) Plow 69; *Browning v Beston* (n 153); *Hill v Grange* (1556) Plow 164.

²⁵⁶ *Wrotesley v Adams* (1559) Plow 187.

²⁵⁷ *Say v Smith* (1564) Plow 269.

²⁵⁸ *Throckmerton v Tracy* (n 68).

²⁵⁹ A case might be brought in debt where a lessor had made a bond obliging himself to perform all the covenants in a separate indenture. When sued on the bond, the lessor would plead performance of the covenants, thus raising the question of the indenture's, rather than the bond's, meaning. See, for example, *Nokes's Case* (1599) 4 Co Rep 80b.

²⁶⁰ *Colthirst v Bejushin* (n 50) 22.

lease from the Prior of Bath.²⁶¹ If he had breached a condition of his lease, Colthirst would have been entitled to the land under another lease made by the Prior.²⁶²

All eight of Plowden's cases on the interpretation of a deed concerned a lease. Plowden was writing at a time when disputes over leases were especially likely to be litigated. Before 1536, about a third of the land in England was held by religious houses,²⁶³ who were accordingly responsible for making many leases. On the dissolution of the monasteries, the freehold of this land was surrendered to the King and redistributed. The dissolution statutes, however, included provisions saving the rights of the monasteries' lessees. The result was that the King's grantees found their land encumbered by existing leases.²⁶⁴ The statutes also gave these new freeholders the right to enforce conditions and covenants contained in the leases,²⁶⁵ and some did so with alacrity. Five of Plowden's cases on the interpretation of deeds concerned leases that were made by a monastic institution before its dissolution.²⁶⁶ In four of these, the plaintiff was the new freeholder, or a lessee of the new freeholder.²⁶⁷ It is possible that the religious conflicts of the day also increased the tension between these new landlords and their tenants.²⁶⁸

Plowden's focus on leases, then, may have been a product of his historical moment. In Dyer's reports too, we find almost twice as many cases involving the interpretation of leases as those involving any other kind of deed, including other conveyances of land as well as bonds. Deeds relating to land were also well-represented in Coke's reports. Coke's focus was not solely on leases, however: he was also interested in feoffments to use. He reported about half a dozen cases involving the construction of a bond, and about a dozen each on leases and limitations of uses. In Egerton's papers from the 1580s, a similar pattern can be discerned. Of his draft arguments relating to the interpretation of deeds, four involved leases and four feoffments to use.

²⁶¹ *ibid* 23.

²⁶² *ibid* 22.

²⁶³ Brooks (n 199) 98.

²⁶⁴ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 711.

²⁶⁵ *ibid* 712.

²⁶⁶ *Colthirst v Bejushin* (n 50); *Kidwelly v Brand* (n 255); *Throckmerton v Tracy* (n 68); *Hill v Grange* (n 255); *Wrotlesley v Adams* (n 256).

²⁶⁷ *Kidwelly v Brand* (n 255); *Throckmerton v Tracy* (n 68); *Hill v Grange* (n 255); *Wrotlesley v Adams* (n 256).

²⁶⁸ In *Throckmerton v Tracy* (n 68), for example, the lessor was a member of a prominent Catholic family, and the new freeholder was a Protestant theologian and pamphleteer.

The interpretation of uses was certainly causing some headaches for the sixteenth-century common law courts. Initially, a feoffment to use had carried no legal obligations, indicating only a personal trust in the feoffee.²⁶⁹ When the Chancery began to enforce uses, the cestui que use remained a stranger to the land at common law. However, a 1484 statute had granted the cestui que use the power to make effective feoffments of the legal estate,²⁷⁰ with the result that the common law courts had gained an extensive jurisdiction over the transfer of uses.²⁷¹ Not everyone, however, regarded the development of uses with equanimity. Because a cestui que use would not die seised of his land, he would be able to escape both the feudal incidents of tenure and the common law rules of inheritance.²⁷² In 1536, Parliament attempted to clamp down on these alleged abuses. The Statute of Uses executed uses, transferring seisin of the land to the cestui que use.²⁷³ However, it did not stamp out the practice of limiting uses entirely. Firstly, some uses fell outside the ambit of the Statute and remained enforceable in Chancery.²⁷⁴ Secondly, settlors continued to limit uses that would be executed by the Statute and dealt with by the common law courts. This was because some devices, ordinarily impermissible at common law, could be created using an executed use.²⁷⁵ Throughout our period, the courts struggled to determine how far the construction of a use could diverge from established common law rules. We will investigate this issue in more detail in chapter three.²⁷⁶

It can be seen, then, that most questions of interpretation arose on conveyances of land, on actions used to try title, while a significant minority arose in cases of debt or covenant. But why were such matters questions for the court in the first place? The meaning of an informal contract, whether made in writing or not,²⁷⁷ was a question of fact and therefore to be decided by the jury.²⁷⁸ We therefore have very little idea how such contracts were interpreted.²⁷⁹ The

²⁶⁹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 654.

²⁷⁰ 1 Ric III c. 1.

²⁷¹ Simpson, *A History of the Land Law* (n 54) 184; JH Baker (ed), *The Reports of John Spelman*, vol 2 (Selden Society 1978) 196; Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 659.

²⁷² Baker, *The Reports of John Spelman* (n 271) 192.

²⁷³ 27 Hen VIII c. 10.

²⁷⁴ These included, for example, a use of a lease, an active use, or a use upon a use: Baker, *An Introduction to English Legal History* (n 44) 290.

²⁷⁵ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 679.

²⁷⁶ See 3.2.5. and 7.3. below

²⁷⁷ A written agreement that lacked a seal was treated in the same way as a purely oral contract: Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 822.

²⁷⁸ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 407; Ibbetson, *A Historical Introduction to the Law of Obligations* (n 36) 84.

meaning of a deed, on the other hand, was a question of law to be determined by the judges. This was the consequence of the common law's rules of pleading. As Simpson explains,

under a system of strict pleading, rules as to interpretation take the form of rules as to what must be pleaded in the way of performance of a [deed], the terms of which must go into a plea. Since objections to the contents of a plea are demurrers and raise an issue of law, this means that the court handles problems of interpretation.²⁸⁰

As we have already mentioned, significant procedural changes took place during the Tudor period.²⁸¹ Until the early sixteenth century, tentative pleading had been common, with serjeants and barristers seeking advice on the effects of their pleas in advance.²⁸² However, judges became increasingly unwilling to assist counsel with their pleas, and discussions of pleading came to be regarded as inferior to judgments.²⁸³ Plowden refused to report 'the sudden speech of the judges upon motion of cases of the serjeants and counsellors at the bar,' but only recorded judgments given 'after great and mature deliberation,' on demurrers or special verdicts.²⁸⁴ During the first half of the sixteenth century, demurrers increased in frequency, as did the number of demurrers leading to a judgment.²⁸⁵

As Simpson suggests, questions of interpretation were often raised on a demurrer. In *Colthirst v Bejushin*, as we saw above, Matthias Colthirst brought an action of trespass against Peter Bejushin.²⁸⁶ Bejushin pleaded that he held a lease of the land for life, on condition that he live there during his term, and that he had lived there continually since entering the land.²⁸⁷ Colthirst demurred, and the parties joined issue on whether Bejushin's plea was sufficient.²⁸⁸

²⁷⁹ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 103. In a small number of cases, the courts were called upon to rule on the meaning of words in an assumpsit: see, for example, *Curriton and Gadbarys Case* (1584) 1 Leo 275; *Bishop v Harecourt* (1590) 1 And 240; *Higginbottom's Case* (1593) 5 Co Rep 19b. See also *Slade v Morley* (1598) BL Add MS 25203 f12, f12.

²⁸⁰ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 103.

²⁸¹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 385.

²⁸² *ibid* 386.

²⁸³ *ibid* 388.

²⁸⁴ Plowden (n 78) v.

²⁸⁵ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 390.

²⁸⁶ *Colthirst v Bejushin* (n 50) 21.

²⁸⁷ *ibid* 22.

²⁸⁸ *ibid*.

Sjt Pollard, for Colthirst, raised the point of construction: Bejushin was required to live on the land throughout his whole term, but he had not shown that he had entered the land as soon as his term commenced.²⁸⁹ Sjt Saunders replied that he was not obliged to do so: the condition only required that he live on the land at some time during his life.²⁹⁰ In order to determine whether Bejushin's plea was good, the judges were required to rule on the meaning of the term in his lease.

One disadvantage of a demurrer was that the party who demurred was required to confess the truth of the facts in the relevant pleading. If his case failed on the point of law, he would have no opportunity to dispute the facts.²⁹¹ Parties therefore began to look for ways to raise questions of law after a trial of the facts before the jury.²⁹² From the mid-sixteenth century, the courts began to allow greater use of special verdicts to achieve this.²⁹³ The jury would set out the facts of the case and the question of law on which their verdict depended.²⁹⁴ This would then be sent to the judges for determination.²⁹⁵ In *The Rector of Chedington's Case* (1598), for example, the jury found that Nicholas Fitzwilliams had leased a rectory to Elizabeth Elderker for 80 years, if she should live so long, and, if she died or alienated the land during the 80 years, remainder to Ralph Elderker on the same proviso, and then to William Elderker and Thomas Elderker.²⁹⁶ All four Elderkers died within the 80 years, and the lease passed from Thomas's administrators to the defendant. Meanwhile, a new rector had been admitted to the rectory, and had leased it to the plaintiff. The plaintiff entered on the defendant, and the defendant re-entered. The jury then enquired of the court whether the defendant's entry was lawful.²⁹⁷ Again, in order to determine this question, the judges were required to interpret the lease and identify whether Thomas had held a good title under it.

Questions of interpretation could also arise on a writ of error, brought by a disappointed party to have the judgment against him reversed.²⁹⁸ Because the court of error could not look

²⁸⁹ *ibid* 23.

²⁹⁰ *ibid* 29.

²⁹¹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 392.

²⁹² *ibid* 393.

²⁹³ *ibid* 400–3.

²⁹⁴ *ibid* 402.

²⁹⁵ Sometimes the special verdict would even identify the intentions of the parties to the deed: see, for example, *Hawes v Wynge* (undated) Hunt MS El 482 f244, f247v, f258v.

²⁹⁶ *The Rector of Chedington's Case* (1598) 1 Co Rep 153a, 153a.

²⁹⁷ *ibid* 153b.

²⁹⁸ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 403–7.

behind the record, this procedure was of limited use before the sixteenth century: only procedural errors were likely to appear on the record.²⁹⁹ However, when a special verdict had been entered, more details of the case would appear, so that points of substance could also be raised by a writ of error.³⁰⁰ Error initially went from the Common Pleas to the King's Bench, and from the King's Bench to Parliament. In 1585, a new Exchequer Chamber was established to hear cases of error from the King's Bench, consisting of the justices of the Common Pleas and the Barons of the Exchequer.³⁰¹ In *Slingsby's Case* (1587), for example, Frances Slingsby and her husband had successfully brought an action of covenant against Roger Beckwith in the King's Bench. Beckwith then brought a writ of error in the Exchequer Chamber, and the judgment of the King's Bench was reversed.³⁰² The Slingsbys had pleaded a covenant made to Frances and three other parties, but the judges of the Exchequer Chamber held that the words of the covenant were joint, rather than several. As a result, Frances could not succeed unless the other covenantees were joined in her action.³⁰³

Questions about the meaning of deeds, then, were of great significance to many people in our period, particularly those with interests in land. Furthermore, procedural changes enabled parties to raise these issues more frequently in court. Parties also had better prospects of receiving clear answers: the courts were becoming more likely to give reasoned judgments, and those judgments carried greater authority.³⁰⁴ It is therefore no surprise that sixteenth-century lawyers were so eager to debate the principles to be used for the construction of deeds.

1.5. Wills: introductory remarks

According to West, a last will was 'the disposition or bestowing of a man's own goods and lands, taking effect after his death.'³⁰⁵ A testament, being 'the principal kind' of will, was 'defined by most men *voluntatis nostrae justa sententia, de eo quod quis post mortem suam fieri velit*' [a will is a lawful expression of our wishes, concerning that which someone wishes to be done

²⁹⁹ Baker, *An Introduction to English Legal History* (n 44) 137.

³⁰⁰ *ibid.*

³⁰¹ *ibid.* Writs of error from the Exchequer Chamber went to Parliament, as did writs from the King's Bench as a court of error. A different Exchequer Chamber heard writs of error from the Exchequer of Pleas.

³⁰² *Slingsby's Case* (1587) 5 Co Rep 18b, 18b.

³⁰³ *ibid.*

³⁰⁴ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 385.

³⁰⁵ West, *The First Part of Symboleography* (n 143) s 633.

after his death].³⁰⁶ This definition was derived from the Digest,³⁰⁷ and was used by common lawyers³⁰⁸ as well as canon lawyers.³⁰⁹

It is perhaps unsurprising that West reached for a civilian definition of a will, since the common law's jurisdiction over wills was relatively recent. Since the twelfth century, the common law rules of inheritance had governed the descent of freehold land.³¹⁰ Thus, except where land was devisable by local custom, only chattels could pass by will.³¹¹ Such wills fell under the jurisdiction of the canon law.³¹² Since the fourteenth century, however, landowners had been exploiting uses to effectively gain the power to devise their land. The cestui que use would simply direct his feoffees to pass the land to a particular person on his death.³¹³ Following the statute of 1484, the devisee would then have the power to dispose of the land itself.³¹⁴ Only in a very technical sense were landowners still unable to devise freehold land.³¹⁵ As we have seen, the Statute of Uses put paid to such devises by use. However, this was extremely unpopular amongst landowners, and lawyers swiftly invented devices to evade it.³¹⁶ In 1540, Parliament backed down. The Statute of Wills granted landowners the power to devise two-thirds of their land held by knight's service, and all of their socage land.³¹⁷

³⁰⁶ *ibid.* 'Last will' and 'testament' were treated as broadly synonymous in the early modern period: RH Helmholz, *The Oxford History of the Laws of England, Vol. I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press 2004) 399. For West, the difference between a will and a testament was that a testament involved the appointment of an executor. The distinction was occasionally made between wills of freehold land and testaments of chattels: Cordelia Beattie, 'Married Women's Wills: Probate, Property, and Piety in Later Medieval England' (2019) 37 *Law and History Review* 29, 31. In this thesis, however, 'will,' 'devise' and 'testament' will be used interchangeably.

³⁰⁷ D.28.1.1; see MC Mirow, 'Readings on Wills in the Inns of Court 1552-1631' (PhD thesis, University of Cambridge 1993) 126.

³⁰⁸ Cowell (n 148) 117.

³⁰⁹ Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* (John Windet 1590) 3v.

³¹⁰ Baker, *An Introduction to English Legal History* (n 44) 266.

³¹¹ Simpson, *A History of the Land Law* (n 54) 62.

³¹² David J Seipp, 'The Reception of Canon Law and Civil Law in the Common Law Courts before 1600' (1993) 13 *Oxford Journal of Legal Studies* 388, 396.

³¹³ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 35) 334.

³¹⁴ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 657.

³¹⁵ Baker, *The Reports of John Spelman* (n 271) 196.

³¹⁶ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 7) 680.

³¹⁷ 32 Hen VIII c. 1, s 1.

The common law, then, acquired responsibility for devises of freehold land, while the ecclesiastical courts retained their jurisdiction over wills of chattels, including leases for terms of years. Sometimes these were separate documents, especially where the testator was a significant landholder.³¹⁸ In other cases, however, they could be separate parts of the same document. The sample wills set out by West in his *Symboleography*, for example, included both devises of the testator's land and bequests of his goods.³¹⁹ In *Pawlet Marquess of Winchester's Case* (1599), the Marquess had made a will devising both his lands and his chattels.³²⁰ It appeared that the Marquess had not been of sane memory at the time, and the King's Bench granted a prohibition to stay proceedings in the ecclesiastical courts. Since 'the will concerning the land, and the testament concerning the goods are mixed together in one will,' the judges thought that the common law ought to determine whether the Marquess had sufficient capacity to make both.³²¹ A common law action might also be brought against a party who had failed to comply with the canon law on a devise, requiring the common law courts to apply the canonists' rules to a will of chattels.³²² As Helmholz observes, the division between land and chattels could be 'quite unstable' in practice.³²³

Common lawyers preferred to keep canon law rules at a certain remove. Since wills of freehold land were made by statutory authority, they were deemed to operate on a different plane to wills of chattels.³²⁴ As a result, readers on wills tended to stolidly ignore the canon law, even where it had rules on issues, such as testamentary capacity, that concerned them both.³²⁵ Similarly, canonists like Henry Swinburne focused on the civil law and avoided references to wills of land.³²⁶ However, as we have seen, common lawyers were prepared to adopt the civilian definition of a will, and some spoke of the new devise of land as part of a

³¹⁸ Holdsworth, *A History of English Law* (n 211) 365.

³¹⁹ See, for example, the will set out at West, *The First Part of Symboleography* (n 143) s 644.

³²⁰ *Pawlet Marquess of Winchester's Case* (1599) 6 Co Rep 23a, 23a.

³²¹ *ibid* 23b.

³²² See, for example, *La Viscountesse Bindon's Case* (1585) Moore 213; *Bewacorne v Cartor* (1589) Moore 272; *Sir Henry Goodiers Case* (1590) 1 Leo 135. See generally St German (n 145) 41–5.

³²³ Helmholz (n 306) 398.

³²⁴ JH Baker, 'Roman Law at the Third University of England' (2002) 55 *Current Legal Problems* 123, 133.

³²⁵ *ibid*.

³²⁶ RH Helmholz, 'Canon Law and English Common Law' (Selden Society 1983) 6. Swinburne dealt briefly, and apologetically, with wills of freehold land: Swinburne (n 309) 69v–90v.

history stretching back to the Twelve Tables.³²⁷ Canon law and common law wills might have had different rules, but they were recognised to be conceptually similar. Indeed, in chapter three, we will see that common lawyers were not above borrowing canonist ideas about the interpretation of wills.³²⁸

Making a will was regarded as an important religious duty. Christians had long been strongly encouraged to leave bequests for pious causes³²⁹ and to arrange the repayment of their debts before death.³³⁰ It had been regarded as sinful not to make a will of chattels,³³¹ and wills of freehold land now took on a similar importance. Testators frequently devised their land to provide for charitable purposes, the care of their families, or the payment of their debts.³³² In the preface to the Statute of Wills, Parliament noted the fear that a testator's chattels might be insufficient to provide for the payment of his debts and the care of his family.³³³ Echoing this statutory language, Fulbecke wrote that the making of wills was 'necessary,' since

without it men cannot effect the good education and bringing up of their children, nor be able of their proper goods, chattels and other moveable substance to discharge their debts, and after their degrees set forth and advance their children and posterity: nor leave their wives such comfortable support as in conscience they ought.³³⁴

Coke warned that it was 'some blemish or touch to a man well esteemed for his wisdom and discretion all his life, to leave a troubled estate behind him amongst his wife, children, or kindred, after his death.'³³⁵

³²⁷ Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (n 146) 34v–35; Baker, 'Roman Law at the Third University of England' (n 324) 139.

³²⁸ See 3.3.1. below.

³²⁹ Michael M Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Pontifical Institute of Mediaeval Studies 1963) 11.

³³⁰ *ibid* 156.

³³¹ Simpson, *A History of the Land Law* (n 54) 62.

³³² Holdsworth, *A History of English Law* (n 211) 371–3.

³³³ 32 Hen. VIII, c. 1, s 1.

³³⁴ Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (n 146) 35.

³³⁵ *The Reports of Sir Edward Coke* (n 26) 10 Co Rep xiv.

Yet despite the importance of wills, they were rarely made in advance. It was a popular superstition that making a will would hasten one's death.³³⁶ As a result, most testators did not make their wills until they were on their deathbeds,³³⁷ unless they had a particularly pressing reason to do so, such as embarking on foreign travel.³³⁸ A will was required to be in writing by the Statute,³³⁹ but very few testators wrote their own wills. Most were either illiterate, or incapacitated by their final illness and no longer able to write.³⁴⁰ Generally, a scribe would be called, either a professional notary or member of the clergy, or simply a literate friend or family member.³⁴¹ The testator would then make an oral declaration of his will, which would be noted by the scribe and later written out in full.³⁴² The written testament might therefore be produced only after the testator's death.³⁴³ In *Brown v Sackville* (1552), for example, the testator was 'sick in bed,' and sent for 'Mr. Atkins, a man learned in the law.' Atkins took notes of the testator's will and left to 'put the said will in writing according to due form of law.' The testator died before he could have the will read back to him, but it was held to be good regardless.³⁴⁴

It was likely that most scribes did not have legal training. In fact, it was conclusively presumed by the courts that a testator had made his will without the aid of counsel.³⁴⁵ We will examine the implications of this presumption in chapter three.³⁴⁶ Model wills, however, had been in circulation since at least the late thirteenth century,³⁴⁷ and both Phayer and West included sample wills in their printed books of precedents.³⁴⁸ Will formularies were also circulating in manuscript form³⁴⁹ and, by the mid-seventeenth century, in popular almanacs.³⁵⁰

³³⁶ Helmholz (n 306) 397.

³³⁷ *ibid.*

³³⁸ Susan E. James, *Women's Voices in Tudor Wills, 1485-1603: Authority, Influence and Material Culture* (Ashgate 2015) 11.

³³⁹ 32 Hen VIII c. 1, s 1.

³⁴⁰ Cressy (n 194) 107.

³⁴¹ JD Alsop, 'Religious Preambles in Early Modern Wills as Formulae' (1989) 40 *Journal of Ecclesiastical History* 19, 20.

³⁴² If the testator's illness was highly contagious, his instructions might have to be relayed through a servant or shouted from a window, so as not to endanger the scribe: *ibid* 24.

³⁴³ Helmholz (n 306) 393; see *Brown v Sackville* (1552) Dyer 72a, 72b.

³⁴⁴ *Brown v Sackville* (n 343) 72a.

³⁴⁵ See, for example, *Newis et Ux v Lark and Hunt* (n 51) 413.

³⁴⁶ See 3.3.1. below.

³⁴⁷ Alsop (n 341) 22.

³⁴⁸ Phayer (n 143) 152v; West, *The First Part of Symboleography* (n 143) ss 642-9.

³⁴⁹ Alsop (n 341) 22.

There were restrictions on who could make a valid will. According to an explanatory statute passed after the Statute of Wills, a will of freehold land made by ‘any woman *covert*, or person within the age of 21 years, idiot or by any person *de non sane* memory shall not be taken to be good or effectual in the law.’³⁵¹ Thus, while an unmarried woman could make a will of land, a *feme covert* could not.³⁵² As Coke put it, ‘a *feme covert* has not any will,’ since ‘after marriage the whole will of the wife is in judgment of law subject to the will of the husband.’³⁵³ A married woman could make a will of chattels with the consent of her husband,³⁵⁴ but not a will of land.³⁵⁵ Unmarried women were much less likely to make wills than men were,³⁵⁶ although many did.³⁵⁷ Most women who made wills were widows.³⁵⁸

Infants were unable to make wills of freehold land, although they had a limited ability to bequeath chattels.³⁵⁹ Parties suffering a ‘defect of mind’ could not make wills. As West put it, these included ‘doting old persons wanting judgment,’ ‘drunkards void of reason,’ and ‘mad fools and idiots.’³⁶⁰ Coke explained that, to have a ‘sane and perfect memory,’ a testator must ‘have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason.’ It was not enough that he was simply able to ‘answer familiar and usual questions.’³⁶¹ A person who had been deaf, blind or mute since birth would be unable to make a will, but those who had later become so could make their wills by writing or by

³⁵⁰ *ibid* 20.

³⁵¹ 34 & 35 Hen VIII c. 5, s 7. See generally MC Mirow, ‘Monks and Married Women: The Use of the Yearbooks in Defining Testamentary Capacity in Sixteenth- and Seventeenth-Century Readings on Wills’ (1997) 65 *Tijdschrift voor Rechtsgeschiedenis* 19, 30–38.

³⁵² One significant exception was that a woman acting as an executrix could make a will of the testamentary property, so that it could pass according to the initial devise. This continued to be the case following the explanatory statute: *ibid* 33.

³⁵³ *Forse and Hembling’s Case* (1588) 4 Co Rep 60b, 61a.

³⁵⁴ West, *The First Part of Symboleography* (n 143) s 634. Her husband’s consent was required at common law, but not by the canon law: see generally Beattie (n 306).

³⁵⁵ Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (n 148) 933.

³⁵⁶ Cressy (n 194) 106. In our period, wills made by women accounted for around 12-17% of the total: Erickson (n 24) 205.

³⁵⁷ See generally James (n 338).

³⁵⁸ Cressy (n 194) 106; Erickson (n 24) 206.

³⁵⁹ West, *The First Part of Symboleography* (n 143) s 634.

³⁶⁰ *ibid*.

³⁶¹ *Pawlet Marquess of Winchester’s Case* (n 320) 23a.

making signs.³⁶² Unsurprisingly, the more prosperous classes of society were the most likely to make wills.³⁶³

Wills shared certain characteristics with deeds. Both were written instruments, subject to legal formality requirements, made by private persons in order to create legal rights and obligations. Such similarities were noted by lawyers at the time. West's concept of 'symboleography', for instance, covered the making of all 'written instruments.'³⁶⁴ Instruments that were made by private persons, he explained, were 'of two sorts, namely, instruments of agreements, or contracts, and of testaments or last wills.'³⁶⁵ He set out five similarities between deeds and wills. Firstly, they were 'formal writing[s],' to be distinguished from ordinary writings made 'for a man's own private use and memory.'³⁶⁶ Secondly, they were written on paper or parchment.³⁶⁷ Thirdly, they could 'breed obligations,' unlike 'bare speeches, communications, or private notes.'³⁶⁸ Fourthly, they were made by 'persons.'³⁶⁹ Finally, they were 'a kind of proof,' having been instituted so that 'the acts and things therein comprised might both more certainly be kept in memory, and more easily to be proved.'³⁷⁰

A will of freehold land was also considered to operate as a conveyance, in the same way as any *inter vivos* grant of land.³⁷¹ Wills of land made under the Statute were a replacement for wills of land made by use. Lawyers therefore continued to treat them as the same kind of transaction. Land devised by will was conveyed directly to the devisees, without passing through the hands of the executors.³⁷² Because a will was treated in the same way as a conveyance, it was not fully ambulatory. A will would only pass land held by the testator at the time he made the will, unless he explicitly referred to land he intended to purchase later.³⁷³ The testator would

³⁶² West, *The First Part of Symboleography* (n 143) s 634.

³⁶³ Cressy (n 194) 106; Erickson (n 24) 41.

³⁶⁴ West, *The First Part of Symboleography* (n 143) s 1.

³⁶⁵ *ibid.*

³⁶⁶ *ibid* s 45.

³⁶⁷ *ibid.*

³⁶⁸ *ibid.*

³⁶⁹ *ibid.*

³⁷⁰ *ibid.* On instruments as proof, see Michael Macnair, *The Law of Proof in Early Modern Equity* (Duncker und Humblot 1999) 107.

³⁷¹ NG Jones, 'Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham' (2010) 31 *Journal of Legal History* 273, 284.

³⁷² *ibid.*

³⁷³ *Brett v Rigden* (n 79) 344.

therefore have to re-publish his will every time his landholdings changed.³⁷⁴ This rule will be discussed further in chapter four.³⁷⁵

There were also significant differences between wills and other kinds of conveyance. Even if a will had been written and published, it took effect only on the testator's death.³⁷⁶ The devisees therefore obtained no rights during the testator's lifetime.³⁷⁷ Coke explained that '*omne testamentum morte consummatum est: et voluntas est ambulatoria usque extremum vitae exitum*' [every testament is completed by death, and a will is ambulatory until the last moment of life].³⁷⁸ As a result, 'it would be against the nature of a will to be so absolute' that it could not be revoked by the testator.³⁷⁹ In fact, a will could be revoked by parol at any time. In one case, the testator had made his will in writing, but later declared by parol that he revoked the devise of his land to Harrison. Before he could reach town to alter his written will, he was murdered by Harrison. It was held that the parol revocation of his will was good.³⁸⁰ A devise could not, therefore, be relied upon in the same way that a deed could.³⁸¹ Nor did a written will satisfy the formal requirements of a deed. Thus, interests that could only be created by deed could not be created by a will.³⁸²

Unsurprisingly, questions about the meaning of wills of land generally arose on actions used to try title to land. Of Plowden's four cases on the interpretation of a will, two were brought on actions of trespass,³⁸³ one on replevin,³⁸⁴ and one on an assize of novel disseisin.³⁸⁵ Coke did not always specify the writ on which his cases had been brought,³⁸⁶ but when he did, they

³⁷⁴ Holdsworth, *A History of English Law* (n 211) 366.

³⁷⁵ See 4.3.2. below.

³⁷⁶ *Brett v Rigden* (n 79) 343.

³⁷⁷ This was established by *Bracton's* time for wills of personalty: see Sheehan (n 329) 140.

³⁷⁸ *Forse and Hembling's Case* (n 353) 61b. See Hebrews 9:17.

³⁷⁹ *ibid.*

³⁸⁰ *Brook v Warde* (1573) Dyer 310b.

³⁸¹ See 4.3.1. below.

³⁸² Coke (n 147) 386.

³⁸³ *Welcden v Elkington* (1578) Plow 516; *Paramour v Yardley* (1579) Plow 539.

³⁸⁴ *Brett v Rigden* (n 79).

³⁸⁵ *Newis et Ux v Lark and Hunt* (n 51).

³⁸⁶ It was omitted, for example, in *Collier's Case* (1595) 6 Co Rep 16a; and *Sunday's Case* (1611) 9 Co Rep 127b.

were similar to those we have seen in cases on deeds: ejectment,³⁸⁷ replevin,³⁸⁸ second deliverance³⁸⁹ and debt.³⁹⁰ The common law only had jurisdiction over wills of freehold land. A lease for years was a chattel real, and its bequest was a matter for the ecclesiastical courts.³⁹¹ However, questions about the devise of a lease for years could be raised in actions like trespass.³⁹² Furthermore, cases concerning the devise of a freehold were often brought, not by the devisees themselves, but by their lessees.³⁹³

The meaning of a will, like that of a deed, was a matter of law. Questions of interpretation arose by similar means. Some were raised on a demurrer. In *Brett v Rigden* (1568), for example, Thomas Brett brought an action of replevin against John Rigden for taking his cows.³⁹⁴ Rigden pleaded that the land on which the cows had been taken was devised by Giles Brett to his great-nephew, who had leased it to Rigden.³⁹⁵ Brett demurred.³⁹⁶ The question for the judges was whether or not Giles had made a good devise of the land.³⁹⁷

Other cases were brought on a special verdict. For example, in *Boraston's Case* (1587), Richard Hynde brought ejectment against William Ambrye. The jury found that Thomas Boraston had devised his land to his executors until Hugh Boraston reached the age of 21, and then to Hugh in fee.³⁹⁸ However, Hugh died at the age of nine.³⁹⁹ At the end of the executors' term, Philip Boraston, Hugh's brother, entered as his heir, and leased the land to Ambrye. Thomas's heirs then entered and leased the land to Hynde, who was ejected by Ambrye. The jury asked the court whether Ambrye's entry had been lawful.⁴⁰⁰ This question required the judges to determine the nature of the interest devised to Hugh in the will.

³⁸⁷ For example, *Boraston's Case* (1587) 3 Co Rep 19a; *Wild's Case* (1599) 6 Co Rep 16b; *Adams and Lambert's Case* (1602) 4 Co Rep 104b.

³⁸⁸ For example, *Fraunces's Case* (1609) 8 Co Rep 89b.

³⁸⁹ For example, *Sir Richard Pexhall's Case* (1609) 8 Co Rep 83b.

³⁹⁰ For example, *Matthew Manning's Case* (1609) 8 Co Rep 94b.

³⁹¹ Holdsworth, *A History of English Law* (n 210) 215.

³⁹² See, for example, *Welcden v Elkington* (n 383); *Paramour v Yardley* (n 383).

³⁹³ A good example is *Boraston's Case* (n 387), discussed below.

³⁹⁴ *Brett v Rigden* (n 79) 340.

³⁹⁵ *ibid* 341.

³⁹⁶ *ibid*.

³⁹⁷ *ibid* 342.

³⁹⁸ *Boraston's Case* (n 387) 19a.

³⁹⁹ *ibid* 19b.

⁴⁰⁰ *ibid*.

Finally, questions of interpretation could be the subject of a writ of error. In *Lowen v Coxe* (1599), for example, Sibil Lowen brought an action of debt against Coxe in the King's Bench. She claimed the rent due on a lease made to Coxe by her late husband Thomas.⁴⁰¹ Coxe pleaded that the land had originally been held by William Coxe, who had devised it to Thomas and John Coxe 'equally, and to their heirs.' John was still alive. Lowen demurred.⁴⁰² The question was then whether Thomas and John were joint tenants or tenants in common by the words of William's will. The King's Bench held that they were tenants in common, so that Coxe's plea was insufficient.⁴⁰³ Coxe then brought a writ of error in the Exchequer Chamber, where the judgment of the King's Bench was affirmed.⁴⁰⁴

Questions about the meaning of wills were both relatively novel and highly significant, since they governed entitlements to estates in land. As with deeds, procedural changes encouraged parties to raise questions about the interpretation of wills, and the courts to give authoritative answers. By the mid-sixteenth century, the stage was therefore set for our 'interpretation boom.'

⁴⁰¹ *Lewin v Cox* (1599) Moore 558, 558.

⁴⁰² *ibid.* Note that, in another report, the plaintiff is identified as the lessor's issue: *Lowen v Cocks* (1599) BL Add MS 25203 f64, f64. In yet another, the case is recorded as being brought on a special verdict: *Lowen v Cox* (1599) Cro Eliz 695, 695.

⁴⁰³ The case had previously been brought in the Common Pleas, where the judges were evenly split: *Lewin v Cox* (n 401) 558; *Lowen v Cocks* (n 402) f64.

⁴⁰⁴ *Lewin v Cox* (n 401) 558; see also *Coxe v Lowen* (1600) BL Add MS 25203 f154, f154.

2. THE SIGNIFICATION OF WORDS

2.1. Introduction

The first step towards understanding a legal instrument was to identify the meaning of its words. In fact, this was regarded as a separate exercise to the interpretation of the document. Writers like Christopher St German only spoke of an ‘interpretation’ when there was a departure from the meaning of the words.¹ Fulbecke, for example, thought that it was ‘foolish’ to doubt the meaning of words where it was ‘plain and manifest.’² He explained that, ‘when the words of a covenant or devise be clear and manifest, we follow the literal sense of them without further investigation, because in things that be certain, and apparent, there is no place for conjecture.’³ Similarly, in *Bold v Molineux* (1536), Fitzherbert and Baldwin JJ argued that ‘if a condition, or words in deeds and statutes, have a meaning, they do not want interpretation.’⁴ Only ‘if the words do not bear apparent meaning, but obscure,’ did a process of interpretation begin, one which required ‘the intention of the makers and parties’ to be ‘expounded.’⁵ In the following chapters, we will examine this process of interpretation more closely. For now, however, we will confine our attention to the prior question: how did the courts identify the meaning of the words?

Much has been written on Renaissance theories of language and meaning. Richard Waswo, for example, has claimed that the Platonic account of words as signs of things was beginning to dissolve in this period.⁶ Instead, scholars either explicitly or implicitly recognised that words did not necessarily stand for things, but could in fact have an apparently unlimited range of meanings.⁷ Maclean, however, argues that there is little evidence of this kind of crisis of

¹ Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton eds, Selden Society 1974) 166; Stefan Vogenauer, *Die Auslegung von Gesetzen in England Und Auf Dem Kontinent: Eine Vergleichende Untersuchung Der Rechtsprechung Und Ihrer Historischen Grundlagen* (Mohr Siebeck 2001) 682. Compare Thomas Ashe, *Epieikeia, et Table Generall a Les Annales Del Ley* (Societie of the Stationers 1609) 5v. It is possible that these writers were influenced by civil law texts such as D.32.25.1.

² William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 30.

³ *ibid* 33v.

⁴ *Bold v Molineux* (1536) Dyer 14b, 17b.

⁵ *ibid*.

⁶ Richard Waswo, *Language and Meaning in the Renaissance* (Princeton University Press 1987) 80.

⁷ *ibid* 271.

meaning amongst Renaissance lawyers in the *ius commune*.⁸ For civilian jurists, words had a ‘true and proper’ signification, which could be extended or restricted by a process of interpretation.⁹ The same appears to have been true of common lawyers. Words were always considered to have a ‘proper signification,’¹⁰ although this was not necessarily conclusive as to the interpretation they would be given by the courts. The law could ‘draw’ even unambiguous words ‘from their proper and usual signification’ as part of the interpretive process.¹¹ This chapter will ask how lawyers established the ‘proper signification’ of words in the first place. We will examine the role of definitions and grammar, and consider the relationship between the legal and common usage of words.

2.2. Grammar and language

Common lawyers primarily relied on the rules of grammar to identify the proper signification of words. As Brian Cummings explains, grammar in the early modern period was ‘the foundation of literacy in general.’¹² The basis of both school and university curricula, it included language skills, literary theory, and ‘the interpretation of linguistic meaning.’¹³ Discussions of grammar appear frequently in the law reports of this period, and it is clear that some lawyers had a particularly strong interest in its precepts. Dyer was especially fond of discussing grammar and etymology, and was careful to record discussions of grammar in his reports.¹⁴

In *Bold v Molineux*, for example, Richard Bold had married William Molineux’s daughter Johan. Molineux made a bond for £30 to Bold, on the condition that he would not pay if Johan died before the Feast of St John the Baptist in 1533 without issue male then living. Johan had a son and died. Her son also died, after Johan but before the Feast.¹⁵ The question was whether the son had to be living at the time of the Feast or at the time of Johan’s death, prompting a debate on the meaning of the word ‘then.’ Sjt Mountague, for example, relied on

⁸ Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge University Press 1992) 85, 211.

⁹ *ibid* 96.

¹⁰ *Throckmerton v Tracy* (1555) Plow 145, 154.

¹¹ *ibid*.

¹² Brian Cummings, *The Literary Culture of the Reformation: Grammar and Grace* (Oxford University Press 2002) 20.

¹³ *ibid* 22.

¹⁴ JH Baker (ed), *Reports from the Lost Notebooks of Sir James Dyer*, vol 1 (Selden Society 1993) xxix, lxi.

¹⁵ *Bold v Molineux* (n 4) 14b.

‘the rules of grammar’ to argue that ‘then’ referred to the time of the Feast. Firstly, because ‘then’ was ‘an adverb of time,’ it must relate ‘to a time certain, and not to an uncertain time.’¹⁶ Secondly, “‘tunc” *significat tempus extremum* [means the last time] by the civilians,’ and so ‘by construction of the rules of grammar, when a thing is doubtful, and may be referred to a double intent, *ad proximum antecedens fiat relatio*’ [relative words refer to the nearest antecedent].¹⁷ Counsel for Bold engaged with this point, objecting that ‘in many cases the relative shall not refer *ad proximum antecedens*,’ if the sense was otherwise.¹⁸ For example, if J.S. bargained and sold his land to J.N., ‘and *the aforesaid* John covenants to deliver the evidences of the land,’ this would refer to the first J.S., and not to J.N.¹⁹ Shelley J observed that the case had ‘been well argued over at the bar, and several good grounds of construction of deeds recited, and also rules of grammar and maxims of civil law.’²⁰ Ultimately, however, these were inconclusive. Fitzherbert and Baldwin JJ concluded that the words of the deed were ‘obscure,’ and must be interpreted by reference to the parties’ intentions.²¹

Egerton was also prone to lengthy discourses on grammar. In *Saunders v Stanfourde*, for example, the Prior of Wroxton had leased land to Richard Alderman for 30 years. The freehold was subsequently surrendered to the King, who sold it to Thomas Pope.²² Pope leased the land to Giles Poulton for 50 years, with a proviso that the lease would be void if Poulton did not quietly enjoy the land, but was disturbed and put out of possession by Alderman.²³ Alderman did enter the land, but not until after Poulton’s death. The question was whether the lease to Poulton had terminated on Alderman’s entry, or whether Poulton’s executor could claim the land after Alderman’s lease expired.²⁴ Egerton spent several pages of his draft argument analysing the grammar of the proviso in detail. First, he observed that the sentence had ‘two distinct parts and propositions, which are severed and divided by this word “but”.’²⁵ In this case, the word ‘but’ did not create a new sentence, but ‘serves to explain that which was uttered before... as in common speech, we say, “It is not true, but false.”’²⁶ Where

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid* 15b.

¹⁹ *ibid.*

²⁰ *Bold v Molineux* (n 4) 15b.

²¹ *ibid* 17b. See 3.2.1. below.

²² *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f70.

²³ *ibid* f70v.

²⁴ *ibid* f70.

²⁵ *ibid* f74v.

²⁶ *ibid* f74v-75.

an affirmative proposition preceded a ‘but,’ and a negative followed it, ‘the one part expounds the other, and the latter does not contain a new thing.’²⁷ He then sought to define the word ‘possession’: it need not necessarily mean ‘actual and manual possession,’ he explained, but simply ‘the right to possession.’²⁸ As a result, the lessee could have been put out of possession even if he had not actually been on the land. Finally, he examined the word ‘and.’ Here, he argued, ‘and’ ought to be taken as a disjunctive, ‘for otherwise, if it will be taken for a copulative, many absurdities ensue in the penning and construction of this short proviso, and all contrary to the plain and simple meaning of the parties.’²⁹ He therefore concluded that the lease to Poulton had terminated when Alderman entered the land, even though Poulton himself had not been disturbed.³⁰

For common lawyers, grammar had a close association with the *ius commune*.³¹ In his ‘Speech touching the *Post-Nati*’ (1608), Egerton noted that many arguments based on definition and etymology had ‘been drawn out of some writers of the civil law.’³² He himself was clearly aware of civilian approaches to meaning, observing that the law would sometimes take ‘a disjunctive for a copulative; a copulative for a disjunctive; the present tense for the future; the future for the present,’ and that examples of this were ‘infinite, as well in the civil law as common law.’³³ We have seen that, in *Bold v Molineux*, Sjt Mountague referred to the meaning given to ‘*tunc*’ by ‘the civilians,’³⁴ and Shelley J spoke of ‘rules of grammar and maxims of civil law.’³⁵ One reason for this was probably that grammar itself was concerned with the Latin language, rather than English. The first grammar of the English language was not published

²⁷ *ibid* f75.

²⁸ *ibid*.

²⁹ *ibid* f76.

³⁰ Egerton also examined the meaning of ‘or’ in *Geale’s Case* (1587) Hunt MS El 482 f139, f144v; and the meaning of ‘aforesaid’ in *The Dean and Chapter of Chester’s Case* (1578) Hunt MS El 482 f32, f37v, f40v.

³¹ David J Seipp, ‘The Reception of Canon Law and Civil Law in the Common Law Courts before 1600’ (1993) 13 *Oxford Journal of Legal Studies* 388, 405.

³² Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press 1977) 229.

³³ *ibid* 224. See David Ibbetson, ‘The Arguments in Calvin’s Case (1608)’ in Troy L Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 226–229.

³⁴ *Bold v Molineux* (n 4) 14b.

³⁵ *ibid* 15b.

until 1586, and even then it was generally assumed that English simply followed the rules of Latin.³⁶

Perhaps as a result, lawyers would occasionally translate English words into Latin in order to explain their meaning, noting, for example, that ‘that’ is ‘*hoc*’ in Latin,³⁷ or ‘eftsoons’ ‘*iterum*’.³⁸ Coke was particularly inclined to this kind of discussion, especially in the later volumes of his reports. In *Beresford’s Case* (1607), for example, land had been granted ‘to the use of Aden, and the heirs males of the said Aden.’³⁹ Coke translated this limitation into Latin in order to discourse on the meaning of the word ‘*de*’ [of].⁴⁰ Similarly, in *Robert Pilfold’s Case* (1612), a question arose on the meaning of the word ‘damages’ in a statute. Coke chose to examine the ‘signification’ of the Latin word ‘*damma*’ to resolve the dispute, although this word was not used in the Law French text.⁴¹ Elsewhere, Coke relied on etymology to establish the meaning of a word. In *Lewis Bowles’ Case* (1615), for example, he investigated the etymology of ‘*impetitio*’ [impeachment] in order to determine the meaning of a ‘without impeachment of waste’ clause.⁴² In his *Commentary upon Littleton*, he explained that ‘it is good to search out the etymology or right derivation of words,’ for ‘*ignoratis terminis, ignoratur & ars*’ [where the terms are unknown, the art is also unknown].⁴³

In other cases, the document at issue was simply written in Latin in the first place. In his *Symbology*, West gave precedents for instruments in both English and Latin, explicitly noting that both were acceptable.⁴⁴ Coke discussed the meaning of words like ‘*aut*’ [or]⁴⁵ and ‘*et*’ [and]⁴⁶ where they appeared in deeds that had been written in Latin. Coke was clearly confident in his Latin skills, but other lawyers were less so. Wilfrid Prest observes that many

³⁶ Cummings (n 12) 206.

³⁷ *Anon* (1566) Dyer 255a, 255a.

³⁸ *Sir William Read and Booth’s Case* (1609) 13 Co Rep 34, 34.

³⁹ *Beresford’s Case* (1607) 7 Co Rep 41a, 41a.

⁴⁰ *ibid* 42a.

⁴¹ *Robert Pilfold’s Case* (1612) 10 Co Rep 115b, 116b. See 8 Hen VI c. 9.

⁴² *Lewis Bowles’s Case* (1615) 11 Co Rep 79b, 82b. See also *Porter and Rochester’s Case* (1608) 13 Co Rep 4, 5, on the etymology of ‘diocese’.

⁴³ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 262.

⁴⁴ William West, *The First Part of Symbology* (Thomas Wight and Bonham Norton 1598) s 253.

⁴⁵ *Henry Finch’s Case* (1605) 6 Co Rep 39a, 39b.

⁴⁶ *Andrew Ognel’s Case* (1587) 4 Co Rep 48b, 50a.

barristers probably had little more than ‘a rudimentary knowledge of Latin.’ William Noy, for example, once had to seek advice on a patent, admitting that he had ‘forgot [his] Latin.’⁴⁷

Outside help, therefore, might be needed to explain unfamiliar words to the court. In one instance, an action of debt was brought on a bond written entirely in Dutch; the court wrote to the Hanseatic League to confirm the meaning of a contested term.⁴⁸ In *Buckley v Rice Thomas* (1555), one issue was the meaning of the word ‘*licet*’ in the plaintiff’s declaration.⁴⁹ Stanford J advised that

in order to understand it truly, being a Latin word, we ought to follow the steps of our predecessors judges of the law, who, when they were in doubt about the meaning of any Latin words, enquired how those that were skilled in the study thereof took them, and pursued their construction... Our predecessors have always consulted about the meaning of Latin words with grammarians and others that best understand them, and such sense as the grammar warrants and allows they have admitted; wherefore I apprehend that grammar is the most proper judge of the meaning of this word.⁵⁰

Saunders J agreed: common lawyers ‘were not above being instructed and made wiser’ by outside experts.⁵¹ Since ‘*licet* is a Latin word, and the sense of it is to be tried by the grammar,’ the judges ‘ought to enquire of the grammar for the meaning of it.’⁵² He had ‘got the question to be proposed to the Doctors of the Arches at their table,’ who had agreed that ‘*licet*’ was perfectly good in this context, and confirmed that ‘they frequently use it in the civil law in such sense.’⁵³

Similarly, in *Humphreston’s Case* (1575), the court resorted to experts in grammar to explain the meaning of the Latin word ‘*puer*’. William Humphreston had suffered a common recovery to the use of him and his wife for their lives, remainder to the ‘*seniori puero*’ of his body. He later levied a fine to the use of him and his wife for their lives, remainder to the eldest child of his

⁴⁷ Wilfrid R Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Clarendon Press 1991) 108.

⁴⁸ *Lynche v Osfeld* (1570) Dyer’s Notebooks (109 SS) 193, 193.

⁴⁹ *Buckley v Rice Thomas* (1555) Plow 118, 121.

⁵⁰ *ibid* 122.

⁵¹ *ibid* 125.

⁵² *ibid*.

⁵³ *ibid* 126. Seipp notes that this kind of consultation was not uncommon: Seipp (n 31) 409.

body. The question was whether the land would remain to his eldest child, a daughter, or to his eldest son. Summing up the case, Gawdy J observed that ‘diverse authors of grammar have been produced to prove’ that ‘*puer*’ could mean either a boy or a girl, mentioning Ambrose Calepine’s Latin dictionary, and Philip Melanchthon, the theologian.⁵⁴ ‘*Puer*’, it seemed, could refer to a daughter ‘in grammatical construction, and exposition of the civil law,’⁵⁵ although it was ‘taken for male in any modern author.’⁵⁶ The judges concluded that the Latin word was ambiguous, and went on to consider what Humphreston’s intentions must have been. In another case, Thomas Elyot’s English-Latin dictionary was prayed in aid by the court.⁵⁷

It is clear, however, that the rules of grammar were not considered to be part of the law of interpretation. Rather, they were a useful resource for lawyers to draw on when questions of language were at issue. In *Buckley*, Saunders J explained that ‘if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns.’ For example, a judge might be ‘informed by surgeons whether it be a mayhem or not, because their knowledge and skill can best discern it.’⁵⁸ Similarly, Bacon lauded the common law for being ‘contented to hear and be advised by other sciences in matters of dependency upon them, as in cases of exposition of words by grammarians,’ or ‘in minerals by natural philosophers.’⁵⁹

It should also be stressed that references to the civil law in this context had little to do with the substance of the law itself. As Stanford J had observed, civilians were simply people who knew some Latin, on a par with grammarians. In *Fysher v Boys*, for example, Egerton referred to Justinian’s Institutes and Digest, but as sources of Latin rather than law.⁶⁰ Williams suggests that civilian texts were so often used only because ‘much of the early-modern activity in the

⁵⁴ *Humphreston’s Case* (1574) 2 Leo 216, 217.

⁵⁵ *Lane v Cowper* (1575) Moore 103, 104.

⁵⁶ *Lane v Coups* (undated) Owen 64, 64.

⁵⁷ *Case of the Bishopric of Chichester* (1559) Dyer’s Notebooks (109 SS) 28, 29.

⁵⁸ *Buckley v Rice Thomas* (n 49) 124–5. See also *The Reports of Sir Edward Coke*, vol II (Joseph Butterworth and Son 1826) 3 Co Rep xxxviii.

⁵⁹ *Le Case del Union, del Realm, D’Escose, ove Angleterre* (1606) Moore 790, 791.

⁶⁰ *Fysher v Boys* (undated) Hunt MS El 482 f190, f190v. See I.2.1.1-6 and D.1.8.

study of Latin was undertaken with legal texts, often by civil lawyers.⁶¹ Such references were ‘linguistic rather than substantive,’⁶² and often made more or less in passing.⁶³

Lawyers were also continually warned that they could not simply rely on definitions and grammar to understand a document. For a start, grammar itself might not give a clear answer. In 1456, Moyle J recalled ‘a discussion with a master of grammar,’ who had explained that ‘often times the past tense will be taken for the present tense, and one word for another, and all will be saved and excused by figures and rules of grammar.’⁶⁴ Definitions might also be unreliable. In *Humphreston’s Case*, for example, Plowden argued that Latin words could be deceptive. After all, ‘libra [pound] in Latin signifies a weight; and yet if I am bound in vigint[is] libris [twenty pounds], if I forfeit my bond, I must pay money, and not lead, or the like.’⁶⁵ In *Mathew v Harecourt* (1590), an assumpsit case, the court observed that, when a barrel of beer was sold, only the beer would pass to the buyer, but when a hogshead of wine was sold, both the hogshead and the wine would be given.⁶⁶ ‘This construction,’ they noted, ‘is not according to the nature of the words, but according to their common reputation.’⁶⁷

Egerton, too, warned that ‘definition and description’ were ‘uncertain and dangerous,’ while relying on etymology was ‘ridiculous and vain.’⁶⁸ It might ‘serve a turn in schools, but it is too light for judgments in law.’⁶⁹ Lawyers should ask what the words had been used for, not where they had come from.⁷⁰ Even Coke admitted that grammar was not the be-all and end-all. In his *Commentary upon Littleton*, he noted that a double negative ‘in legal construction shall not hinder the negative.’ Thus, ‘the grammatical construction is not always in judgment of law to be followed.’⁷¹ Elsewhere, he admonished his reader that, while bad grammar would not avoid a deed, it was nevertheless to be avoided.⁷²

⁶¹ Ian Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (PhD thesis, University of Cambridge 2008) 123.

⁶² *ibid.* See also David Ibbetson, *Common Law and Ius Commune* (Selden Society 2001) 16.

⁶³ See, for example, *The Case of Barretry* (1578) 8 Co Rep 36b, 37a; *The Case of Monopolies* (1602) 11 Co Rep 84b, 86b. A different kind of case arose when a common law court was required to adjudicate on the meaning of a term in the canon law: see, for example, *Portman v Willis* (1595) Cro Eliz 386.

⁶⁴ (1456) YB Mich 35 Hen VI pl 25, f15b-17b, f16b.

⁶⁵ *Lane v Coups* (n 56) 64.

⁶⁶ *Mathew v Harecourt* (1590) Savile 124, 124.

⁶⁷ *ibid* 125.

⁶⁸ *Knafla* (n 32) 229.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *Coke* (n 43) 223v.

2.3. Legal and common usage

In other cases, common law texts were used to establish the meaning of a word. In some cases, they were simply treated as alternative sources of linguistic meaning. Writs, for example, could be used to demonstrate the rules of grammar or Latin usage. In *Bold v Molineux*, a *cui in vita* writ was used as an example of a good grammatical construction.⁷³ Similarly, in a 1561 case, Dyer CJ argued that a grant of a ‘*messuagium*’ did not pass a garden: in a *praecipe* writ, he explained, a message and a garden were named separately, ‘which proves them to be several.’⁷⁴ In *Buckley v Rice Thomas*, Saunders J even described the Register of Writs as ‘our Calapine,’ a reference to Calepine’s dictionary.⁷⁵ Having quoted the works of Fortescue and Polydore Vergil to demonstrate ‘the usage of those that are acquainted with the Latin tongue,’ he also cited a number of writs as evidence of the meaning of the word ‘*licet*.’⁷⁶

Previous cases could also be used to demonstrate the meaning of a word. In *Andrew Ognel’s Case* (1587), Coke cited two Year Books cases ‘for the exposition of the word ‘*et*’.⁷⁷ In *Saunders v Stanfourde*, Egerton referred to the Year Books to demonstrate the meaning of ‘*ita quod*’ [so that].⁷⁸ More often, though, a legal authority was cited to establish that the word in question had a specific legal meaning. In his *Commentary upon Littleton*, Coke observed that common lawyers used ‘significant words framed by art, which are called *vocabula artis* [words of art], though they be not proper to any language.’⁷⁹ Many of these were ‘ancient terms and words drawn from that legal French,’ which were ‘woven in the laws themselves.’⁸⁰ Fulbecke advised law students to use ‘diligence’ in learning these words, because they had been ‘devised for acquainting the mind with the rules and mysteries of their arts.’⁸¹

Specifically legal precedents were therefore required to understand these words. In a 1576 case, for example, rent was due ‘at Michaelmas, or by the space of a quarter of a year after.’

⁷² *Henry Finch’s Case* (n 45) 39b.

⁷³ *Bold v Molineux* (n 4) 15b.

⁷⁴ *Anon* (1561) Moore 24, 24. See also *Portman v Willis* (n 63) 387.

⁷⁵ *Buckley v Rice Thomas* (n 49) 125.

⁷⁶ *ibid*.

⁷⁷ *Andrew Ognel’s Case* (n 46) 50a. See (1440) YB Mich 19 Hen VI pl 7, f3b-4b and (1469) YB Mich 9 Edw IV pl 28, f42b.

⁷⁸ *Saunders & Starkey v Stanfourde* (n 22) f75. See (1370) YB Trin 44 Edw III pl 24, f21b-22a.

⁷⁹ Coke (n 43) 101v.

⁸⁰ *ibid* preface (unpaginated).

⁸¹ Fulbecke (n 2) 30.

Bendlowes produced ‘an old book of the Exchequer’ to prove that a quarter of a year was considered by the law to mean 91 days, ‘and to the six hours over, the law pays no regard.’⁸² Similarly, although the ‘natural day’ was 24 hours long, *Bracton* was authority that the ‘artificial day’ ended at sunset, so that rent due on a particular day must be paid before dark.⁸³ Other words carried a legal implication when used in a deed: for example, the word ‘*excambium*’ [exchange] implied a condition of re-entry and a warranty of voucher.⁸⁴

Coke, in particular, delighted in recording these terms of art. In *Edward Altham’s Case* (1610), Marcia Nash argued that she had not given up all her right to her dower when she released all her ‘*actiones... sectas, querelas et demanda*’ [actions... suits, quarrels and demands] against Thomas Nash.⁸⁵ Coke painstakingly analysed the meaning of each of these words in turn, relying heavily on how they had been understood in previous cases. ‘Quarrels,’ for example, had been held to cover both real and personal actions in a 1469 case, as well as causes of actions in 1460. Coke was also unable to resist adding notes on the etymology of ‘*querela*’ and its synonyms.⁸⁶ In his *Commentary upon Littleton*, he expanded on the point further: *querela* ‘properly’ referred only to personal actions, where the plaintiff was called the ‘*querens*,’ and the writ used the word ‘*queritur*.’ However, a release of all quarrels would be taken more extensively than the strict meaning of the word, on the principle that a deed was taken most strongly against its writer.⁸⁷ The *Commentary* is full of similar discourses on the meaning of words. In the first chapter, for example, the word ‘lands’ inspired Coke to write several pages on the words that could be used for different kinds of land:

In our Latin a wood is called *boscus*. *Grava* signifieth a little wood, in old deeds, and *Hirst* or *Hurst* a wood, and so doth *Holt* and *Shawe*. *Twaite* signifieth a wood grubbed up, and turned to arable. *Stethe* or *Stede* betokeneth properly a bank of a river, and many times a place, as *Stowe* doth, and *Wic*, a place upon the seashore, or upon a river. *Lea* or *Ley* signifieth pasture.⁸⁸

⁸² *Anon* (1575) Dyer 345a, 345a.

⁸³ *Hill v Grange* (1556) Dyer 130a, 130b.

⁸⁴ *Bustard’s Case* (1603) 4 Co Rep 121a, 121a; see also *Goodall’s Case* (1597) 5 Co Rep 95b, 96b.

⁸⁵ *Edward Altham’s Case* (1610) 8 Co Rep 150b, 150b.

⁸⁶ *ibid* 153b. See (1469) YB Mich 9 Edw IV pl 30, f43b-44b and (1460) YB Mich 39 Hen VI pl 15, f9a-12a.

⁸⁷ Coke (n 43) 292. See 6.5.2. below.

⁸⁸ *ibid* 4v. Fulbecke included a similar, but much shorter, list in his guide for law students: Fulbecke (n 2) 67v.

Egerton shared Coke's love of language. He frequently highlighted definitions where they appeared in his statute books or law reports,⁸⁹ and made lists of them in his notes.⁹⁰ His library held several lists of legal terms, such as 'An explanation of sundry titles, and ancient obscure words which have been contained in the Great Rolls of the Exchequer for diverse hundreds of years now last past.'⁹¹

In many cases, it was vital to know the correct legal meaning of a word or phrase. As Coke observed, 'there be many words so appropriated, as that they cannot be legally expressed by any other word, or by any periphrasis or circumlocution.'⁹² The legal effect of an instrument could be changed significantly by fine variations of its drafting. For example, certain forms of words were needed to limit different kinds of estates. Littleton warned that, to pass the fee simple of land to another, it had to be granted 'to him and to his heirs.' A phrase like 'to him forever,' or 'to him and to his assigns forever,' would not suffice, because it lacked 'these words "his heirs," which words only make the estate of inheritance in all feoffments and grants.'⁹³

Thus, in *Pagett v Aston* (1580), the Bishop of Coventry had covenanted to grant a woodwardship and estovers to Sir Edward Aston and his heirs. He subsequently made an indenture, reciting this covenant, in which he granted the office and estovers to Sir Edward, 'for the easement of the said Edward and his heirs.'⁹⁴ Although the Bishop's intention was clearly to grant the office to Sir Edward and his heirs, Egerton successfully argued that he had failed to do so, since the grant itself did not mention heirs. As Egerton explained, 'in every grant where any estate of inheritance passes, it must have apt words to express it, and this is what Littleton has, that these words, his heirs,' are required.⁹⁵ The court agreed that 'here no inheritance in the things granted passed to the said Sir Edward but only an interest for his own life; for the grant was to Sir Edward only without the word, heirs.'⁹⁶

⁸⁹ See, for example, William Rastell, *A Collection of All the Statutes* (Richard Tottell 1572) Hunt RB 59499 f213; Edmund Plowden, *Les Comentaries, Ou Les Reportes de Edmund Plowden* (Richard Tottell 1571) Hunt RB 62961 f54v, f276v, f375.

⁹⁰ *Pagett v Aston* (1580) Hunt MS El 482 f204, f215.

⁹¹ Hunt MS El 2629.

⁹² Coke (n 43) 9.

⁹³ Thomas Littleton, *Littleton Tenures in Englishe* (Richard Tottell 1556) 2.

⁹⁴ *The Lord Paget and Sir Walter Ashtons Case* (1583) 1 Leo 2, 2.

⁹⁵ *Pagett v Aston* (n 90) f212.

⁹⁶ *The Lord Paget and Sir Walter Ashtons Case* (n 94) 2.

There were also strict rules about the words that were required to make a grant conditional. Dyer, for example, explained that the words ‘*eâ conditione*’ or ‘*si contingat*’ did not ‘make a condition’ by themselves, but only ‘a confidence and trust.’ However, the words ‘*sub conditione*, *ita quod*, *proviso* imply the penalty of a condition broken’ without more.⁹⁷ Specific words were also required to reserve a rent,⁹⁸ discharge a debt,⁹⁹ or make a confirmation¹⁰⁰ or warranty.¹⁰¹

However, these rules did not mean that lawyers took an unthinkingly formalistic approach to meaning. They also looked at common usage to establish the meaning of a word. Egerton, for example, argued that ‘leases’ referred ‘most properly and aptly’ to ‘leases in possession, and not in reversion,’ as this was how the words were used ‘in common speech, in writings, and in statutes.’¹⁰² In another case, he observed that a distinction between the Queen’s ‘progenitors’ and her ‘other ancestors’ was ‘usual enough in common speech’ and had ‘been observed in the common form of pleading, which is much to be regarded.’¹⁰³

Lawyers were also prepared to admit that a word had more than one signification, and that it could be understood by its ‘common meaning’ instead of its legal meaning. In *Edward Altham’s Case*, Coke observed that the word ‘title’ had ‘two significations, one properly and strictly,’ and ‘another signification’ in which it was ‘taken largely.’¹⁰⁴ Similarly, in a 1583 case, Peryam J explained that there were ‘two constructions and meanings’ of the word ‘remainder’: its ‘proper’ meaning at common law, and its ‘common meaning.’¹⁰⁵ Lawyers had long been prepared to accept a common meaning where the legal meaning was clearly not what the parties had intended.¹⁰⁶ As we will see in chapter three, the proper signification of a word could often be trumped by reference to the usage intended by the parties.¹⁰⁷

⁹⁷ *The Duke of Norfolk’s Case* (1557) Dyer 138a, 138b. See also Coke (n 43) 203–205.

⁹⁸ Coke (n 43) 47.

⁹⁹ *Hickmot’s Case* (1610) 9 Co Rep 52b, 53a.

¹⁰⁰ Coke (n 43) 301v.

¹⁰¹ *ibid* 384.

¹⁰² *Lepur v Woolf* (undated) Hunt MS El 482 f157, f158v.

¹⁰³ *Anon* (undated) Hunt MS El 482 f201, f201.

¹⁰⁴ *Edward Altham’s Case* (n 85) 153b.

¹⁰⁵ *Anon* (1583) Moore 122, 123.

¹⁰⁶ See, for example, (1423) YB Mich 2 Hen VI pl 2, f4b-5a, f4b; (1456) Mich 35 Hen 6 pl 25, f15b-17b, f15b, f16b.

¹⁰⁷ See 3.2.1. and 3.3.1. below.

2.4. Conclusions

The courts, then, insisted that an instrument must not be ‘interpreted’ if the meaning of its words was clear. They looked to the rules of grammar, to legal precedents, and to common usage to understand the proper signification of words. However, lawyers also acknowledged that words might bear more than one meaning. Where the words of the document were ambiguous, unclear or contradictory, there was plenty of scope for the law of interpretation to operate. Identifying the proper signification of the words, then, was only a starting point. In the next chapter, we will investigate the extent to which this signification could be displaced by evidence that the parties had intended their words to bear a different meaning.

3. INTENTIONS AND WORDS

3.1. Introduction

As we saw in chapter two, early modern common lawyers recognised that words could have a meaning beyond their ‘proper signification.’ Effectively, the potential interpretations of a document could be set along a scale. At one end of the scale, the words would be taken according to their signification. At the other end, they would be understood as their writer or writers had intended them. Where on the scale the correct interpretation lay was primarily determined by which kind of document or, occasionally, which part of the document was at issue. Thus, the signification of the words was more important when interpreting a deed than a will, for which the writer’s intentions carried more weight. Furthermore, intentions were even less to be considered when the relevant term of the deed was, for example, an ‘odious’ condition or the limitation of an estate. These differences were justified with reference to differences in the creation, context and purpose of each kind of document or term.

Within this framework, lawyers’ attitude to interpretation also changed over time. In the mid-sixteenth century, the signification of the words was generally regarded as subordinate to the writer’s intentions, even in deeds. By the early seventeenth century, lawyers were more likely to prioritise the signification of the words, even in wills. Instead of arguing that the words of a document were subordinate to the writer’s intentions, they began to claim that his intentions must be subordinate to his words.

This chapter will examine the extent to which the writer’s intentions would be allowed to subvert the proper signification of words in a deed or will. We will see that different approaches were taken to wills, to deeds, and to different terms in deeds. The chapter will also demonstrate how the courts’ approach to all kinds of instrument changed during the second half of the sixteenth century, as the signification of the words became increasingly important.

3.2. Deeds

3.2.1. THE WRITER’S INTENTIONS

References to the writer’s intentions had been rare in fourteenth-century cases on the interpretation of deeds,¹ but became increasingly common after the mid-fifteenth century.²

¹JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 243.

By the middle of the sixteenth century, when Plowden and Dyer were writing their reports, appeals to the parties' intentions had come to dominate the interpretation of deeds. Because of the popularity of Plowden's and Dyer's reports in print, their ideas would influence many other lawyers.

One particularly influential case was *Hill v Grange* (1556). Henry Pate had leased a messuage, and all the lands appertaining to it, to John Grange.³ William Hill, who had since acquired the reversion from Pate, objected that land could not be appurtenant to a messuage, because it was of a different nature; no land could therefore have passed by the lease.⁴ The defendant replied that it was 'the common course throughout the realm' to make leases this way. 'If in such cases it has always been the intent of the parties in every country,' he argued,

that the land used with a messuage shall pass by a contract made in such words, it is the office of the judges to know the common language of the people, and their common method of speaking, and to adjudge upon them according to the common course and understanding of the country.⁵

The judges held that 'land could not be appurtenant to a messuage in the true sense of the word appertaining,' and that not even immemorial usage could change this fact.⁶ However, they also ruled that, in this case, the word 'appertaining' should not be given 'its proper signification,' but should 'have such signification as was intended between the parties.' It would be taken to mean the land occupied with the messuage: 'not according to the true definition of it... but in such sense as the party intended it.'⁷ The lease was therefore good.

A similar problem arose in *Throckmerton v Tracy* (1555). The Abbot of Tewkesbury had leased land to three tenants for lives, then made a lease to John and Margaret Smith for 21 years, commencing on the next Michaelmas to follow the deaths of the life tenants. Richard Tracy, a successor to the Abbot's title, claimed that this second lease was void. The problem was that the premises of the lease to the Smiths purported to grant the reversion, while the *habendum* clause specified the land itself. Since it was impossible for one person to hold both the

² See, for example, (1440) YB Mich 19 Hen VI pl 7, f3b-4b, f4b; (1456) YB Mich 35 Hen VI pl 25, f15b-17b, f16a.

³ *Hill v Grange* (1556) Plow 164, 167.

⁴ *ibid* 168.

⁵ *ibid* 169.

⁶ *ibid* 170.

⁷ *ibid*.

possession and the reversion of land, the two parts of the deed were repugnant. Either it was wholly void, or the premises were valid and the *habendum* void, so that the lessees were only entitled to the reversion.⁸ However, since the reversion had been destroyed on the deaths of the life tenants, this meant that nothing remained for the Smiths to take the following Michaelmas.⁹

The plaintiff, a successor to the Smiths' title, responded that the Abbot's intention was 'very apparent': he wanted the lessees to have the land after the deaths of the life tenants, but had used the word 'reversion' incorrectly.¹⁰ 'If the intent of the parties appears,' it was argued, 'the law will construe the words in such sense as to perform that intent rather than in any other sense.'¹¹ Thus, although the use of the word 'reversion' was 'not in its proper signification,'¹² the law ought to 'draw the words from their proper and usual signification to fulfil the intention of the parties.'¹³ Perhaps evincing a lack of faith in this approach, Dyer also claimed that the word 'reversion' had in fact been used in its 'proper signification' here, and that it was the common usage that was faulty.¹⁴

Stanford J accepted that the word 'reversion' had 'two intendments': the 'common sense' and the 'natural sense.'¹⁵ Here, the parties had evidently meant it in its 'natural sense', to refer to the land that had reverted. He concluded that the lease would 'be construed according to the intent of the parties, and not otherwise.'¹⁶ Saunders J took an even more radical approach. For him, the meaning of 'reversion' was all but irrelevant. Indeed, 'a grant of the land shall make a reversion to pass, and a grant of the reversion shall make the land to pass.'¹⁷ What mattered was 'that contracts shall be as it is concluded and agreed between the parties, according as their intents may be gathered.'¹⁸ He warned judges not to 'cavil about the words in subversion of the plain intent of the parties,' which was '*calumnia quaedam*' [a kind of

⁸ *Throckmerton v Tracy* (1555) Plow 145, 152. If the premises and *habendum* of a deed were repugnant, the *habendum* would be void: see 5.2.1. below.

⁹ *ibid* 153.

¹⁰ *ibid* 159.

¹¹ *ibid* 154.

¹² *ibid*.

¹³ *ibid*.

¹⁴ *ibid* 160.

¹⁵ *ibid*.

¹⁶ *ibid*.

¹⁷ *ibid* 161.

¹⁸ *ibid*.

trickery] and ‘*malitiosa juris interpretatio*’ [a wicked interpretation of the law].¹⁹ Instead, they ought to ‘observe and follow the intent of the words’, which were only ‘the testimony of the contract.’²⁰ ‘*Summum jus,*’ he cautioned, was ‘*summa injuria*’ [the greatest law is the greatest injustice].²¹

As we have seen, Plowden had a reputation as a careful and accurate reporter,²² and the results in both of these cases are confirmed by Dyer.²³ Neither was Plowden necessarily biased in his selection of cases, since similar discussions can readily be found in Dyer’s reports. In *Reade v Bullocke* (1543), for example, Dyer reported Shelley J’s observation that ‘he thought this doctrine honest, and wished it were used, s. that every man skilled in the law would construe a deed after the intention of the maker, as far as by his ingenuity and reason he is able.’²⁴

The same approach is evident in *Bold v Molineux* (1536), also reported by Dyer. As we saw in chapter two, Molineux had made a bond for £30 to Bold, on condition that he would not pay if Johan died before the Feast of St John the Baptist in 1533 without issue male then living.²⁵ The question was whether the son had to be living at the time of the Feast or at the time of Johan’s death. The parties began by squabbling over the grammar of the condition: what did the word ‘then’ mean? However, this was not ultimately decisive. Shelley J thought that the ‘sense’ of the condition was more important than the words in which it had been expressed, concluding that ‘then’ seemed to refer to the time of Johan’s death.²⁶ Fitzherbert and Baldwin JJ, however, believed that the circumstances suggested a different intention. Fitzherbert J ‘argued much upon the intent of making’ the bond.²⁷ It was, he observed, ‘the common practice of all men who give large sums of money with the marriage of their children’ to include such conditions. This was to ensure that ‘if the issue die, the payment shall immediately cease.’²⁸ ‘Then’ must therefore have been intended to refer to the time of the Feast.

¹⁹ *ibid.*

²⁰ *Throckmerton v Tracy* (n 8) 161.

²¹ *ibid* 161–2.

²² See 1.2. above.

²³ *Hill v Grange* (1556) Dyer 130a; *Throgmorton v Tracey* (1555) Dyer 124b.

²⁴ *Reade v Bullocke* (1543) Dyer 56b, 56b.

²⁵ See 2.2. above.

²⁶ *Bold v Molineux* (1536) Dyer 14b, 16b.

²⁷ *ibid.*

²⁸ *ibid* 17b.

Because they were printed, these case reports were readily available for future lawyers' reference. Anderson even wrote that he would not mention cases showing that words in deeds were to be taken by the parties' intentions, because 'the common books in print contain many such cases.'²⁹ Egerton, who owned a heavily-annotated copy of Plowden's *Commentaries*,³⁰ referred to it often. In his argument in *Saunders v Stanfourde*, for example, he made 45 references to earlier cases, 36 from the Year Books and nine from Plowden.³¹ Plowden's influence is very clear in Egerton's argument. In that case, as we have seen, land had been leased to Giles Poulton, proviso that the lease would be void if Poulton did not quietly enjoy the land, but were put out of possession by Alderman. The question was whether the lease had been lost when Alderman entered after Poulton's death.³² Although Egerton examined the grammar of the proviso in minute detail, he also relied heavily on the intentions of the parties to establish its meaning. He argued that, even though Poulton had not been 'put out of possession' by Alderman, the parties would have intended such an entry to terminate the lease. 'It is good,' he explained,

to apply the words to serve the meaning of the parties, and to the end for which they were ordained. And to remember, *qui haeret in litera, haeret in cortice* [he who sticks to the letter, sticks to the shell]... In our law, in construction of writings and deeds, the precision of the words has not been regarded, but the words have been applied to the meaning of the parties.³³

'*Qui haeret in litera, haeret in cortice*' recalled a discussion of statutory interpretation in Plowden's *Commentaries*.³⁴ Egerton went on to discuss *Hill v Grange* as a case where the words of a deed were not 'construed according to their natural property, but will be applied to the end and intention of the parties.'³⁵ He also drew from *Throckmerton v Tracy*, noting Saunders J's point that 'by the grant of the land, the reversion of the same land passes,'³⁶ and echoing his

²⁹ *Williams v Evesque de Lincoln* (undated) 2 And 173, 175.

³⁰ Edmund Plowden, *Les Comentaries, Ou Les Reportes de Edmund Plowden* (Richard Tottell 1571) Hunt RB 62961.

³¹ *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70.

³² See 2.2. above.

³³ *Saunders & Starkey v Stanfourde* (n 31) f72.

³⁴ *Eyston v Studd* (1574) Plow 459, 467.

³⁵ *Saunders & Starkey v Stanfourde* (n 31) f72.

³⁶ *ibid.*

warning that ‘cavillation with words contrary to the simple meaning’ was ‘a wicked interpretation of the law.’³⁷

Plowden’s cases on interpretation also influenced later treatise-writers. For example, Edward Hake’s *Dialogue on Equity*, composed at the very end of the sixteenth century,³⁸ was largely based on Plowden’s *Commentaries*.³⁹ Hake drew on Plowden’s report of *Browning v Beston* (1555) to argue that ‘at all times and in all ages the judges of the law have expounded both deeds and contracts not precisely or strictly according to the words,’ but ‘according to the intent of the parties.’⁴⁰

At the turn of the century, the courts were still insisting that the aim of interpreting a deed was to identify and implement the intentions of its writers. For example, it was established that land could pass by the name of a manor, even if it was not in fact a manor.⁴¹ In one 1596 case, the Common Pleas opined that this was not true of fines, but only of conveyances, ‘for there the intent of the parties will help it.’⁴² When the issue arose in the case of a fine, however, the court held that it would in fact ‘not regard this precise propriety of words,’⁴³ since, ‘forasmuch as the true intent and meaning of the parties appears, why should not we as judges adjudge it good?’⁴⁴ Again, they referred to *Hill v Grange* for support.

It was also considered that the ordinary effect of the word ‘proviso’ was to introduce a condition.⁴⁵ However, this was not a hard and fast rule: what really mattered was whether the parties had intended to make a condition. As Egerton argued, a proviso by itself was meaningless until ‘the sense and meaning of the parties’ was considered.⁴⁶ Thus, in *Sir Moyle Finch v Throckmorton* (1590), Clark B held that, although the words of a proviso were conditional, the ‘express agreement’ of the parties had been to make a limitation. He cited

³⁷ *ibid* f72v.

³⁸ Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, Yale University Press 1953) xxvii–xxviii.

³⁹ *ibid* xx.

⁴⁰ *ibid* 51.

⁴¹ *Morris v Smith and Paget* (1585) Cro Eliz 38, 39.

⁴² *Mallet v Mallet* (1596) Cro Eliz 524.

⁴³ *Sir Moyle Finch’s Case* (1606) 6 Co Rep 63a, 65a.

⁴⁴ *ibid* 64b.

⁴⁵ *The Duke of Norfolk’s Case* (1557) Dyer 138a, 138b; *Englefields Case* (1590) Moore 303, 307. See 2.3. above.

⁴⁶ *Scott v Scott* (undated) Hunt MS El 482 fl 16, fl 19.

Plowden's reports of *Colthirst v Bejushin* (1550) and *Browning v Beston* as authority.⁴⁷ Similarly, in *Sir Henry Berkeley v The Earl of Pembroke* (1591), the judges of the Exchequer Chamber concluded that a proviso 'made a condition by the intent of the parties.' Moore reported that 'no certain rule was given to expound where it will be a condition and where a covenant, except to follow the intent of the parties as near as it may be collected from the words.'⁴⁸

As we saw in *Bold v Molineux*, this approach also applied to penal bonds. In *Walter v Pigot* (1602), for example, debt was brought for 'septingentis libris' [£700]. However, the obligation in question was only for 'septuagintis libris' [£70], and the defendant demurred. The court found for the plaintiff, holding that 'the intent is to be observed, which appears by the condition of the obligation.' Since the bond was conditioned on the payment of £500, the parties must have intended a larger sum to be the penalty.⁴⁹

Why were lawyers so willing to discount the proper signification of a deed in favour of the meaning intended by its writers? Firstly, they were alive to the possibility that the parties might not accurately have expressed their intentions in their words. Lawyers of the mid-sixteenth century do not seem to have expected laymen to know the correct meaning of the words in their deed. In *Hill v Grange*, for example, counsel for the defendant argued that it would be 'unreasonable' to destroy a lessee's estate 'because he has not made use of a language which is not used in his own country.'⁵⁰ Rather, it was the responsibility of judges 'to enquire and know the sense of words, and adjudge upon the same according to common usage, for else he would create great confusion and disturbance in the public-weal.'⁵¹ It was judges who must inform themselves about the language of common people, not vice versa.

This was, lawyers considered, only reasonable. As Sjt Catlyn contended in *Browning v Beston*,

if the law should be so precise as always to insist upon a peculiar form and order of words in agreements, and would not regard the intention of the parties when it was expressed in other words of substance, but would rather apply the intention of the parties to the order and form of words, than the words to the intention of the parties, such law would be more full of form than of substance. But our law,

⁴⁷ *Sir Moyle Finch v Throckmorton* (1590) Moore 291, 292.

⁴⁸ *Sir Henry Berkeley v Le Countee de Pembroke* (1591) Moore 706, 707.

⁴⁹ *Walter v Pigot* (1602) Moore 645, 645; compare *Parry v Dale* (1607) Cro Jac 146, where the condition was to do a collateral act, and so could not demonstrate the intention of the parties.

⁵⁰ *Hill v Grange* (n 3) 169.

⁵¹ *ibid.*

which is the most reasonable law upon earth, regards the effect and substance of words more than the form of them, and takes the substance of words to imply the form thereof, rather than that the intent of the parties should be void.⁵²

This rejection of formalism was not only based on pragmatic concerns about the efficacy of deeds, but also on fundamental understandings about the nature of language and legal documents. Plowden discussed this at length in the context of statutes. He explained that ‘it is not the words of the law, but the internal sense of it that makes the law.’⁵³ This internal sense could be identified by enquiring into the legislator’s intentions.⁵⁴ Words were simply the formal shell of the document, and did not necessarily correspond to its true, intended, meaning.⁵⁵ As Sjt Saunders put it, ‘words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it.’⁵⁶

The same was true of the words of a deed. In *Throckmerton*, Saunders J held that judges must ‘follow the intent of the words,’ for ‘the words are no other than the testimony of the contract.’⁵⁷ Contracts, he explained, ‘shall be as it is concluded and agreed between the parties, according as their intents may be gathered.’⁵⁸ Similarly, Popham CJ described a deed as ‘an explanation in writing of the intent of the parties,’⁵⁹ and Sjt Catlyn insisted that ‘the agreement of the minds of the parties is the only thing the law respects in contracts.’⁶⁰ The words of the deed, then, were only evidence of the parties’ intentions, and not necessarily reliable evidence. Thwarting the parties’ intentions because they had not used the correct words was not only unreasonable, but also inconsistent with the nature of legal writing.

One of the most striking attempts to address this issue is found in Fulbecke’s *Direction* to law students. Fulbecke attempted to reconcile the traditional, Platonic account of language with the law’s prioritisation of the parties’ intentions over the signification of their words. He began by advising students not to ‘vary or depart from the proper sense and signification of the

⁵² *Browning v Beston* (1555) Plow 131v, 140.

⁵³ *Eyston v Studd* (n 34) 465.

⁵⁴ *ibid* 467.

⁵⁵ *ibid* 465.

⁵⁶ *Partridge v Strange & Croker* (1553) Plow 77, 82.

⁵⁷ *Throckmerton v Tracy* (n 8) 161. Compare *Southwall v Huddelston and Reynoldys* (1523) YB Hil 14 Hen VIII pl 1, 119 SS 150-163, 160.

⁵⁸ *ibid* 161.

⁵⁹ *Broke v Smith* (1602) Moore 679, 679.

⁶⁰ *Browning v Beston* (n 52) 140.

words,' because 'the property of words is strictly to be maintained.'⁶¹ He argued that words were 'servants to things,' because they were 'invented for the plain and perfect description of things,' and that 'without words a man's meaning may not be certainly known.'⁶² However, he added, words were also 'invented that they might show the meaning of the parties.'⁶³ Thus, it was possible to depart from the 'true property' of the words if there was 'apparent proof of another meaning':⁶⁴ for example, if the proper meaning of the words caused 'some absurdity, inconvenience, or injustice,'⁶⁵ or was 'too burdensome... and so unjust against the party.'⁶⁶ Like Plowden, he argued that

a man's speech doth consist of words and meaning, even as a man himself doth consist of body and soul, or to make the matter more plain, the words are but the *superficies* [surface], and the intent or meaning is the substance.⁶⁷

Thus, if the writer's meaning did not correspond to his words, 'there the tongue yieldeth to the heart, and the words do give place to the meaning.'⁶⁸

All of these arguments were strongly influenced by continental lawyers, philosophers and theologians. Plowden explicitly attributed his account of equitable interpretation, which was based on the intentions of the legislator, to Aristotle.⁶⁹ When he compared the words of a statute to the shell of a nut, he was borrowing a metaphor that had been used by Gratian to describe the words of the Gospel and by Baldus to describe the law.⁷⁰ He quoted maxims like '*qui haeret in litera haeret in cortice*'⁷¹ and '*ratio legis est anima legis*' [the reason of the law is the soul of the law],⁷² both derived from the writings of the canonist Panormitanus.⁷³ He also discussed

⁶¹ William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 29v.

⁶² *ibid.*

⁶³ *ibid.* 34.

⁶⁴ *ibid.*

⁶⁵ *ibid.* 29v.

⁶⁶ *ibid.* 34v.

⁶⁷ *ibid.*

⁶⁸ *ibid.* 34.

⁶⁹ *Eyston v Studd* (n 34) 465, 466.

⁷⁰ Stefan Vogenauer, *Die Auslegung von Gesetzen in England Und Auf Dem Kontinent: Eine Vergleichende Untersuchung Der Rechtsprechung Und Ihrer Historischen Grundlagen* (Mohr Siebeck 2001) 471.

⁷¹ *Nichols v Nichols* (1575) Plow 477, 488.

⁷² *Eyston v Studd* (n 34) 465.

⁷³ Vogenauer (n 70) 770. Panormitanus was a prominent figure in the literature of English canonists: RH Helmholz, *Roman Canon Law in Reformation England* (Cambridge University Press 1990) 145.

the standard hypothetical cases used by rhetoricians.⁷⁴ Similarly, when Saunders J warned against the literal construction of a lease, he took Cicero as his authority.⁷⁵ Hake's discussion of equitable interpretation, largely derived from Plowden, included references to authors like Plato,⁷⁶ Aristotle,⁷⁷ Cicero,⁷⁸ Augustine,⁷⁹ Johann Wild⁸⁰ and Melanchthon.⁸¹ Fulbecke cited Celsus's discussion of words and their meaning,⁸² and linked it to Sjt Saunders' treatment of the same topic in Plowden.⁸³ The civilian maxims used by Plowden would remain popular throughout our period.⁸⁴

Some of these civilian ideas had been in the common law for centuries. Coke, for example, quoted *Bracton's* definition of equity, which enjoined judges to fulfil the will of an owner in transferring his property.⁸⁵ *Bracton* seems to have poached this from the *Corpus Iuris Civilis*.⁸⁶ Coke also cited *Bracton's* description of a deed as '*legatus mentis*' [a legate of the mind],⁸⁷ which bore a close resemblance to the civilian maxim, '*verba sunt cordis nuntia*' [words are the

⁷⁴ Hans W Baade, 'The Casus Omissus: A Pre-History of Statutory Analogy' (1994) 20 *Syracuse Journal of International Law and Commerce* 45, 81. For example, has a stranger broken the law if he scales the walls in order to defend the city?

⁷⁵ *Throckmerton v Tracy* (n 8) 161.

⁷⁶ Hake (n 38) 25.

⁷⁷ *ibid* 7.

⁷⁸ *ibid* 17.

⁷⁹ *ibid* 27.

⁸⁰ *ibid* 8, 56.

⁸¹ *ibid* 14, 57.

⁸² Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 61) 29v. See D.1.3.17.

⁸³ *Partridge v Strange & Croker* (n 56) 82.

⁸⁴ For '*qui haeret in litera, haeret in cortice*' see *The Lord Mountjoy's Case* (1589) 5 Co Rep 3b, 4b; *Powlter's Case* (1610) 11 Co Rep 29a, 34b; Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 365v; *Marriot and Pascalls Case* (1588) 1 Leo 159, 161; *Saunders & Starkey v Stanfourde* (n 31) f72. West quoted both the nut metaphor and '*ratio legis est anima legis*': William West, *The Second Part of Symboleography* (Thomas Wight 1601) 176v. See also 6.4. below.

⁸⁵ *Shelley's Case* (1581) 1 Co Rep 93b, 101a; *Sir Moyle Finch's Case* (n 43) 64b; Coke (n 84) 36.

⁸⁶ Samuel Thorne (tr), *Bracton on the Laws and Customs of England*, vol II (Harvard University Press 1968) 67. See I.2.1.40.

⁸⁷ Coke (n 84) 36; see also Hake (n 38) 52.

messengers of the heart].⁸⁸ Similarly, Sjt Lovelace quoted from *Bracton's* introductory remarks to underline the importance of intentions in all things.⁸⁹ *Bracton* apparently derived this material from the glossator Azo.⁹⁰

In other instances, however, common lawyers were apparently being influenced by contemporary continental scholarship. Fifteenth- and sixteenth-century civilian treatises on statutory interpretation consistently argued that the 'mind,' 'reason' or 'soul' of a statute took precedence over its words.⁹¹ Vogenauer, for example, observes that the *Discourse on Statutes* seems to be closely following Andreas Alciatus's 1530 work, *De verborum significatione*, when it discusses the nature of words.⁹² Alciatus wrote that, 'since words were invented to express the speaker's intention, it is right that his will must be considered first.'⁹³ Similarly, the writer of the *Discourse* explained that, 'since that words were but invented to declare the meaning of men, we must rather frame the words to the meaning than the meaning to the words.'⁹⁴

Fulbecke also appears to have drawn his views on interpretation from civilian sources. He is believed to have studied law at a continental university,⁹⁵ and was certainly very familiar with contemporary civilian scholarship.⁹⁶ As Adolfo Giuliani explains, in the *ius commune*, the meaning of a private document was traditionally regarded as a question of fact, rather than law.⁹⁷ Alciatus had argued that, while the legislator's mind was relevant to the interpretation

⁸⁸ Adolfo Giuliani, 'From Presumption to Interpretation' in Ferdinando Treggiari (ed), *Giuristi dell'Università di Perugia* (Aracne 2010) 472. This maxim was ultimately derived from Aristotle: see *ibid* 467.

⁸⁹ *Le Serjaunts Case* (1567) Hunt MS El 482 f3, f3. See Thorne (n 86) 20.

⁹⁰ Frederic William Maitland (ed), *Select Passages from the Works of Bracton and Azo* (Selden Society 1894) 13.

⁹¹ Baade (n 74) 55–56.

⁹² Vogenauer (n 70) 769.

⁹³ Cited in Giuliani (n 88) 460.

⁹⁴ Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (Huntington Library 1942) 140. This was a point commonly made by civil lawyers, often citing D.33.10.7.2: see Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Cambridge University Press 1992) 68.

⁹⁵ Richard J Terrill, 'The Application of the Comparative Method by English Civilians: The Case of William Fulbecke and Thomas Ridley' (1981) 2 *Journal of Legal History* 169, 174.

⁹⁶ *ibid* 177. Ibbetson describes the *Direction* as 'shot through with civilian learning': David Ibbetson, 'Authority and Precedent' in Mark Godfrey (ed), *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016) 74.

⁹⁷ Giuliani (n 88) 451–3.

of statutes, a contract must be interpreted by the proper meaning of its words.⁹⁸ Fulbecke seems to have been making a similar point when he accepted that ‘in bargains and contracts we must not respect so much that which was meant, as that which is spoken, because bargains do properly consist in *facto*.’⁹⁹ Thus, ‘in matters of contract a man’s will is rather gathered by his words, than by his meaning... as the words do sound, so his will is to be construed.’¹⁰⁰ However, Fulbecke ultimately concluded that ‘there be more things which we think, than which we speak or write.’¹⁰¹ He argued that, ‘though words were invented, that they might express our thoughts, yet by them only our meaning is not signified.’¹⁰² Even in the case of contracts, the law must examine the circumstances in which the words had been spoken in order to identify the parties’ true intentions.¹⁰³ By the late sixteenth century, most civilian writers were also arguing that contracts gained their force from the parties’ intentions.¹⁰⁴

Because the interpretation of private documents was a question of fact rather than law, it was traditionally considered to fall into the province of rhetoric, rather than the civil law.¹⁰⁵ This meant that early modern common lawyers had plenty of opportunity to acquaint themselves with continental theories on the subject.¹⁰⁶ By the mid-sixteenth century, rhetoric was being taught in even humble grammar schools, thanks to the influence of the humanist project in England.¹⁰⁷ Furthermore, over half of those called to the Bar between 1590 and 1639 had attended university,¹⁰⁸ where literature, rhetoric and dialectic formed major components of

⁹⁸ *ibid* 465.

⁹⁹ Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 61) 31. Fulbecke cited Alciatus elsewhere in the *Direction*: *ibid* 32v. Ibbetson has suggested that this was a blind citation via Alberico Gentili:

Ibbetson, ‘Authority and Precedent’ (n 96) 74, fn 72.

¹⁰⁰ Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 61) 31.

¹⁰¹ *ibid* 34. Compare the English civilian Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* (John Windet 1590) 9v.

¹⁰² Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 61) 35.

¹⁰³ *ibid* 34–35.

¹⁰⁴ Adolfo Giuliani, ‘Civilian Treatises on Presumptions, 1580-1620’ in RH Helmholz and W David H Sellar (eds), *The Law of Presumptions: Essays in Comparative Legal History* (Duncker und Humblot 2009) 52–56.

¹⁰⁵ Giuliani (n 88) 451–3.

¹⁰⁶ Barbara Shapiro, ‘Classical Rhetoric and the English Law of Evidence’ in Lorna Hutson and Victoria Kahn (eds), *Rhetoric & Law in Early Modern Europe* (Yale University Press 2001) 62–3.

¹⁰⁷ Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge University Press 1996) 23.

¹⁰⁸ Wilfrid R Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Clarendon Press 1991) 112.

the curriculum.¹⁰⁹ Many works of rhetoric were written by former students at the Inns of Court,¹¹⁰ and were popular amongst common lawyers.¹¹¹ Lawyers were therefore soaking up rhetorical techniques and terminology. Scholars have demonstrated that many aspects of early modern common law method were strongly influenced by the traditions of continental rhetoric.¹¹² The interpretation of documents was another area of law ripe for such influence.

It is also striking that common lawyers often cited non-legal sources to explain their approach to interpretation. Indeed, the superiority of intentions over words was an idea also current amongst, for example, theologians and translators at the time.¹¹³ The influence of theological ideas on legal interpretation can be seen in the popular anti-Semitic trope that disparagingly associated literal interpretation with Jews.¹¹⁴ Fulbecke drew on this tradition, warning his reader against a 'Jewish or mystical interpretation' that would frustrate the intentions of the

¹⁰⁹ See generally Peter Mack, 'Rhetoric and Pedagogy in the Renaissance' in Michael J Macdonald (ed), *The Oxford Handbook of Rhetorical Studies* (Oxford University Press 2017). It is not clear that rhetoric was taught at the Inns of Court, but the learning exercises obviously required rhetorical skills: DS Bland, 'Rhetoric and the Law Student in Sixteenth-Century England' (1957) 54 *Studies in Philology* 498, 498; Richard J Schoeck, 'Lawyers and Rhetoric in Sixteenth-Century England' in James J Murphy (ed), *Renaissance Eloquence* (University of California Press 1983) 280–1.

¹¹⁰ Thomas Elyot's *The Governour* devoted a chapter to the study of the common law, discussing the rhetorical techniques used by lawyers: Donald W Rude (ed), *A Critical Edition of Sir Thomas Elyot's The Boke Named The Governour* (Garland Publishing 1992) 71. Abraham Fraunce's *Lawier's Logike* sought to introduce common lawyers to Ramist logic: Abraham Fraunce, *The Lawier's Logike* (William How 1588). Both men had studied at the Inns of Court.

¹¹¹ Coke's library included 62 works on philosophy, rhetoric, grammar and logic, subjects which he described as 'handmaids to the knowledge of laws': WO Hassall, *A Catalogue of the Library of Sir Edward Coke* (Yale University Press 1950) 59–64. Thomas Wilson's *The Arte of Rhetorique* was particularly popular amongst common lawyers: Richard J Schoeck, 'Rhetoric and Law in Sixteenth-Century England' (1953) 50 *Studies in Philology* 110, 120; Thomas Wilson, *The Art of Rhetoric (1560)* (Peter E. Medine ed, Pennsylvania State University Press 1994).

¹¹² Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press 1977) 40–44; Schoeck (n 109) 281; Shapiro (n 106) 68; David Ibbetson, 'The Arguments in Calvin's Case (1608)' in Troy L Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 213; Ibbetson, 'Authority and Precedent' (n 96) 80–3; Lorna Hutson, 'Rhetoric and Early Modern Law' in Michael J Macdonald (ed), *The Oxford Handbook of Rhetorical Studies* (Oxford University Press 2017).

¹¹³ Richard Waswo, *Language and Meaning in the Renaissance* (Princeton University Press 1987) 151; Maclean (n 94) 115.

¹¹⁴ Vogenauer (n 70) 469.

parties.¹¹⁵ Interpretation that prioritised the parties' intentions, meanwhile, had evidently been sanctioned by the Christian God.¹¹⁶

3.2.2. THE MEANING OF THE WORDS

In the mid-sixteenth century, this view seemed to be almost universal. Only one discordant note was allowed to sound in Plowden's *Commentaries*: the abortive dissent of Broke CJ in *Throckmerton v Tracy*. Unlike the other judges in the case, he had initially insisted that 'there ought to be apt words to express the meaning, or else the meaning shall be void. For the party ought to direct his meaning according to the law, and not the law according to his meaning.'¹¹⁷ However, his scruples do not seem to have troubled him for long: 'afterwards,' reported Plowden, he said that 'he was content that judgment should be given for the plaintiff after all.'¹¹⁸ Dyer recorded that Broke had 'prepared an argument on both sides, and if any one of his companions had been against the lease, he would have argued for it.'¹¹⁹ Broke CJ apparently did not intend his speech to be an authoritative judgment, an attitude that was still possible while the doctrine of precedent was in its infancy.¹²⁰

However, there were hints of similar views on interpretation elsewhere. In one case in the late 1530s, the court held that a warranty of a 'croft' was void in the feoffment of a camp. Although admitting that 'it was the intent to have a warranty of the same camp,' they ruled that 'this part of the deed will sooner be taken as void than to construe it according to an intent not warranted by the words.'¹²¹ As the century wore on, these dissenting voices were raised more loudly. In the early 1570s, Sjt Lovelace put a case where one man had made a lease to another, *habendum* to his executors and assigns. The judges agreed that this *habendum* was void, because it limited an estate to persons who were not mentioned in the premises.¹²² Like Broke CJ, Harper J refused to 'subject the law to his intent': when a party 'overthwarts the law,' he ruled, 'and frames such an instrument, the law shall be first served, and not their

¹¹⁵ Fulbecke, *A Direction or Preparative to the Study of the Lawe* (n 61) 34v.

¹¹⁶ Vogenauer (n 70) 469. See, for example, 2 Corinthians 3:16: 'the letter killeth, but the spirit giveth life.'

¹¹⁷ *Throckmerton v Tracy* (n 8) 162.

¹¹⁸ *ibid* 163.

¹¹⁹ *Throgmorton v Tracey* (n 23) 126b.

¹²⁰ JH Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (Oxford University Press 2003) 50.

¹²¹ *Anon* (1537/8) 1 And 29, 29.

¹²² *Anon* (1572/3) 3 Leo 32, 33. Such deeds were sometimes held to be good: see 5.2.1. below.

meanings, when the same doth not agree with the law.¹²³ Such arguments were attempted by counsel increasingly frequently. Even when they were unsuccessful, this shows that they were at least thought to be plausible. In *Cotton's Case* (1590), for example, Sjt Beaumont argued that 'where the intent of the donor is not according to the law, the law shall not be construed according to his intent: but this intent shall be taken according to the law.'¹²⁴

The courts were growing less certain that their proper role was to identify the parties' intentions. Instead, it was for the parties to make sure that their intentions had been expressed in a way that the law would understand. By the end of the century, discussions of interpretation focused on the parties' words as much as their intentions. The courts would only consider an intention that they could find expressed in the words of the deed. We have already seen that, in *Sir Henry Berkeley v The Earl of Pembroke*, the judges explained that they would 'follow the intention of the parties as near as it may be collected from the words.'¹²⁵ Similarly, in *Butt's Case* (1600), the court held that 'the law will not make an exposition against the express words and intent of the parties,' for '*quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*' [when there is nothing ambiguous in the words, then no exposition contrary to the express words is to be made].¹²⁶ This identification of the parties' words and intentions made judges more hostile to arguments that the usual meaning of words should be subverted on the basis of a different intention. As Egerton explained, 'deeds are to be construed according to the intent of the parties,' but only 'as far as the words will bear, and the rules of the law permit.'¹²⁷

What reasons did lawyers give for rejecting the meaning intended by the parties in favour of that expressed by their words? Again, they were both pragmatic and conceptual. Firstly, the courts no longer seem to have assumed that parties would not understand correct legal language. There was now an expectation that they would have thought carefully about, and even taken advice on, the drafting of their deed. They would therefore have chosen the right words to express their intended meaning.

It had long been the case that a party who bound himself in a deed was treated as speaking at his own peril:¹²⁸ indeed, this was seen as a key difference between deeds and other

¹²³ *ibid* 34.

¹²⁴ *Cottons Case* (1590) 1 Leo 211, 214.

¹²⁵ *Sir Henry Berkley v Le Countee de Pembroke* (n 48) 707.

¹²⁶ *Butt's Case* (1600) 7 Co Rep 23a, 24a. See also Coke (n 84) 147.

¹²⁷ *Bracebridge's Case* (undated) Hunt MS El 482 f124, f125v.

¹²⁸ See, for example, (1462) YB Pas 2 Edw IV pl 6, f2a-4a, f2a.

documents.¹²⁹ As Sjt Lovelace explained in 1567, ‘in deeds the intent will be taken most strongly against the feoffor, because it is made on consideration and deliberation.’¹³⁰ In *Sharington v Strotton* (1565), Plowden observed that words often passed ‘from men lightly and inconsiderately, but where the agreement is by deed, there is more time for deliberation.’ The writer must first determine to make the deed, then cause it to be written, then seal it, and finally deliver it. He therefore had plenty of time to deliberate on its contents.¹³¹ No concessions would be made to one who, with this advantage, nevertheless spoke ‘obscurely or ambiguously.’¹³²

The courts were becoming ever less tolerant of parties who were ignorant of the correct form of words to use in a deed. We have already encountered Egerton’s successful argument in *Pagett v Aston*: that the Bishop of Coventry’s grant to Sir Edward Aston passed only a life estate, despite clear evidence that it had been intended to grant a fee.¹³³ Egerton compared the process of drafting a deed to that of writing a will. When construing a will, the courts would supply words that were lacking because of ‘the lack of advice and counsel’ available to the writer. However,

in deeds and grants the law has another rule, for there advice and deliberation is used, to the intent that that which is intended by the parties may be expressed by apt and convenient words, and therefore no intent or meaning will be taken except that which the express and apt words deliver.¹³⁴

Coupled with this was a concern that badly-drafted deeds were becoming a serious problem in practice. In *Throckmerton v Tracy*, Broke CJ was already complaining about the Abbot’s ‘peculiar form’ of drafting.¹³⁵ In *The Earl of Pembroke v Sir Henry Berkeley* (1596), the court expressed a similar sentiment. Gawdy, Clench, Walmsley and Beamont JJ thought that the proviso in question was intended to be a covenant, noting that

it is common for scriveners and ignorant persons to make in effect every covenant to begin with a proviso in this manner, and therefore to expound such

¹²⁹ (1442) YB Mich 21 Hen VI pl 16, f6a-7b, f7a.

¹³⁰ *Le Serjaunts Case* (n 89) f3.

¹³¹ *Sharington v Strotton* (1565) Plow 298, 308.

¹³² Swinburne (n 101) 193.

¹³³ *The Lord Paget and Sir Walter Ashtons Case* (1583) 1 Leo 2. See 2.3. above.

¹³⁴ *Pagett v Aston* (1580) Hunt MS El 482 f204, f212.

¹³⁵ *Throckmerton v Tracy* (n 8) 163.

a manner of proviso as a condition, it shall be too perilous to the estates of men.¹³⁶

Their argument, however, was rejected by the other justices of the Exchequer Chamber, who insisted that ‘the ignorance of scrivener, who do they know not what by their ignorance, shall be corrected by the law.’¹³⁷ Similarly, in *Mariot v Mascal* (1587), Anderson CJ held that ‘it is no reason to expound a lease which is void to be good because there are many of them made.’¹³⁸ It was better, he argued, that many leases should be void than that the law be undermined. Elsewhere, he maintained that a ‘knave and foolish’ clause in a grant ought to be void, for ‘if it should be good, many mischiefs would follow.’¹³⁹ The courts, then, were increasingly reluctant to be led by drafters, and instead sought to assert their authority over them.

A second development was closely related. The courts were still concerned that their approach to interpretation should avoid causing ‘confusion and disturbance in the public-weal,’ as they put it in *Hill v Grange*.¹⁴⁰ However, they increasingly thought that this confusion would be caused, not when they struck down deeds for lacking the correct words, but when they hedged about what those words meant. As Broke CJ had argued in *Throckmerton*,

if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance, and to destroy all learning and diligence. For if a man was assured that whatever words he made use of his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was its meaning.¹⁴¹

In *Lewis Bowles’s Case* (1615), for example, the court refused to resile from the established meaning of the phrase ‘without impeachment of waste.’ It would, they argued, ‘be dangerous now to recede’ from ‘the continual and constant opinions of all ages,’ concluding that it was ‘better that there should be a defect, than that the law should be changed.’¹⁴² The courts should maintain clear and certain rules, instead of relying on something so uncertain as the

¹³⁶ *Henry Earl of Pembroke v Sir Henry Barkley* (1596) Popham 116, 117.

¹³⁷ *ibid* 119.

¹³⁸ *Mariot v Mascal* (1587) 1 And 202, 219.

¹³⁹ *The Heirs of Sir Roger Lewknor and Ford’s Case* (1586) Godbolt 114, 118.

¹⁴⁰ *Hill v Grange* (n 3) 169.

¹⁴¹ *Throckmerton v Tracy* (n 8) 162.

¹⁴² *Lewis Bowles’s Case* (1615) 11 Co Rep 79b, 83a.

parties' intentions. Bacon, for example, argued that 'if the labour were only to pick out the intentions of the parties, every judge would have a several sense,' and 'quiet and certainty' would be undermined.¹⁴³ The courts emphasised that a deed was a 'public' document, and that 'the inheritances and estates of men' depended on it.¹⁴⁴ Its meaning ought therefore to be clear to all.¹⁴⁵ Coke noted that the rules were less strict when the case concerned a lease, rather than a 'freehold and inheritance,' since 'a lease for years was but a contract, rather than an estate in land.'¹⁴⁶

Again, underlying these concerns was a deeper understanding of language itself. For some lawyers, it was simply incoherent to take a word to mean something that it did not mean. Anderson CJ was a firm proponent of this view.¹⁴⁷ In *Mathew v Harecourt* (1590), an assumpsit case, he rejected the idea that the law could accept a meaning that was 'merely contrary to the truth of the sense of the words.'¹⁴⁸ The other judges were prepared to follow the parties' intentions, based on common usage.¹⁴⁹ Anderson, however, insisted that 'to say that common understanding makes that which the law understands contrary to the words is not reasonable, and it is not necessary to respond to this common understanding further.'¹⁵⁰

In his report of *Mariot v Mascal*, Anderson even included a lengthy digression on the nature of language. Words, he explained, were 'means or instruments by which one may deliver to another his intent and mind.'¹⁵¹ Like Fulbecke, he recalled the Platonic account of language: 'each thing is known by its name,'¹⁵² and, when a person spoke, he expressed his intent about the thing he had named. Thus, it was a

¹⁴³ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 333.

¹⁴⁴ *Sir Anthony Mildmay's Case* (1605) 6 Co Rep 40a, 42a.

¹⁴⁵ *Corbin v Corbin* (1598) BL Add MS 25203 f5, f5v.

¹⁴⁶ Coke (n 84) 203v.

¹⁴⁷ In one anomalous case, Anderson CJ is recorded as arguing that land could be passed by name of a manor, even if it were not a manor. He held that 'words are as we shall construe them': *Heigham's Case* (1583) Godbolt 16, 17. Such a statement is very much at odds with the views he repeatedly expressed elsewhere.

¹⁴⁸ *Bishop v Harecourt* (1590) 1 And 240, 240.

¹⁴⁹ *Mathew v Harecourt* (1590) Savile 124, 124.

¹⁵⁰ *Bishop v Harecourt* (n 148) 241.

¹⁵¹ *Mariot v Mascal* (n 138) 209.

¹⁵² *ibid* 210.

great mischief to confound the sense of words and names, for thereby it will not be known of what thing there is speech, and if this were suffered, justice would not be executed, nor right done between the parties, and therefore in the law, words are to be considered according to their sense and signification.¹⁵³

Words were the means by which parties expressed their intentions in legal documents. If their meanings were not respected, he warned, land would be able to pass by the name of a horse, or a book by the name of a ring.¹⁵⁴ And if the law

suffered one word to be taken for another, and one word to express or contain a thing which it does not contain or express, it suffers a thing which is against the sense and nature of words, and thus confounds all manner of understanding, from which confusion and great inconvenience will ensue; for no Act of Parliament, record or writing may be understood, except by written words, and that by the natural sense of them.¹⁵⁵

For Anderson, like Broke, it was simply incoherent for the courts to interpret a word contrary to its signification. Even if this seemed to be what the parties had intended, it was better that they suffered a mischief than lawyers the inconvenience of being unable to agree on the meaning of any document at all. Anderson's discussion echoed Phayer's praise of written documents: only if they were clear and certain could justice truly be done between the parties.¹⁵⁶

3.2.3. CONDITIONS

Not all terms in deeds, however, were created equal. The courts were also developing more specific rules on the interpretation of particular terms: for example, conditions that, if fulfilled, would determine a party's estate. No special approach to such conditions was mandated by Littleton: he simply wrote that they ought to be performed 'as like to the intent of the condition' as possible.¹⁵⁷

¹⁵³ *ibid.*

¹⁵⁴ *ibid* 211.

¹⁵⁵ *ibid* 213.

¹⁵⁶ See 1.4. above.

¹⁵⁷ Thomas Littleton, *Littleton Tenures in Englishe* (Richard Tottell 1556) 75.

Neither did Plowden suggest that destructive conditions would be treated differently to other kinds of term. In his *Commentaries*, he emphasised the importance of the parties' intentions for the construction of conditions. In *Colthirst v Bejushin*, for example, the Prior of Bath had leased land to Henry and Eleanor Bejushin, and to their son Peter after their deaths, provided that he reside there during his whole term. One question was whether Peter had complied with this proviso, having lived there continually since entering the land, but not having entered until some time after his parents' deaths. Sjt Pollard, for the plaintiff, argued that 'the intent of a condition ought always to be performed as well as the words thereof: if Peter did not enter until ten years after the beginning of his term, he could hardly claim to have complied with the lessor's intention.'¹⁵⁸ Hales J accepted Sjt Pollard's argument, holding that the words of the condition must be construed according to 'the apparent intent of the lessor.'¹⁵⁹ The other judges decided the case on a different ground. However, Mountague CJ agreed that 'if it was a condition then I would readily admit that it ought to be taken according to the intent of it, that he should be resident all the term.'¹⁶⁰

However, there was also an alternative approach. In a 1535 case, for example, Audley LC held that 'conditions will always be taken strictly, because they defeat the estates to which they are annexed,'¹⁶¹ and Dyer reported in 1539 that 'every condition is taken strictly.'¹⁶² He expanded on the point in *The Earl of Arundel's Case* (1576), holding that a condition 'is in law construed penal, and rigorous, and strictly, not liberally.'¹⁶³ On this view, a condition must be interpreted according to the narrowest possible meaning of its words, and not extended on the basis of the parties' intentions.¹⁶⁴

The two approaches appear to have co-existed for some time. Egerton, for example, was prepared to argue the point in whichever way was most beneficial for his client. Thus, in

¹⁵⁸ *Colthirst v Bejushin* (1550) Plow 21, 23.

¹⁵⁹ *ibid* 30.

¹⁶⁰ *ibid* 34. The majority found that the term was not a condition, but a limitation on the commencement of the estate. As a result, the rules of pleading meant that Bejushin did not have to show when he entered.

¹⁶¹ (1535) YB Trin 27 Hen VIII pl 6, f14b-20a, f19a.

¹⁶² *Anon* (1539) Dyer 45a, 45a.

¹⁶³ *Earl of Arundel's Case* (1575) Dyer 342b, 343b.

¹⁶⁴ In principle, at least, it could be an expansive construction of a condition, rather than a strict construction, that was required in order to preserve the estate. However, given the kinds of terms that were generally at issue, it seems to have been presumed that it was an expansive construction of the condition that would destroy the estate.

Saunders v Stanfourde, he echoed *Colthirst v Bejushin*, insisting that a destructive condition could be taken ‘amply and largely’ if the parties had so intended it.¹⁶⁵ He admitted having heard that such a condition ought to be taken strictly, but had been able to find no good reason for this.¹⁶⁶ In fact, he had observed ‘many cases in our laws’ where the converse had been held to be the case. As a result, ‘the most sure ground’ he had found in such cases, ‘as well as in others, is to search diligently for the true intent and plain meaning of the parties,’ instead of judging by ‘the precise nature and quality of the words.’¹⁶⁷ In *Scott v Scott* (1589), on the other hand, Egerton changed his tune, arguing that a condition ‘will be taken strictly according to the words.’¹⁶⁸

The question remained controversial at the turn of the century. In *Marsh v Curteis* (1596), for example, French had leased a messuage and 20 acres of land to Harrington, on the condition that the lessee ‘shall not parcel out any of the lands from the house.’¹⁶⁹ Harrington then leased out the messuage and part of the land. The question was whether this was a breach of the condition, given that the house had been parcelled out from some of the land, and not vice versa. The justices of the Common Pleas found that it was a breach. They were prepared to expound the word ““parcelling”” as it is in vulgar speech,¹⁷⁰ having been informed that it was a ‘common term in Essex,’¹⁷¹ and referred to any separation of the house and the land. In the King’s Bench, Gawdy J resolved that

we must regard the intent of it, and this was that the land would go with the house to the intent that hospitality will be kept, and it is all one in effect and in the intent of the condition to grant the house from the land and the land from the house.¹⁷²

Popham CJ and Clench and Fenner JJ, however, disagreed. They held that ‘in a condition the letter and the intent must concur, because they are odious in law,’ and concluded that the

¹⁶⁵ *Saunders & Starkey v Stanfourde* (n 31) f73v.

¹⁶⁶ *ibid* f73.

¹⁶⁷ *ibid* f73v.

¹⁶⁸ *Scott v Scott* (n 46) f118v.

¹⁶⁹ *Marsh v Curteis* (1596) Moore 425, 425.

¹⁷⁰ *ibid*.

¹⁷¹ *Marsh v Curteis* (1594) Cro Eliz 528, 528.

¹⁷² *Curtys v Marshe* (1599) BL Add MS 25203 f44v, f44v.

condition had not been breached.¹⁷³ In *Moyes v Grigge* (1600), on the other hand, Clench and Gawdy JJ agreed that a destructive condition would be taken ‘strictly for the lessor.’¹⁷⁴ And in *Henry Earl of Pembroke v Symmes* (1600), the following term, Gawdy J was the only one of the four to dissent from John Dodderidge’s argument that conditions ‘must have a reasonable construction, as appears in Colthirst’s case.’¹⁷⁵

The same justices of the King’s Bench had also equivocated in *Taunton’s Case* (1594). Coles had leased land to Taunton for 99 years, on the condition that he could re-enter if Taunton demised the land. Taunton devised the land to his youngest son in his will. The court concluded that ‘conditions shall be taken strictly, yet not directly against the intent of the parties, and the reasonable disposition of the words; and therefore a devise shall be intended to be within this word, demise.’ However, they admitted that this was ‘very hard,’ since Taunton ‘thought not it was any breach of the condition.’¹⁷⁶ Here, the judges’ quandary was plain: although they disliked destroying estates, they were also reluctant to construe a condition in an unreasonably literal way.

If the justices of the King’s Bench had no fixed opinion on the point, other lawyers seem to have taken a less equivocal view. Moore, for example, frequently appended remarks to his reports about the oppressive nature of conditions, describing them as ‘odious to defeat estates’¹⁷⁷ or ‘odious against common right.’¹⁷⁸ Coke, too, seems to have found destructive conditions particularly objectionable. As counsel in *Englefield’s Case* (1590), he compared them to penal statutes, which were also to be construed strictly.¹⁷⁹ Both, he said, were ‘odious,’ concluding that the ‘destruction [of estates] is the cause of the hatred which the law bears for conditions.’¹⁸⁰ Later, as Chief Justice in *Fraunces’s Case* (1609), he approved the argument that ‘a beneficial condition, which creates an estate, is to be interpreted benignly, according to the intention of the words; however, an odious condition, which destroys an estate, is taken

¹⁷³ *ibid.* The lessee had subsequently leased out the residue of the land, which all four judges agreed was a breach of the condition.

¹⁷⁴ *Moyes v Grigge* (1600) BL Add MS 25203 f200v, f200v.

¹⁷⁵ *Henry Counte de Pembroke v Symmes* (1600) BL Add MS 25203 f226v, f227.

¹⁷⁶ *Tauntons Case* (1594) Owen 14, 14–15.

¹⁷⁷ *Davy v Matthews & Binfield* (1598) Moore 525, 526.

¹⁷⁸ *Moody v Garmon* (1616) Moore 848, 848.

¹⁷⁹ *Englefields Case* (n 45) 332.

¹⁸⁰ *ibid.*

strictly, according to the proper signification of the words.¹⁸¹ He made the same point in his *Commentary upon Littleton*, distinguishing between conditions that created estates and those that destroyed them. The former were to be taken ‘according to the intent and meaning of the condition,’ but the latter ‘strictly’ by the words.¹⁸²

Another treatise writer, Fulbecke, was more ambivalent. He explained that the common law ‘many times taketh the words of a condition strictly to preserve an estate,’ citing Dyer’s anonymous 1539 case.¹⁸³ However, he also observed that, in a more recent case, a condition had been ‘extended by equity for the safeguard of the party.’¹⁸⁴ It seemed, then, that the position of conditions remained unclear. Although common lawyers were anxious to preserve estates, they were not entirely comfortable with a literal approach to construction.¹⁸⁵

3.2.4. LIMITATIONS OF ESTATES

Terms in deeds that limited estates were also a special category, since there were specific forms of words needed to express each kind of estate. As we have seen, for example, a fee simple could only be passed by the words ‘to him and his heirs.’¹⁸⁶ No evidence of the writers’ intentions could be introduced to vary the meaning of these words. This clearly left many pitfalls for the unwary: as Coke noted, a limitation to ‘him and his heir’ would not pass a fee, nor ‘to him or his heirs’, nor ‘to two and heirs’ without the word ‘their.’¹⁸⁷ Conversely, parties who used the crucial words might be held to have passed a fee simple when they did not actually intend to do so. In *Webbe v Potter* (1583), Dyer CJ held that, where there was ‘an express limitation of the fee to the husband and his heirs,’ it ‘shall not be contradicted by any intendment’ that the grant was actually intended to be in frankmarriage.¹⁸⁸ Lawyers were well aware that these rules could thwart the intentions of the parties. Henry Finch, for example, thought that one who granted land to another ‘and his heirs males’ must have intended to

¹⁸¹ *Fraunces’s Case* (1609) 8 Co Rep 89b, 90b. ‘*Conditio beneficalis quae statum construit, benignè secund[um] verbor[um] intentionem est interpretanda, odiosa autem quae statum destruit, strictè secund[um] verbor[um] proprietatem est accipienda.*’

¹⁸² Coke (n 84) 219v.

¹⁸³ William Fulbecke, *The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1602) 69v.

¹⁸⁴ *ibid* 70.

¹⁸⁵ Conditions in wills do not seem to have been strictly construed, though Popham CJ argued otherwise in *Molineux v Christopher Molineux* (1607) Cro Jac 144, 145.

¹⁸⁶ See 2.3. above.

¹⁸⁷ Coke (n 84) 8v. Egerton made the same point in *Pagett v Aston* (n 134) f212v.

¹⁸⁸ *Webbe and Potter’s Case* (1583) Godbolt 18, 20.

give an entail, although the words would be taken to pass a fee simple.¹⁸⁹ The justification for this was, again, the need for certainty where estates were concerned. As Coke explained, the reason that the law was ‘so precise to prescribe certain words to create an estate of inheritance, is for avoiding of uncertainty, the mother of contention and confusion.’¹⁹⁰

There was, however, an exception: when the estate limited was an entail. The statute *De donis* had expressly identified the words needed to grant an entail: ‘where any giveth his land to any man and his wife, and to the heirs begotten of the bodies of the same man and his wife’ or ‘where one giveth land to another, and the heirs of his body issuing.’¹⁹¹ However, it had also provided that ‘the will of the donor, according to the form in the deed of gift manifestly expressed, shall be from henceforth observed.’¹⁹² By extending the equity of the statute, lawyers had recognised other forms of entail: for example, ‘if lands be given unto a man and to his heirs male of his body engendered.’¹⁹³ The emphasis on ‘the will of the donor’ allowed them to permit limitations of entails that did not use the statutory wording, as long as the intention was clear.¹⁹⁴ Thus, a grant to one and ‘the heir of his body’ would be good, in contrast to the rule for a fee simple.¹⁹⁵

In *Cotton’s Case*, for example, land was conveyed to Sir Thomas Cotton for life, remainder to William Cotton ‘and to his firstborn son, and his male heir, and thus to the firstborn of the firstborn of the said William,’ with remainders over.¹⁹⁶ Sjt Drue argued that this was a good grant in tail,

for according to the Statute of Westminster 2, the will of the donor ought to be observed, and here it appeareth that the intent of the donor was to create an estate tail, although the words of the limitation do not amount to so much. And the estates mentioned in the statute aforesaid, are not rules for entails, but only examples.¹⁹⁷

¹⁸⁹ Henry Finch, *Nomotechnia* (Societie of Stationers 1613) 25.

¹⁹⁰ Coke (n 84) 9.

¹⁹¹ It also noted that an entail could be created by implication where land was given in frankmarriage.

¹⁹² 13 Edw I c. 1.

¹⁹³ Littleton (n 157) 6.

¹⁹⁴ *Beresford’s Case* (1607) 7 Co Rep 41a, 41b.

¹⁹⁵ JH Baker (ed), *John Spelman’s Reading on Quo Warranto* (Selden Society 1997) 83; Coke (n 84) 20.

¹⁹⁶ *Cottons Case* (n 124) 211.

¹⁹⁷ *ibid* 212.

Sjt Beaumont objected that ‘the will of the donor, without sufficient words, cannot create an estate tail,’¹⁹⁸ but to no avail.

There were some limits. Although Spelman had approved them in an early-sixteenth-century reading, Coke thought that the words ‘to him and his seed’ or ‘issue’ would not create an entail.¹⁹⁹ ‘Albeit that the Statute provideth,’ he explained, that the will of the donor should be observed, ‘yet that will and intent must agree with the rules of law.’²⁰⁰ In *Abraham v Twigg* (1596), the use of land had been granted ‘to Gabriel Dormer and his heirs male lawfully engendered, and for defect of such issue,’ remainders over. The court held that this could not ‘be an estate tail, because there is not any body from whom the heir male should come.’²⁰¹ The limitation simply departed too far from the statutory wording to be covered by its equity.²⁰² As was argued in *Beresford’s Case* (1607), the intent of the donor in *Abraham* did not ‘stand with the rule of law’ that required a body to be specified. Although the remainders over indicated his intention to grant an entail, ‘that could not against the rule of law make words of fee simple to be converted to an estate tail.’²⁰³

However, these exceptions had a narrow scope. In *Beresford’s Case* itself, the grant was to ‘the heirs male of Aden lawfully begotten.’ The court was able to distinguish this from *Abraham* on the grounds that ‘of Aden’ was equivalent to ‘of the body of Aden,’ while the grant in *Abraham* had lacked the word ‘of.’²⁰⁴ Again, they emphasised the statutory mandate that ‘the intent of the donor’ prevail.²⁰⁵ Indeed, lawyers’ continued insistence on this point suggests that they saw this approach to entails as a departure from the common law rules, a departure that could only be justified on the basis of statutory authority. As Moore explained, in the case of an entail ‘the law is intent on the will of the party,’ and ‘dispenses with the defect of apt words if there are sufficient words to declare the intent’ because ‘the will of the donor is the intent of the Statute.’²⁰⁶ In this instance, lawyers were prepared to ignore the meaning of the donor’s words in order to fulfil his intentions.

¹⁹⁸ *Cottons Case* (n 124) 214.

¹⁹⁹ Baker, *John Spelman’s Reading on Quo Warranto* (n 195) 83; Coke (n 84) 20v.

²⁰⁰ Coke (n 84) 20v.

²⁰¹ *Abraham v Twigg* (1596) Cro Eliz 478, 478.

²⁰² *Beresford’s Case* (n 194) 41b.

²⁰³ *ibid.*

²⁰⁴ *ibid* 42a.

²⁰⁵ *ibid.*

²⁰⁶ *Uses & Revocations de Uses* (undated) Moore 608, 610.

3.2.5. LIMITATIONS OF USES

Another exceptional kind of deed was the feoffment to use. As we have seen, uses were originally enforced only by the Chancery, but the Statute of Uses 1536 had brought executed uses under the jurisdiction of the common law.²⁰⁷ The Chancery had permitted some devices, such as executory interests, to be created via a use, although they were impermissible at common law. In the 1550s and 1560s, the common law courts held that these interests remained good even after the use had been executed.²⁰⁸ These departures from common law rules were justified on the basis that ‘the intention of the parties is the direction of uses.’²⁰⁹ Manwood J observed that uses were

not directed by the rules of the common law, but by the will of the owner of the lands: for the use is in his hands as clay is in the hands of the potter which he in whose hands it is may put into what form he pleaseth.²¹⁰

Egerton described a use as a ‘subtle thing,’ which ‘may be framed to commence, transfer and determine as a man wishes... because a use is nothing but trust, and trust must be guided by meaning.’²¹¹

Although, once raised, a use would be executed by the Statute, the question of its raising in the first place was still governed by pre-Statute law.²¹² As Moore explained, the Statute of Uses had ‘not altered the common law in limiting and raising uses,’ for, although it had changed the nature of the use, ‘there is no alteration made in the limiting of the use.’²¹³ The practice of the Chancery therefore also remained relevant.²¹⁴ In *Englande’s Case*, for example,

²⁰⁷ See 1.4. above.

²⁰⁸ AWB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 196.

²⁰⁹ See, for example, *Shelley’s Case* (n 85) 100a; *Dowman’s Case* (1586) 9 Co Rep 7b, 11a; *Edward Fox’s Case* (1609) 8 Co Rep 93b, 94a.

²¹⁰ *Brent’s Case* (undated) 2 Leo 14, 16.

²¹¹ *Rose v Morys* (1588) Hunt MS El 482 f282, f283v.

²¹² Other discussions of the nature of a use also referred back to pre-Statute understandings: see, for example, *Chudleigh’s Case* (1595) 1 Co Rep 120a, 121b. I am grateful to Neil Jones for this point.

²¹³ *Uses & Revocations de Uses* (n 206) 610.

²¹⁴ Simpson argues that, before the Statute, there were no serious conflicts between the common law and Chancery rules governing uses: AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1st edn, Oxford University Press 1975) 328.

Egerton relied on a 1522 definition of a use as ‘nothing but a trust and confidence.’²¹⁵ As a result, he continued, ‘the judges and sages of the law, in the construction of uses, direct and apply their judgments according to the will and intent of the parties, and not according to the precise rules of the law.’ Otherwise, ‘the trust will be defrauded, the party injured, and conscience offended.’²¹⁶ Coke also made the link to ‘conscience’ in *Shelley’s Case* (1581). He explained that ‘the intent of the parties was the direction of the uses,’ because they had been ‘adjudged by the Chancellor who is a judge of equity, and that in Chancery, which is a court of conscience.’ He concluded that equity required the will of an owner to be performed.²¹⁷

For this reason, the common law courts did not require any formalities to raise a use. The use of a deed or any other writing was unnecessary, as long as good consideration had been given and the settlor’s intention was clear.²¹⁸ This intention could be ‘expressed by writing, words or circumstances.’²¹⁹ As the court held in *Scope’s Case* (1612), ‘it does not matter whether he declares his intention by words, or by his acts and deeds.’²²⁰ Again, Coke explained this rule on the basis of pre-Statute law. A use, he argued, was not ‘any inheritance in law, but is only a trust and the remedy for it is given in Chancery, and a trust is a secret thing between the parties, for which no deed is necessary, for a deed is public.’²²¹

Where writing had been used, its function was simply to provide evidence for the parties’ intentions. In *Tibb v Poplewell* (1599), for example, a woman had granted land to her future husband, but, following the deed’s enrolment, no livery had been made.²²² The question was whether the deed was effective to raise a use. Coke argued that it was not, ‘for he said that uses always arise according to the intent of the parties... and he observed four circumstances

²¹⁵ *Englande’s Case* (undated) Hunt MS El 482 f53, f54. See (1522) YB Mich 14 Hen VIII pl 5, f4b-10a, f7a.

²¹⁶ *Englande’s Case* (n 215) f54v.

²¹⁷ *Shelley’s Case* (n 85) 100b.

²¹⁸ *Ewstace Callard v Richard Callard* (1603) Moore 688; *Callard v Callard* (1594) Cro Eliz 344; see Frank Goodwin, ‘Before the Statute of Frauds, Must an Agreement to Stand Seised Have Been in Writing?’ (1894) 7 Harvard Law Review 464.

²¹⁹ *Uses & Revocations de Uses* (n 206) 610.

²²⁰ *Scope’s Case* (1612) 10 Co Rep 143b, 144a. ‘*Quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*’

²²¹ *Corbin v Corbin* (n 145) f5-5v; see also *Corbens Case* (1594) Moore 544, 544. Coke did, however, note that a deed was necessary to raise a use in favour of a corporation or the Crown.

²²² *Tebb v Poplewell* (1598) BL Add MS 25203 f12v, 12v.

in the deed by which it appeared clearly that they did not have any intent to raise a use.²²³ Similarly, in *Edward Fox's Case* (1609), it was held that 'forasmuch as the intention of the parties is the creation of uses, if by any clause in the deed it appears, that the intent of the parties was to pass it in possession by the common law, there no use shall be raised.'²²⁴ The words of the deed, however, were clearly subordinate to the intention they expressed: the court concluded that '*verba intentioni non e contra debent inservire*' [words should serve the intentions, not the reverse].²²⁵

The courts' approach to uses also meant that they would allow common law rules on the meaning of words to be trumped by evidence of the parties' intentions.²²⁶ For instance, before the Statute of Uses, the words 'to him and his heirs' had not been required to limit a fee simple in use, either by the Chancery or the common law courts. In 1532, the justices of the Common Pleas had held that 'to him and his' or 'to him to do his will therewith' would suffice.²²⁷ This continued to be the case after 1536, and was explicitly based on the practice of the pre-Statute Chancery.²²⁸ In 1540, it was held that a bargain and sale could pass the fee simple of a use without the words 'his heirs.' As authority, Audley LC cited practice 'before the Statute of Uses,' concluding that it was 'the same law of a sale by indenture by the statute of 27 Hen. VIII without words of heirs.'²²⁹ Coke made the same point in *Shelley's Case*:

The law is plain, that if a man had before the statute of 27 Hen. 8. bargained and sold his land for money without these words, 'his heirs,' the bargainee hath a fee simple. And the reason is, because by the common law nothing passeth from the bargainor, but a use, which is guided by the intent of the parties, which was to convey the land wholly to the bargainee.²³⁰

He concluded that, even after the Statute, uses were to be 'directed by the intent and meaning of the parties.'²³¹ If a use passed by bargain and sale, 'in equity, and according to the meaning

²²³ *Tibb v Poplewell* (1599) BL Add MS 25203 f129v, f130.

²²⁴ *Edward Fox's Case* (n 209) 94a.

²²⁵ *ibid.*

²²⁶ These intentions could be collected from a number of documents: see, for example, *Vavisor's Case* (1572) Dyer 307b. Egerton noted that evidence of the parties' intentions could be based on 'any matter either expressed in the deed or to be averred outside it': *Englande's Case* (n 215) f54v.

²²⁷ *Anon* (1532) Old Benloe 11, 11.

²²⁸ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 120) 678.

²²⁹ Robert Brooke, *La Graunde Abridgement* (Richard Tottell 1573) 168.

²³⁰ *Shelley's Case* (n 85) 100b. See (1535) YB Pas 27 Hen 8 pl 15, f5a-5b.

²³¹ *Shelley's Case* (n 85) 101a.

of the parties,' the bargaineer would have 'the fee simple without these words "his heirs"'.²³² Likewise, Egerton argued that, in the case of a use, 'the law respects principally the intent of the parties, and never the words of the deed.'²³³ And Moore wrote that

as much as makes evident the intent and mind of the feoffor is a sufficient declaration of the use, although it was not expressed in such words as are requisite in the limitation of lands in possession. And for this reason, in similar cases where the law is intent on the will of the party, it dispenses with the defect of apt words, if they have words that are sufficient to declare the intent, and equivalent in substance.²³⁴

He went on to make a connection between the limitation of uses and of entails. Both were 'cases where the law is intent on the will of the party': uses because of the rules that had been developed before the Statute of Uses, and entails 'because the will of the donor is the intent of the Statute' *De donis*.²³⁵

It is clear that the interpretation of uses, like the interpretation of entails, was seen as an exception to the usual common law rules. In the case of uses, this seems only to have been explicitly discussed towards the end of the sixteenth century. Perhaps this was because a consistent approach to uses had not been pinned down until this point. It may also have been because, with the courts increasingly focused on the words of a deed, their treatment of uses was beginning to seem anomalous and in need of explanation.

As with the limitation of entails, however, there were limits to the courts' tolerance. We have seen that, in *Abraham v Twigg*, it was held that the words 'to him and his heirs male lawfully engendered' did not make an entail. 'Although it were by way of use,' insisted the judges, 'it differs not from other gifts by deed, and shall not have any other construction.'²³⁶ Similarly, in *Corbet's Case* (1600), the court held that a perpetuity clause in the limitation of a use was bad. Firstly, it was substantively unlawful, being repugnant to the nature of an entail.²³⁷ Secondly,

²³² *ibid* 100b.

²³³ *Englande's Case* (n 215) f54v.

²³⁴ *Uses & Revocations de Uses* (n 206) 610.

²³⁵ *ibid*.

²³⁶ *Abraham v Twigg* (n 201) 478.

²³⁷ *Corbet's Case* (1600) 1 Co Rep 83b, 84a. See 7.3. below.

it would have been in any case void for uncertainty.²³⁸ Anderson CJ held that ‘judges ought to know the intent of the parties by certain and sensible words, which are agreeable and consonant to the rules of law.’²³⁹ He drew a parallel with the limitation of a fee simple: even if the parties’ intention was apparent, it would be to no avail if they had failed to use words understood by the law.

3.3. Wills

3.3.1. THE WRITER’S INTENTIONS

The common law had only recently gained a substantial jurisdiction over gifts by will.²⁴⁰ Devises of chattels continued to be governed by the canon law, but the common law had become involved with devises of the use of freehold land in the fifteenth century, and since the Statute of Wills 1540 had exercised jurisdiction over wills of land itself.²⁴¹ Despite the novelty of wills of freehold land, the mid-sixteenth century courts do not seem to have had much hesitation about the correct approach to their interpretation. As with deeds, the intention of the writer was far more important than the meaning of the words he had used. Lawyers argued that the words of a will were simply evidence of the writer’s intentions, and had no real significance of their own. As Egerton wrote,

each will consists of two parts, words, and intent. And as spoken words are nothing but wind and verberation of the air, so written words are nothing but dead elements, and nothing to be esteemed except in respect of the intent and meaning which is to be collected and drawn out of them. Thus the effect of each will is the intent and meaning of the deceased, and the words serve only as testimony of his will.²⁴²

In fact, the position was even more pronounced with wills than it was with deeds. Even Broke CJ, in his dissent in *Throckmerton*, noted the difference. In deeds, he argued, ‘the law rules the

²³⁸ This two-pronged attack on a perpetuity clause was also deployed in *Sir Anthony Mildmay’s Case* (n 144).

²³⁹ *Corbet’s Case* (n 237) 85a.

²⁴⁰ The common law courts had had some involvement with wills for much longer. For example, they had jurisdiction over the appointment of executors and administrators: see *Graysbrook v Fox* (1565) Plow 275, 277; *Hensloe’s Case* (1600) 9 Co Rep 36b, 40b–41b.

²⁴¹ 32 Hen VIII c. 1. See 1.5. above.

²⁴² *Englande’s Case* (n 215) f55.

intent, and not the intent the law. But in testaments the intent only shall be observed and considered.’²⁴³

One leading case was *Newis v Lark* (1571), also known as *Scholastica’s Case*. The substantive effect of the case was to sanction an evasion of the rule against perpetuities, an evasion that would be firmly disapproved in *Mary Portington’s Case* (1613).²⁴⁴ The argument, however, was framed in terms of interpretation, and the case was also important for what it established about the construction of wills. Henry Clerk had devised land to his son John in tail, remainder to Francis, remainder to Scholastica. He also provided that, if any of them alienated the land, they were to be excluded from the entail.²⁴⁵ John and Francis granted the land to William Lark, and Scholastica and her husband entered, claiming that the two had forfeited their estates.²⁴⁶ The question was whether the term was a condition or a limitation. If it were a limitation, the land would pass to Scholastica. If it were a condition, however, the breach would destroy the whole entail, and the land would revert to Henry’s heir, John. The court agreed that this ‘manifestly’ could not have been Henry’s intention.²⁴⁷ He had wanted the entail to continue, and, to effect this, the term must be taken as a limitation on the estate. The judges held that ‘words in a will, which seemingly tend to a condition, shall not in the law be taken for a condition’ if the testator’s intention appeared to have been otherwise.²⁴⁸ ‘When the case is upon a devise,’ they explained, ‘the intent only is regarded, and the words, although they are not apt in law for the matter, shall be drawn to the intent.’²⁴⁹ Dyer CJ referred to the case of a conveyance, observing that if a condition could be taken as a limitation ‘where it was by deed, *a fortiori* shall it be so here where it is by last will, in which the intent rules the words, and not the words the intent.’²⁵⁰

Egerton made a similar point in his argument in *Englande’s Case*. William Chester held the use of a piece of land in Southwark, and devised it to be used to maintain, *inter alia*, a chantry and an almshouse. The question was whether these words were sufficient to transfer the use of the

²⁴³ *Throckmerton v Tracy* (n 8) 162.

²⁴⁴ *Mary Portington’s Case* (1613) 10 Co Rep 35b. See Simpson (n 208) 211 fn 7.

²⁴⁵ *Newis et Ux v Lark and Hunt* (1571) Plow 403, 409.

²⁴⁶ *ibid* 410.

²⁴⁷ *ibid* 412.

²⁴⁸ *ibid* 413.

²⁴⁹ *ibid*.

²⁵⁰ *ibid* 414. Similar *a fortiori* arguments were made by counsel in, for example, *Brett v Rigden* (1568) Plow 340, 345; and *Paramour v Yardley* (1579) Plow 539, 541.

land from William's heirs to his feoffees.²⁵¹ Egerton began by reminding the court that deeds were to be construed according to 'the true intent of the parties' and not the 'precision of the words.'²⁵² Just as 'such favourable construction' had been made of deeds,

in construction of wills, it has been received as a principle that the intent of the devisor is to be preferred, as fully as it may stand with the law. And the words (although they be imperfect or improper) will be drawn and strained to serve the intent.²⁵³

In fact, this had 'prevailed so fully that sometimes the intent of the testator has been received, contrary to the natural sense and property of the words.'²⁵⁴ In this case, Chester must have intended the use to go to his feoffees, or none of his stated aims could be achieved.²⁵⁵ Although the use had not been expressly mentioned in the will, any defect in the words could be remedied by evidence of Chester's intention.²⁵⁶

It was, therefore, agreed that wills were to be treated differently to deeds. Coke observed that a 'benign' interpretation was to be made of a contract, but a 'more benign' interpretation of a testament.²⁵⁷ Thus, words that were to be given their proper signification in a deed would be taken according to the testator's apparent intention when used in a will. We have already seen, for example, that conditional words could be taken to make a limitation in a will. In *Wiseman v Baldwin* (1595), Baldwin had devised land to Henry on condition that he pay £20 to Baldwin's daughter. If Henry failed to do so, the daughter would have the land. As Godfrey noted, the words were clearly conditional, but the devisor had apparently intended to make a limitation.²⁵⁸ On the authority of *Newis v Lark*, the term was held to be a limitation. Gawdy J explained that 'there is great diversity between an estate in law, and a devise, in which the intent of the devisor is to be observed.'²⁵⁹ In the same way, words like '*eâ intentione*', which were

²⁵¹ *Englande's Case* (n 215) f53.

²⁵² *ibid* f55.

²⁵³ *ibid* f55-55v.

²⁵⁴ *ibid*.

²⁵⁵ *ibid* f57.

²⁵⁶ *ibid* f58.

²⁵⁷ Coke (n 84) 112-3. '*In contractibus benigna, in testamentis benignior...interpretatio facienda est.*'

²⁵⁸ *Wiseman v Baldwin* (1595) Gould 152, 153.

²⁵⁹ *Wiseman v Baldwin* (1595) Owen 112, 112. *Newis v Lark* was used as authority for a similar conclusion in *Hainsworth v Pretty* (1603) Cro Eliz 919, 920.

insufficient to make a condition in a deed,²⁶⁰ could do so in a will if this appeared to be the devisor's intention.²⁶¹ This was, as Egerton explained, because of 'the favourable allowance which the law yields to the intent of testators.'²⁶²

The same was true of words referring to land. In *Kerry v Derrick* (1602), a testator had bequeathed his 'rents' to his wife for life. It was held that this was a good devise of his land, 'according to the common phrase and usual manner of speaking of some men, who name their land by their rents.'²⁶³ In *Inchley v Robinson* (1587), the Marchioness of Exeter, who held a rent issuing out of a certain manor, devised 'the manor.' The question was whether this was a good devise of the rent. Sjt Walmesley argued that it was not. A rent had no 'affinity or likelihood' to a manor, nor was it described as a manor 'in common speaking.'²⁶⁴ Similarly, Sjt Shuttleworth objected that 'there is not any mention made of any rent in all the will,'²⁶⁵ and it could not pass without 'apt words.'²⁶⁶ Sjt Fenner, on the other hand, argued that the testator's 'intent shall be taken, although it was not written by apt words.' He reminded the court that a deed could be interpreted by the writer's intention, 'and *a fortiori* a devise.'²⁶⁷ The justices indicated that they agreed, and the case was discontinued.²⁶⁸

The courts took a similar approach to terms limiting estates in wills. They would correct defects of form when they deemed the testator to have sufficiently expressed his intention: as Cooper put it in *Forster v Walker* (1584), 'the defect of a will in words, in making of an estate shall be supplied by intent.'²⁶⁹ Thus, in *Boraston's Case* (1587), Thomas Boraston had devised land to his executors until Hugh reached the age of 21. Although Hugh died at the age of nine, Thomas was deemed to have granted the executors a term for the twelve years until Hugh would have turned 21. Although Thomas had made

²⁶⁰ *The Duke of Norfolk's Case* (n 45) 138b.

²⁶¹ *Crickmere v Paterson* (1589) Cro Eliz 146, 146; *Gibbons v Malyard and Martin* (undated) Popham 6, 8.

²⁶² *Englande's Case* (n 215) f62v.

²⁶³ *Kerry v Derrick* (1602) Cro Jac 104, 104. See William Sheppard, *The Touch-Stone of Common Assurances* (M Lee, M Walbancke, D Pakeman and G Bedell 1651) 437.

²⁶⁴ *Jelsey v Robinson* (1583) Owen 88, 88.

²⁶⁵ *Inchley and Robinson's Case* (1587) 2 Leo 41, 42.

²⁶⁶ *The Lord Mountjoyes and Barkers Case* (1587) 4 Leo 73, 76.

²⁶⁷ *ibid.*

²⁶⁸ *Inchley and Robinson's Case* (n 265) 43; *The Lord Mountjoyes and Barkers Case* (n 266) 76.

²⁶⁹ *Forster and Walker's Case* (1584) 2 Leo 165, 165.

his will in a disordered manner, and in barbarous and unfit words, the law in such case will reduce his words, which want order, into good order, and sentence his unfit words to words sufficient in law, according to his intent which appears by his own words.²⁷⁰

The courts would also waive the usual requirement of specific words to grant a fee simple or a fee tail. In *Blanford v Blanford* (1616), a term was devised to Thomas and Lucy, ‘and if it shall please God to send them issue male, then to be reserved and put out’ for their benefit. It was held that ‘the implication of the devise is sufficient to settle an estate in the issue male, although the term was not expressly devised’ to them.²⁷¹ Similarly, a devise ‘to him and his successors’ would pass a fee simple, even without the words ‘his heirs’;²⁷² so too would a devise ‘to him in perpetuity,’ or ‘to him and his assigns forever.’²⁷³ ‘If he die before he hath issue’ could substitute for ‘if he die without issue’ in the creation of an entail;²⁷⁴ ‘men children’ was a good approximation of ‘heirs male’;²⁷⁵ and ‘to him and his lawfully procreated heirs’ would suffice without ‘heirs of his body.’²⁷⁶ Furthermore, while a grant ‘to him and his heirs male’ would pass a fee simple, a devise in the same words would create an entail.²⁷⁷ ‘The reason for this,’ explained Anderson, ‘is that the intent of the donor’ could not be fulfilled ‘if “heirs male of his body” is not supplied by intendment.’²⁷⁸ Fulbecke described this as limiting an estate ‘by implication.’²⁷⁹ In Hake’s discussion of the same rule, he observed that ‘in the exposition of wills and testaments... the common law seemeth so highly to respect the intent of the testator or devisor, as that a man would think there were almost nothing else that the law therein hath regard unto.’²⁸⁰

Why did the courts take such different approaches to the interpretation of deeds and wills? Firstly, wills were closely linked to uses, since any pre-1540 will of freehold land, unless

²⁷⁰ *Boraston’s Case* (1587) 3 Co Rep 19a, 20b.

²⁷¹ *Blanford v Blanford* (1616) Moore 846, 847.

²⁷² *Anon* (1616) Moore 852, 853.

²⁷³ Coke (n 84) 9v.

²⁷⁴ *Newton v Barnardine* (1583) Moore 127, 128; see also *Cosens Case* (1586) Owen 29, 30.

²⁷⁵ *Anon* (1564) 1 And 43, 43.

²⁷⁶ *Church v Wyat* (1595) Moore 637, 637.

²⁷⁷ *Corbet’s Case* (1599) And 134, 138; Coke (n 84) 27.

²⁷⁸ *Corbet’s Case* (n 277) 138.

²⁷⁹ Fulbecke, *The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (n 183) 46v.

²⁸⁰ Hake (n 38) 57.

devisable by custom, must have been a devise of a use. As we have seen, the usual phrases needed to limit estates were not required for uses. Thus, it was established before the Statute of Wills that a devise ‘to him and his’ or ‘to him to do his will therewith’ would pass a fee simple,²⁸¹ as would ‘to him in perpetuity,’ so that ‘the will of the devisor made by the testament shall be performed after the intent of the devisor.’²⁸² In 1535, Fitzherbert and Shelley JJ agreed that a devise to a man and his heirs male would pass an entail, ‘because the law is favourable to all devises, and construes them according to the intent of the devisor.’²⁸³

As N. G. Jones explains, even after the Statute of Wills was passed, there was not always a clear distinction between executors and feoffees to use.²⁸⁴ Wills made under the Statute were understood to operate as conveyances, in a similar way to declarations of use.²⁸⁵ As a result, the courts’ approach to devises of uses continued to influence their interpretation of wills of freehold land. In *Shelley’s Case* (1581), for example, Coke explained that ‘the limitation in uses and estates given by devises resemble one another.’ Citing pre-Statute cases, he observed that ‘the judges there took the construction of devises, and of estates conveyed in use to be all one, viz. according to the meaning of the parties.’²⁸⁶ Similarly, Sjt Shuttleworth relied on a case on a will from 1500 in *Inchley v Robinson*,²⁸⁷ and Hake on the 1535 case discussed above.²⁸⁸

Secondly, common lawyers’ approach to wills may have been influenced by the canon law, which had a parallel jurisdiction over the devise of chattels.²⁸⁹ Many common lawyers reported their familiarity with the church courts’ processes for dealing with wills,²⁹⁰ perhaps from their personal experiences of acting as an executor or inheriting goods.²⁹¹ In canon law, the testator’s intention was of paramount importance for interpretation. In his sixteenth-

²⁸¹ *Anon* (n 227) 11.

²⁸² Littleton (n 157) 115v.

²⁸³ (1535) YB Mich 27 Hen VIII pl 11, f27a, f27a.

²⁸⁴ NG Jones, ‘Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham’ (2010) 31 *Journal of Legal History* 273, 283.

²⁸⁵ *ibid* 284. See 1.5. above.

²⁸⁶ *Shelley’s Case* (n 85) 101a.

²⁸⁷ *Inchley and Robinson’s Case* (n 265) 42. See (1500) YB Trin 15 Hen VII pl 22, f11b-12b.

²⁸⁸ Hake (n 38) 57.

²⁸⁹ In the serjeants’ case of 1567, two of the serjeants argued that the common law ought to follow principles of interpretation applied to wills of chattels: *Le Serjaunts Case* (n 89) f5, f9v.

²⁹⁰ David J Seipp, ‘The Reception of Canon Law and Civil Law in the Common Law Courts before 1600’ (1993) 13 *Oxford Journal of Legal Studies* 388, 401.

²⁹¹ RH Helmholz, ‘Canon Law and English Common Law’ (Selden Society 1983) 16.

century treatise on canon law, Swinburne wrote that ‘it is the mind and not the words of the testator, that giveth life to the testament,’²⁹² and advised judges to consider ‘not the words, but the meaning of the testator.’²⁹³ ‘Without meaning, or consent of mind,’ he explained, ‘the testament is altogether without life; and is no more a testament than a painted lion is a lion.’²⁹⁴

Common lawyers often referred to *ius commune* sources as authority for this approach to wills. Particularly popular was the etymology, given in Justinian’s *Institutes*, of ‘testament’ as ‘*testatio mentis*’: a signifying of the mind.²⁹⁵ Discussed by Swinburne,²⁹⁶ it was also wheeled out by common lawyers and judges,²⁹⁷ treatise-writers,²⁹⁸ and readers in the Inns of Court,²⁹⁹ even though it was well known to be false.³⁰⁰ Another common definition of a testament also had roots in the Digest,³⁰¹ and was used by civil and common lawyers: ‘a testament is the determination of our will, concerning that which one would have done after his decease.’³⁰² One sixteenth-century gloss to Littleton, attributed to James Whitelocke,³⁰³ connected the common law’s respect for the will of the testator with a Digest text enjoining the reader to ‘interpret in the fullest possible way the wishes of testators.’³⁰⁴ The coincidence of the two

²⁹² Swinburne (n 101) 261.

²⁹³ *ibid* 9v.

²⁹⁴ *ibid* 9.

²⁹⁵ I.2.10.pr.

²⁹⁶ Swinburne (n 101) 2v–3.

²⁹⁷ *Graysbrook v Fox* (n 240) 278b; *Brett v Rigden* (n 250) 343.

²⁹⁸ Coke (n 84) 322v.

²⁹⁹ For example, in Ambrose Gilbert’s 1556 reading on the Statute of Wills, and Robert Nowell’s 1561 reading on the same: MC Mirow, ‘Readings on Wills in the Inns of Court 1552-1631’ (PhD thesis, University of Cambridge 1993) 41, 306; also John Briscoe’s reading in 1623: JH Baker, ‘Roman Law at the Third University of England’ (2002) 55 *Current Legal Problems* 123, 140.

³⁰⁰ Swinburne (n 101) 3; see also William M Gordon, ‘Succession’ in Ernest Metzger (ed), *A Companion to Justinian’s Institutes* (Cornell University Press 1998) 84.

³⁰¹ D.28.1.1; see Mirow (n 299) 126.

³⁰² For civil lawyers, see Swinburne (n 101) 3v; John Cowell, *The Institutes of the Lawes of England, Digested into the Method of the Civill or Imperiall Institutions* (Thomas Roycroft 1651) 117. For common lawyers, see William West, *The First Part of Symboleography* (Thomas Wight and Bonham Norton 1598) s 633. See 1.5. above.

³⁰³ Baker, ‘Roman Law at the Third University of England’ (n 299) 144. Whitelocke, unusually, was a common lawyer who had taken a degree in civil law: David Ibbetson, *Common Law and Ius Commune* (Selden Society 2001) 11.

³⁰⁴ Baker, ‘Roman Law at the Third University of England’ (n 299) 150: the passage in Littleton referred to at n 282 above was annotated with text from D.50.17.12 (*‘in testamentis plenius voluntates*

bodies of learning affirmed common lawyers' conviction that their approach to wills was a reasonable one.³⁰⁵

Thirdly, it was felt that last wishes were inherently worthy of respect, and that carrying them out was part of the law's fundamental role in society. Coke, for example, wrote that '*reipublicae interest suprema hominum testamenta rata haberi*' [it is the concern of the commonwealth that the last wills of men be upheld].³⁰⁶ Sheppard quoted a biography of Virgil to argue that 'belief in the laws must be preserved; it is necessary to obey what the last wish commands and orders to be done.'³⁰⁷ We saw in chapter one that wills had always performed a religious function.³⁰⁸ Since it was a testator's Christian duty to arrange his affairs before he died, it was also the duty of those who survived him to put his wishes into effect.

The Statute of Wills had explained that the power to devise land was granted so that a testator could provide for 'the advancement of his wife, preferment of his children and payment of his debts.'³⁰⁹ As we saw in chapter one, these were weighty concerns.³¹⁰ This statutory language was quickly adopted by the profession,³¹¹ and was used to explain the importance of the testator's intentions. In 1567, Sjt Wraye argued that one 'cause of the favourable exposition of wills' was that the testator 'provided for his family.'³¹² Similarly, in *Paramour v Yardley* (1579), a devise providing funds for the education of the testator's children was construed favourably because of its 'great importance.'³¹³ A will was also the testator's last chance to pay his debts,

testantium interpretantur'). As Baker notes, this was a somewhat unusual gloss, containing a large number of civilian *regulae iuris*: *ibid* 142.

³⁰⁵ Baker, 'Roman Law at the Third University of England' (n 299) 146. Cowell, a civil lawyer, argued that the common law and civil law on this point both accorded with reason: Cowell (n 302) 143.

³⁰⁶ Coke (n 84) 322v.

³⁰⁷ Sheppard (n 263) 434; William Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (Lee, Pakeman et al 1656) 956; see MCJ Putnam and J Ziolkowski, *The Virgilian Tradition: The First Fifteen Hundred Years* (Yale University Press 2008) 350. '*Sed legum servanda fides; suprema voluntas/ Quod mandat fierique jubet, parere necesse est.*' The biography was a popular one from the fifteenth century on, and appeared at the start of contemporary editions of Virgil's poetry. I am grateful to Talitha Kearey for this reference.

³⁰⁸ See 1.5. above.

³⁰⁹ 32 Hen VIII c. 1, s 2.

³¹⁰ See 1.5. above.

³¹¹ MC Mirow, 'Bastardy and the Statute of Wills: Interpreting a Sixteenth-Century Statute with Cases and Readings' (1999) 69 Mississippi Law Journal 345, 357.

³¹² *Le Serjaunts Case* (n 89) 9v.

³¹³ *Paramour v Yardley* (n 250) 542.

another critical obligation.³¹⁴ In *Milward v Moore* (1580), the court held that a deviser must have intended his debts to be paid as soon as possible, for ‘the speedier disburdening of his conscience, and less peril to his soul.’³¹⁵ As a result, in *Matthew Manning’s Case* (1609), Coke explained that

a more favourable interpretation is made of a will in point of interest or estate to satisfy the will of the dead for the payment of his debts, than of a grant or conveyance in his life; which he may enlarge, or make other provision of his pleasure.³¹⁶

These were not just important concerns because of the statute. Rather, they were thought to be common functions of all kinds of will. Fulbecke, for example, had the civil lawyer in his *Parallele* observe that ‘the making of wills is necessary’ so that men could educate their children, pay their debts, advance their children, and support their wives ‘as in conscience they ought.’³¹⁷

Finally, and most importantly, there was a pragmatic reason for giving little weight to the words of a will. As we have seen, a testator usually declared his will on his deathbed, without the benefit of legal advice.³¹⁸ Thus, as Harper J explained in *Newis v Lark*,

the deviser shall be accounted *inops consilii* [without help of counsel], because men most commonly make their wills when they are at the point of death, and have not time to seek counsel, for which reason the law shall be their counsel, and shall interpret the words, and direct the operation of them according to the intent of the party.³¹⁹

Similarly, Egerton observed that deeds were made by parties ‘in their sanity, and when they had, or could have had, advice of counsel, to express and show their intent in apt and proper

³¹⁴ Michael M Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Pontifical Institute of Mediaeval Studies 1963) 156.

³¹⁵ *Milward v Moore* (1580) Savile 72, 73.

³¹⁶ *Matthew Manning’s Case* (1609) 8 Co Rep 94b, 96a.

³¹⁷ William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1601) 35.

³¹⁸ RH Helmholz, *The Oxford History of the Laws of England, Vol. I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford University Press 2004) 398. See 1.5. above.

³¹⁹ *Newis et Ux v Lark and Hunt* (n 245) 413.

words.³²⁰ In contrast, ‘wills (for the greater part) are made when men are in extremity of sickness, and lack counsel, and they themselves are ignorant and simple, and thus the law yields all favour which it may in construction of wills.’³²¹ Unlike a party to a deed, a testator could not be regarded as speaking ‘at his peril.’³²² Rather, as Sjt Lovelace put it, he was making his testament ‘by the necessity of death.’³²³

The presumption that a testator was *inops consilii* was so strong that it was invoked even in cases where the testator really did have time to consult a legal advisor. In the serjeants’ case of 1567, four of the seven serjeants made reference to the presumption, even though the testator in their case had made his will some years before he died.³²⁴ Sjt Jeffrey went so far as to declare that ‘every devise will be construed favourably, because the approach of death deprives a man of his senses and of his intelligence,’ although this was manifestly irrelevant to the case at hand.³²⁵

It was also irrelevant that the testator might have had legal knowledge of his own. In *Paramour v Yardley*, Plowden noted that ‘testators themselves in general are unacquainted with the law, and know not how to put their words in their proper order.’³²⁶ Some judges seem to have treated this as an irrebuttable presumption. In *Coxe v Lowen* (1600), for example, Lowen had devised land to his two sons ‘equally.’ It was argued that he must have intended the word ‘equally’ to make them tenants in common. However, Walmesley J held that ‘we must not understand that he was an erudite man, for all our books are contrary. But he is to be taken for an illiterate man, in which case it is no marvel if he uses an idle word.’³²⁷ Similarly, in *The Lord Mountjoye v Barker* (1587), Gawdy J argued that ‘it may be taken, that she who devised was ignorant of the law,’ and thought that a rent was the same thing as a manor.³²⁸ Inconvenient words could thus easily be explained away.

³²⁰ *Englande’s Case* (n 215) f55-55v.

³²¹ *ibid.* See also, for example, *Boraston’s Case* (n 270) 20b; *Matthew Manning’s Case* (n 316) 95a.

³²² See 3.2.2. above.

³²³ *Le Serjaunts Case* (n 89) f3.

³²⁴ *ibid* f3, f4v, fv, f9v. In the case on which the facts were based, the testator had made his will over five years before his death: *Brett v Rigden* (n 250) 341-2.

³²⁵ *Le Serjaunts Case* (n 89) f7.

³²⁶ *Paramour v Yardley* (n 250) 540.

³²⁷ *Coxe v Lowen* (1600) BL Add MS 25203 f154, f154.

³²⁸ *The Lord Mountjoyes and Barkers Case* (n 266) 74; see also *Inchley and Robinson’s Case* (n 265) 43.

3.3.2. THE MEANING OF THE WORDS

On the other hand, the words of a will had a particular importance. Though lawyers drew analogies between wills and limitations of uses, there was a major difference between the two: a will of freehold land was required to be in writing by the Statute.³²⁹ Thus, the only intention that the courts were lawfully permitted to consider was one that they could extrapolate from the testator's written words.

In *Brett v Rigden* (1568), for example, Giles Brett devised his land to his nephew Henry, *habendum* to Henry and his heirs forever. Henry, however, pre-deceased Giles, leaving a son, Thomas.³³⁰ Giles 'said and declared to the same Thomas Brett the son' that he would have the land that Henry should have had by Giles' will. However, Giles did not alter his written will before his own death. One question that arose was whether Thomas was entitled to take the land, either by the words 'his heirs' in the will, or by Giles' oral declaration.³³¹ The court held that he was not. Although Henry's heirs had been mentioned in the will, this was only to limit the estate that Henry himself would have, a fee simple. It did not mean that Giles had intended Henry's heir to take the land directly.³³² As for the oral declaration, they ruled that it 'was of no effect in law, and that no regard ought to be given to it, inasmuch as it was not written in his last will.' If the words of the will could not, by themselves, make the land pass to Thomas, they were not to be aided by matter that was not in writing.³³³

The extent to which the courts could deviate from the proper meaning of the words was a vexed question. As we have seen, there was a strong inclination to interpret a will favourably throughout our period. However, by the final decades of the sixteenth century, lawyers were increasingly voicing their concern about the legitimacy of this approach. In *Higham v Horwood* (1585), an illiterate testator had instructed a clerk to write his will, specifying that his house, land and pasture were to be sold. The scribe, however, wrote that the land and its appurtenances were to be sold. The question was whether the executors had the authority to sell the land, which was not, strictly speaking, an appurtenance. Bramshaw argued that they did not. A will of land, he pointed out, 'must be in writing by the Statute, and all that is not included in the writing is void.' The deviser's intention was not to be considered, but only 'the

³²⁹ 32 Hen VIII c. 1.

³³⁰ *Brett v Rigden* (n 250) 341.

³³¹ *ibid* 342.

³³² *ibid* 345.

³³³ *ibid*.

words that are written.³³⁴ Coke, as opposing counsel, made the orthodox counter-argument: ‘the writer was ignorant of the law,’ and must have thought that land could be appurtenant to a house. Therefore, ‘the word will be framed according to his intent,’ to mean ‘land usually occupied with the house.’³³⁵ The court ultimately agreed.³³⁶ However, Clench J was initially reluctant to do so. He observed that, if a testator devised land to his son, without specifying ‘him and his heirs,’ it could not be averred that the devisor’s intent was that the son and his heirs would take. Why, he asked Coke, should it be different in this case?³³⁷ Moore did not record Coke’s reply.³³⁸

Other judges were less scrupulous. In *Downhall v Catesby* (1594), an illiterate testator instructed that his land be given to his son for life. The clerk, however, wrote that the son was to have the land in fee. Fenner J thought that the words could be taken to mean an estate for life, but the rest of the court was against him.³³⁹ In *Fuller v Fuller*, the same year, a testator had devised land to his son and the heirs male of his body. As in *Brett v Rigden*, the son pre-deceased him. Here, however, Popham CJ and Fenner J thought that ‘there was enough before in writing to make the issue have the land.’³⁴⁰ Gawdy and Clench JJ disagreed.

The tide certainly seemed to be turning against such arguments. Judges were increasingly preoccupied by the idea of a ‘secret intent,’ which could not be found in the words of the will. In *Maunchel v Dodenton* (1587), the court explained that ‘devises must be taken according to the intents of the devisors, if they may be known by the will.’³⁴¹ However,

this intent must appear to others who adjudge it, or otherwise they cannot know or recognise the intent of the testator, which is very reasonable; because none can recognise the secret intent of a man which does not appear by some external things or act, such as writing or such similar thing.³⁴²

³³⁴ *Higham v Horwood* (1585) Moore 221, 221.

³³⁵ *ibid* 222.

³³⁶ *Higham and Harewoods Case* (1586) 1 Leo 34, 34; *Harwood and Higham’s Case* (1586) Godbolt 40, 40.

³³⁷ *Higham v Horwood* (n 334) 222.

³³⁸ See also Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (n 317) 50; *Bucher v Sanford* (1588) Gould 99, 99.

³³⁹ *Downhall v Catesby* (1594) Moore 356, 356.

³⁴⁰ *Fuller v Fuller* (1594) Moore 353, 353.

³⁴¹ *Maunchel v Dodenton* (1587) 1 And 197, 197.

³⁴² *ibid* 198.

In *Legwoode v Burrish* (1599), a testator had devised land to his wife until his eldest son turned 24; and if the eldest son died, to his younger son; and if the younger son died, to his two daughters; and so on. The question was whether he had intended to create an entail, or to grant successive life estates. It was argued that

the will must be construed according to the intent of the devisor, and it may not be understood that his intent was to disinherit his posterity, but his intent was that if the eldest son died without issue that the younger would have it, and if the younger died without issue that his daughters would have it.³⁴³

The court responded that ‘perhaps his private intent was such, that his issues would not be disinherited, but the words of the will have no such implication.’ The eldest son was therefore held to have only a life estate in the land.³⁴⁴

The key distinction was that ‘the intent of the devisor may be implied where the words are defective, but never against the express words of the will.’³⁴⁵ However, there was clearly a fine line between understanding defective words in light of the testator’s intentions and introducing intentions that contradicted the written words. On a number of occasions, lawyers expressed anxiety about overstepping the mark. In *The Lord Mountjoye v Barker* (1587), for example, Sjt Shuttleworth argued that ‘the construction of a will ought to be according to the words, or according to the intent collected out of the words, and not by a thing out of the will.’ He gave two reasons for this. Firstly, if the intention did not come from the words of the will, ‘a stranger shall be the maker of the will of another.’³⁴⁶ Secondly, the ‘set order’ of words ought to be observed ‘for the avoiding of confusion.’³⁴⁷

A similar point was made by Coke in *Bullen v Bullen* (1600):

It is clear that the intent of the devisor must be collected out of the written will, and the court must not adjudge what was his intent by any foreign matter outside the will, for at this day the greater part of the inheritances of the realm depend on wills, and therefore it is convenient to have the exposition of them guided by some certain bounds, and it would be dangerous to make such favourable

³⁴³ *Legwoode v Burrish* (1599) BL Add MS 25203 f57, f57v.

³⁴⁴ *ibid.*

³⁴⁵ *Bacon v Hill* (1597) Moore 464, 464.

³⁴⁶ *The Lord Mountjoyes and Barkers Case* (n 266) 76.

³⁴⁷ *ibid.*

construction of wills as to search for an intent which does not appear by the words of the will.³⁴⁸

In *Garmyn v Arscott*, the court refused to accept that a will was fundamentally different from a deed in this respect. The judges observed that ‘neither a will nor an act of the party rules the law, but the law rules wills and other acts of the parties.’³⁴⁹ A will was not taken according to the writer’s intentions because it was the testator’s last will, but because it expressed his intentions, just as ‘a deed is the will of the parties.’³⁵⁰ Thus, ‘the intents of the makers of wills will be taken, but not always, any more than the intents of parties to deeds will always be taken.’³⁵¹ For instance, a testator’s intention would be void if it were not expressed clearly enough in the will. ‘No one knows what thing the maker of the will intended,’ explained the court, except by the words of the will. ‘Otherwise, it is an intent that passes all understanding and intelligence, and rests on opinion without any certainty.’³⁵²

We have seen that, in *Englande’s Case*, Egerton argued that ‘wills are to be construed according to the intent and meaning of the deviser.’³⁵³ In *Sanders v Byng*, however, his client’s case required a different approach. Here, Egerton warned that

the intent is not to be imagined and hunted out of the words of the will according to our fancy, but an apt and reasonable intent is to be plausibly collected and inferred, from the words themselves put together, and from the necessary circumstances of it.³⁵⁴

Where the testator’s intention was not clear, he argued, the land should simply be allowed to descend ‘as the law directs.’³⁵⁵ The common law rules of descent were ‘never to be prevented

³⁴⁸ *Bullen v Bullen* (1600) BL Add MS 25203 f248, f249. Coke went on to discuss *The Lord Cheyney’s Case* (1591), which, as we will see, concerned a different issue in the law of evidence: see 3.4. below.

However, Coke’s argument was made in the context of a dispute about interpretation. His point seems to have been that, in both contexts, the words of the written will were to be paramount: *ibid* f249v.

³⁴⁹ *Garmyn v Arscott* (undated) 2 And 7, 10.

³⁵⁰ *ibid*.

³⁵¹ *ibid*. The court admitted that, sometimes, words in a will would convey an estate although, in a deed, they would be void. This was because they were words that sufficed to show the testator’s intention, but not words that the law allowed to pass land in a deed: *ibid* 13.

³⁵² *ibid* 12.

³⁵³ *Englande’s Case* (n 215) f55v.

³⁵⁴ *Sanders v Byng* (undated) Hunt MS El 482 f182, f183v.

³⁵⁵ *ibid* f183.

or avoided, except where the intent of the testator appears to be thus, either by express words, or by direct and plain intent, to be inferred by the words and circumstances of the will.³⁵⁶ In fact, an intention to depart from the common law rules of inheritance should be regarded as ‘unnatural and wrongful.’³⁵⁷

Egerton was exploiting lawyers’ continued suspicion of the Statute of Wills, which, decades after its enactment, could still be regarded as a dubious novelty. On this view, rather than being ‘favoured’ by the common law, wills of freehold land were an imposition on its rules and ought to be strictly curtailed. Arguments against the favourable interpretation of wills were bolstered by the presentation of a fallback option: ‘in doubtful cases the safest way is to expound with the heir general against the will.’³⁵⁸ In *Wild’s Case* (1599), Clench and Fenner JJ argued that the testator’s intention ‘ought to be manifest and certain, and not obscure or doubtful: for at the common law lands were not devisable.’ The Statute of Wills was ‘made to the great disadvantage of heirs at the common law,’ and was ‘utterly against the rule and reason also of the common law; for the ancient common law did favour him whom the common law made heir.’³⁵⁹

There was a clear link between attitudes to the Statute of Wills and approaches to the construction of wills. In *Butler v Baker* (1591), for example, Egerton was again on the other side of the argument. As a result, he was full of praise for the Statute, which was made ‘for the favour and benefit of subjects,’ and was ‘to be construed favourably according to the intent of the makers.’³⁶⁰ Conversely, ‘against the heir it will be taken strictly,’³⁶¹ and in the same way, ‘wills will be taken strictly against the heir, for the entire scope and intent of Parliament was to bind the heirs.’³⁶²

We have seen that distaste for bad drafting encouraged the courts to take a stricter approach to the interpretation of deeds. In principle, this should not have been the case for wills, since the courts’ role was to aid a testator who was *inops consilii*. However, it is clear that lawyers and judges were increasingly anxious about badly-drafted wills, and this may also have influenced their increasingly strict approach to interpretation. In *Butler v Baker*, for example, Coke warned

³⁵⁶ *ibid.*

³⁵⁷ *ibid* f183v.

³⁵⁸ *Lovice v Goddard* (1604) Moore 772, 774.

³⁵⁹ *Wild’s Case* (1599) 6 Co Rep 16b, 16b.

³⁶⁰ *Butler v Baker* (1591) Hunt MS El 482 f286, f289v.

³⁶¹ *ibid.*

³⁶² *ibid* f290.

testators to draft their wills carefully, since ‘great doubts and controversies daily arise on devises made by last wills,’ due to their ‘obscure and insensible words, and repugnant sentences.’³⁶³ The result, he observed elsewhere, was that ‘none should know by the written words of a will, what construction to make, or advice to give.’³⁶⁴ Coke had little patience for inept testators, complaining that judges had to ‘so often and so much perplex their heads, to make atonement and peace by construction of law between insensible and disagreeing words, sentences, and provisos’ in wills.³⁶⁵

As with deeds, then, lawyers were increasingly emphasising the words of wills by the end of the sixteenth century. They were no longer concerned with the testator’s intentions per se, but with the ‘intention expressed in the will.’³⁶⁶ In *Lovice v Goddard* (1604), for example, the court held that ‘the mind of the devisor... is to be preferred in cases where the words will serve.’³⁶⁷ Coke made the same point in his report of the case, explaining that ‘against the express words no inference or interpretation shall be admitted.’³⁶⁸ While in theory, specific forms of words were not needed in wills, a testator who was insufficiently precise could be accused of failing to make his intentions clear. Walmsley J warned in 1595 that ‘it is not a safe course to search the intent, unless we be certain of the intent.’ If the testator’s intentions were not clear, it was safest to interpret the words according to their usual meaning at common law.³⁶⁹ However, if the will remained ‘uncertain and doubtful and cannot be expounded for the uncertainty of the words thereof, the law therein will ever favour the inheritance of a man,’ allowing the will to fail and the land to descend to the common law heir.³⁷⁰

3.4. The parol evidence rule

Concerns about subverting the words of a document were also apparent in the law of evidence.³⁷¹ In particular, they were evident in the development of the nascent parol evidence

³⁶³ *Butler and Baker’s Case* (1591) 3 Co Rep 25a, 36a.

³⁶⁴ *The Lord Cheyney’s Case* (1591) 5 Co Rep 68a, 68b.

³⁶⁵ *The Reports of Sir Edward Coke*, vol I (Joseph Butterworth and Son 1826) 2 Co Rep x.

³⁶⁶ *Adams v Lambert* (undated) Moore 648, 648.

³⁶⁷ *Lovice v Goddard* (n 358) 773.

³⁶⁸ *Leonard Lovies’s Case* (1613) 10 Co Rep 78a, 87a.

³⁶⁹ *Lewen v Dodd* (1595) Cro Eliz 443, 444.

³⁷⁰ Hake (n 38) 60; see also *Taylor, and Joan his Wife, v George Sayer* (1600) Cro Eliz 742, 743.

³⁷¹ The usefulness of evidence to establish the parties’ intentions was clearly limited. For obvious reasons, a testator could not appear to give evidence about his intentions. The parties to the case were

rule, which provided that the terms of a written document could not be varied by parol evidence.³⁷² This could touch on the same issues as the law of interpretation, but was raised at a different point in the proceedings. The parol evidence rule concerned questions of fact, which were a matter for the jury, while questions of construction were for the judges to resolve.³⁷³

The rule first appeared in relation to wills.³⁷⁴ In 1587, Anderson CJ had argued that an averment of fact could be admitted ‘to take away surplusage’ in the words of a will, ‘but not to increase that which is defective,’ because, in that case, the will would not be ‘in writing which the statute requires.’³⁷⁵ However, in *The Lord Cheyney’s Case* (1591), the court held that an unambiguous will could never be altered by a ‘secret invisible averment’ of the testator’s intention. This was because a

will concerning lands, &c. ought to be in writing, and the constructions of wills ought to be collected from the words of the will in writing, and not by any averment out of it; for it would be full of great inconvenience, that none should know by the written words of a will, what construction to make, or advice to give, but it should be controlled by collateral averments out of the will.³⁷⁶

The rule clearly emerged from the same anxieties as the courts’ stricter approach to interpretation.³⁷⁷ It was also based in the statutory requirement of writing. Egerton, for example, observed that an averment could be made against the words of a will of chattels, or of a will of land that could be devised at common law.³⁷⁸

also prohibited from giving sworn evidence, although documents written by the parties were admissible: Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 120) 364.

³⁷² Michael Macnair, *The Law of Proof in Early Modern Equity* (Duncker und Humblot 1999) 136. There was an older rule that a deed could not be contradicted by a parol averment: see 1.4. above. However, this applied only to pleaded documents, and did not bind the jury: see *James’ Case* (1584) Moore 181, 181; *Goddard’s Case* (1584) 2 Co Rep 4b, 4b. The parol evidence rule, which covered evidence given to the jury, first developed at the end of the sixteenth century: Macnair 137.

³⁷³ *Edward Altham’s Case* (1610) 8 Co Rep 150b, 155a.

³⁷⁴ Macnair (n 372) 137.

³⁷⁵ *Anon* (1587) Godbolt 131, 131.

³⁷⁶ *The Lord Cheyney’s Case* (n 364) 68b.

³⁷⁷ We have seen that Coke linked the two: see n 348 above.

³⁷⁸ Macnair (n 372) 137.

There was, the court noted, an exception to the rule: where the will contained a latent ambiguity.³⁷⁹ For example, if a man devised land to his son John, witnesses could be produced to show that the testator had two sons named John, and meant the younger.³⁸⁰ In *The Lord Cheyney's Case*, the court explained that, if a will was ambiguous, the reader 'ought at his peril to inquire' what it meant. It could therefore cause 'no inconvenience' to have the meaning of the will depend on a 'secret invisible averment,' since everyone ought to know that one would be needed.³⁸¹

The rule was applied to deeds in *The Countess of Rutland's Case* (1604). The question was whether the jury in a trespass trial could consider a parol agreement that purported to vary the terms of a use limited by deed. Popham CJ held that, in general, it could not, since 'every contract or agreement ought to be dissolved by matter of as high a nature as the first deed.'³⁸² Furthermore,

it would be inconvenient, that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted.³⁸³

Here, there was no statutory requirement of writing to uphold, but there was a concern for the sanctity of deeds, and again for the certainty of estates. The terms of a deed could not be varied by an averment of fact, but only by raising a question of interpretation.³⁸⁴ If the words were unambiguous as a matter of construction, there was nothing that could be done. As the court explained in *Edward Altham's Case* (1610),

³⁷⁹ *ibid* 137, fn 38.

³⁸⁰ See (1373) YB Mich 47 Edw III pl 29, f16b. This case, is, if anything, a damning indictment of medieval naming practices.

³⁸¹ *The Lord Cheyney's Case* (n 364) 68b. The court's reasoning here would also seem to extend to a patent ambiguity, but the point was not discussed.

³⁸² *The Countess of Rutland's Case* (1604) 5 Co Rep 25b, 26a. In support of this proposition, Coke cited a Bractonian maxim derived from D.50.17.35: Macnair (n 372) 136.

³⁸³ *The Countess of Rutland's Case* (n 382) 26a. On the facts of the case, the parol agreement was in fact admissible: *The Countess of Rutland's Case* (n 382) 26b.

³⁸⁴ *Edward Altham's Case* (n 373) 155b; Spedding, Ellis and Heath (n 143) 385.

if a man makes a feoffment to one and his heirs, no averment can be taken that the intent of the parties was, that the feoffee should have but an estate to him and the heirs of his body, for such averment would be against the judgment of the law, which appears to the judges upon the view of the deed.³⁸⁵

If the words of the deed were patently ambiguous, no averment of fact could be taken to correct them. A grant to ‘one of the sons of I.S.,’ for example, was simply void for uncertainty.³⁸⁶ The party here was in something of a catch-22: the question was one of construction, which the jury could not determine, but the evidence was matter of fact, of which the judges could not take notice.³⁸⁷ Bacon explained the rationale for the rule: if a deed could be corrected by an averment of fact, it would make ‘that to pass without deed, which the law appointeth shall not pass but by deed.’³⁸⁸

The only exception was if the deed was good on the face of it, but a latent ambiguity was raised by the facts of the case. In this case, the ambiguity was created by matter of fact, so the question became one for the jury, who could take an averment of fact to correct it.³⁸⁹ The same example was given as in the case of a will: if A. levied a fine to his son William, this was clear as a matter of construction. It would therefore be possible to inform the jury that A. in fact had two sons named William, and that A. had meant William the younger.³⁹⁰ In this case, however, the result was explained on the basis of the jury’s proper role, rather than policy concerns about uncertainty.

The crystallisation of the rule at the end of the sixteenth century was, at least in part, a result of the same pressures that bore on the law of interpretation. The courts were increasingly concerned that invoking the writer’s intentions would undermine certainty, to the detriment of those whose estates depended on written documents. They therefore took a more formalistic approach to legal instruments and their meaning.

³⁸⁵ *Edward Altham’s Case* (n 373) 155a.

³⁸⁶ *ibid.* See also *Cob v Betterson* (1615) Cro Jac 374, 374.

³⁸⁷ Chancery, however, might intervene, if it was clear that the parties’ intention was not reflected in their deed: Macnair (n 372) 137.

³⁸⁸ Spedding, Ellis and Heath (n 143) 385.

³⁸⁹ *Edward Altham’s Case* (n 373) 155a.

³⁹⁰ *ibid.*

3.5. Conclusions

There was a significant shift in lawyers' attitudes to the interpretation of private documents during our period. In the mid-sixteenth century, they had accepted that a document should be given the meaning intended by its writer, rather than the proper signification of the words he had used. They did not believe that a word was given a new meaning by the writer, but simply that they should 'apply the word out of its proper signification to fulfil the intent.'³⁹¹ Thus, they emphasised both the existence of a 'proper signification' and its subordination to the intentions of the writer. This was because of their understandings of the nature of language, the role of legal documents in society, and the way in which those documents were made.

At the turn of the century, the courts were still insisting that their aim was to identify the writer's intentions. However, they now emphasised that those intentions must be properly expressed in the words of the document, and asserted their right to determine which forms of drafting were legitimate. Otherwise, they warned, the result would be uncertainty for those whose estates depended on written documents. Again, lawyers were motivated by a combination of ideas about the nature of language and about the practical effects of legal instruments. Similar concerns encouraged a parallel development in the law of evidence: the formalisation of the parol evidence rule.

The courts seem to have thought of their approach to deeds as the default position for interpretation. Deviations from it were always carefully justified. For example, the courts hewed more closely to the strict meaning of the words when the term of the deed at issue was a destructive condition or the limitation of an estate. Both exceptions were explained in policy terms: the former, because the courts did not wish estates to be destroyed, and the latter, because of the need for estates to be certain. Other exceptional cases demanded greater consideration of the writer's intentions, with the result that the legally-mandated words would not be required if the writer had made his intentions clear. This was the case for limitations of entails and uses, in both cases because of an imposition on the common law rules: by the statute *De donis* for the former, and Chancery practice for the latter. It was also the case for wills, partly because of their historical links to the Chancery, but also due to the usual circumstances of will-making and to lawyers' reverence for last wishes.

³⁹¹ *Throckmerton v Tracy* (n 8) 154.

Lawyers saw these exceptional cases as part of the same picture. Moore described wills and limitations of entails and uses as ‘similar cases, where the law is intent on the will of the party.’³⁹² In *Ross v Morris* (1588), Egerton drew an analogy between wills and entails, arguing that ‘both the will of the donor and the will of the testator are to be respected.’³⁹³ And in *The Lord Paget’s Case* (1589), Coke cited precedents on uses and wills interchangeably, noting that ‘the intents of the parties do direct the construction of both.’³⁹⁴ However, the three were not entirely alike: a will still demanded a more favourable construction than any *inter vivos* conveyance. Anderson CJ observed that ‘the case of a will, which receiveth a benign interpretation according to the testator’s intent, is stronger’ than that of a use.³⁹⁵ As we have seen, in *Abraham v Twigg*, it was held that the grant of a use ‘to Gabriel Dormer and his heirs male lawfully engendered’ was insufficient to create an entail.³⁹⁶ The court held that the limitation of a use ‘differs not from other gifts by deed.’³⁹⁷ Moore, counsel for the losing party, complained that ‘it is not the same in a will of land.’³⁹⁸

As concerns for certainty came to the fore, however, suspicion of these exceptional cases was growing. Coke described entails, uses and wills as encroachments on the common law, which had caused ‘infinite troubles’³⁹⁹ by raising ‘intricate and subtle questions’ of interpretation.⁴⁰⁰ Because the usual rules of construction were suspended, writers had been encouraged to devise ‘upstart and wild’ forms of drafting, which provoked litigation, took up valuable court time, and undermined certainty.⁴⁰¹ The courts reacted by refusing to consider an intention that had not been sufficiently expressed in words.

In chapters six and seven, we will examine further, closely-related changes in the courts’ approach to legal interpretation. First, though, we will explore lawyers’ conceptions of the writer’s intentions in more detail. In chapter four, we will ask what kind of intentions the courts thought that they were looking for. And in chapter five, we will see how lawyers went about identifying the intentions that would inform their interpretation of a document.

³⁹² *Uses & Revocations de Uses* (n 206) 610.

³⁹³ *Rose v Morys* (n 211) f282.

³⁹⁴ *The Lord Pagets Case* (1589) 1 Leo 194, 198.

³⁹⁵ *Corbet’s Case* (n 237) 86a.

³⁹⁶ *Abraham v Twigg* (1596) Moore 424, 425.

³⁹⁷ *Abraham v Twigg* (n 201) 478.

³⁹⁸ *Abraham v Twigg* (n 396) 425. See, for example, *Church v Wyat* (n 276) 637.

³⁹⁹ *The Reports of Sir Edward Coke*, vol II (Joseph Butterworth and Son 1826) 4 Co Rep vii.

⁴⁰⁰ *ibid* 4 Co Rep vi.

⁴⁰¹ *ibid* 4 Co Rep vii.

4. THE NATURE OF INTENTIONS

4.1. Introduction

In chapter three, we saw that the writer's intention was central to the interpretation of a legal document. We now turn to consider the kind of intention that lawyers were invoking in the interpretive process. Firstly, whose intention was relevant? For wills, the answer was relatively clear: the intention of the testator. But what about deeds, where the multiple parties involved in the drafting might have had different intentions? There was a further difficulty: when was the intention to be assessed? This was a particular problem when the document was made a long time before it came into effect, and its words had taken on a different meaning in the interim. This chapter will build on chapter three by investigating the courts' conception of a writer's intention. We will examine both of these issues to establish the similarities and differences between the intentions that were relevant to deeds and those that were considered when interpreting wills.

4.2. Deeds

4.2.1. WHOSE INTENTION?

During the medieval period, the courts had strict rules about which party must 'speak' which terms in a deed. Sometimes, only one party would have to make the terms. For example, only the lessor would have to speak in a lease that involved simply a grant of the land and a reservation of the rent.¹ This kind of lease could be made either by a deed poll, sealed only by the lessor, or by an indenture, sealed by both parties.² However, other terms that could be added to a lease might have to be spoken by the lessee: for example, a covenant to repair.³ A lease that involved such reciprocal grants would have to be made by an indenture, and would often be written in the third person.⁴

In the fifteenth century, it was debated whether the terms of an indenture would always bind both parties who had sealed it. On one view, an indenture would only bind both parties if it

¹ JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 11.

² *ibid* 8.

³ *Gibbons v Maltyard and Martin* (undated) Popham 6, 8; Kaye (n 1) 11.

⁴ Kaye (n 1) 8. See also Thomas Littleton, *Littleton Tenures in Englishe* (Richard Tottell 1556) 79v.

purported to speak for both: for example, if it was written in the third person.⁵ However, the view that ultimately prevailed was that both parties would be bound, even if only one party had spoken the terms.⁶ As Littleton explained, an indenture sealed by both parties was ‘the deed of both, and also every part of the indenture is the deed of both parties.’⁷

In the mid-sixteenth century, the courts were still struggling with the implications of this question. They were unsure whether a term spoken by one party to an indenture could be understood to be made by the agreement of both parties. In one 1536 case, for example, Shelley J and Sjt Mervyn described it as a ‘constant principle’ that a condition must be reserved by a lessor, and not granted by the lessee. Fitzherbert J replied ‘that all the grants, covenants and words in an indenture are the grant and agreement of both parties, and is only one deed.’⁸ However, Shelley and Mervyn insisted that ‘although it be but one deed, yet the grants and covenants are several’ unless the ‘words are spoken in the third person, and suit equally well to the lessor and lessee.’⁹ Thus, in *Reade v Bullocke* (1543), Shelley J was prepared to accept that a lessor’s reservation of rent could be described as a covenant of the lessee, because, in that case, it was ‘as much the word of the lessee as of the lessor.’¹⁰

In *Browning v Beston* (1555), the point was discussed at greater length. John Browning leased land from Magdalen College, Oxford, covenanting and granting that he would pay a certain sum annually, and that the lease would be void if ‘the said annual rent’ was not paid.¹¹ He fell into arrears, and the college claimed that the lease had thereby terminated. However, Browning argued that there was, in fact, no rent to pay. A rent, explained Sjt Ramsey, must be reserved by the lessor, but here, the lessee had made the grant.¹² The condition that made the lease void had also been granted by the lessee, which was similarly impermissible.¹³ Sjt

⁵ Kaye (n 1) 10. See, for example, (1430) YB Mich 9 Hen VI pl 8, f35b-36a, f36b.

⁶ *ibid*; see, for example, John Perkins, *A Verie Profitable Booke* (Richard Tottell 1555) 33v; *Smith v Stapleton* (1573) Plow 426, 434; *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f71v.

⁷ Littleton (n 4) 80v. See also Bryan CJ in (1480) YB Mich 20 Edw IV pl 2, f8b-9a, f8b: ‘When there is an indenture it is the deed of both of them.’

⁸ *Anon* (1536) Dyer 6a, 6b.

⁹ *ibid*.

¹⁰ *Reade v Bullocke* (1543) Dyer 56b, 57a.

¹¹ *Browning v Beston* (1555) Plow 131v, 131v.

¹² *ibid* 132.

¹³ *ibid* 133.

Gawdy agreed that ‘it is utterly against reason to take the words of one person as the words of another,’ even when ‘he is party to the same indenture.’¹⁴

Counsel for the college took two different tacks in response. Sjt Stanford and John Walsh argued that the law would ‘say that the words are spoken by him who could most properly speak them.’ Thus, although they were ‘in fact the words of the lessee... in construction of law they shall be taken the words of reservation of the lessors.’¹⁵ For Sjts Morgan and Catlyn, though, this was an unnecessary complication. As Sjt Morgan explained, ‘the chief matter to be considered is the assent of the parties.’¹⁶ No words spoken by the lessor could be effective without the agreement of the lessee. The lessor could not have an action of debt for the rent unless ‘it be adjudged a contract in law, and a contract cannot be without an assent between two or more, wherefore the assent of both parties is the perfection of the contract.’ Thus, ‘the law saith, that although the words come out of the mouth of the one only, yet they are the words of both in effect and operation of law.’¹⁷ Similarly, Sjt Catlyn argued that ‘in contracts it is not material which of the parties speak the words, if the other agrees to them, for the agreement of the minds of the parties is the only thing the law respects in contracts.’¹⁸ On this view, the words were not just the words of the lessee, although he was the party who had spoken them. Rather, because they had been agreed by both parties, they were the words of both.

Browning was ultimately decided on a point of pleading, so the judges never gave their opinions on the issue.¹⁹ Nonetheless, Sjts Morgan and Catlyn’s argument took on an authority of its own.²⁰ In *Thomas v Ward* (1590), for example, Robert Houghton cited *Browning* to argue that the words of a lessee in an indenture ‘are the words of the one and other.’²¹ Similarly, in *Domina Russell v Gulwell* (1599), Coventry observed that, ‘as Littleton says, each indenture and each part of it is the deed of both parties.’²² Thus, although a reservation of rent ‘must be spoken by the lessor... yet it is an agreement of the lessee, as is held in *Browning* and *Beston*’s

¹⁴ *ibid* 136.

¹⁵ *ibid* 134.

¹⁶ *ibid* 137.

¹⁷ *ibid* 138.

¹⁸ *ibid* 140.

¹⁹ *Browning v Beston* (n 11) 144.

²⁰ But compare *Tanfield v Crapnell* (1574) Dyer’s Notebooks (110 SS) 304, 305.

²¹ *Thomas v Ward* (1590) Cro Eliz 202, 202.

²² *Domina Russell v Gulwell* (1599) BL Add MS 25203 f49v, f49v.

Case.²³ Gawdy J agreed, holding that ‘where the words of an indenture are spoken generally, they bind both parties and will be taken for the agreement of both of them.’²⁴ Other lawyers failed to distinguish between this position and Stanford and Walsh’s argument that the law would simply treat the words as spoken by the appropriate party. In *Alfo v Henning* (1610), for example, Coke CJ held that ‘the words of the indenture shall be accounted to be his, who may most properly speak them.’²⁵ However, he later concluded that ‘being by indenture, they shall be the words of both.’²⁶

By the end of the sixteenth century, it seems to have been generally accepted that all indentures were made by the agreement of both the parties, no matter how they had been phrased.²⁷ However, some lawyers still refused to accept the practical consequences of this conclusion. In *The Earl of Pembroke v Sir Henry Berkeley* (1595), for example, Tanfield and Atkinson argued that, ‘although the words in the indenture are *quasi* the words of both, yet they are properly the words of him who speaks them.’ Thus, if a term was spoken by the lessee, it would not be understood to be made by the lessor. Only words written in the third person could truly be the words of both.²⁸ In a 1613 reading, Humphrey Were attempted to reconcile the 1536 case and *Browning*, arguing that ‘although the words of the indenture are the words of both, yet the words of the one will not be taken as the words of the other, for each has his own part to speak in an indenture.’²⁹ He continued,

Although the words of the indenture are the covenants and agreements of both, yet the covenants and grants which are of one party, are not the covenants and grants of the other party, and although it is one deed, yet the grants and covenants are several: reservation is the part of the feoffor, payment the part of the feoffee, etc.³⁰

²³ *ibid.*

²⁴ *ibid* f50.

²⁵ *Alfo and Dennis v Henning* (1610) Owen 151, 151.

²⁶ *ibid* 152.

²⁷ See also *Stevinson Case* (1589) 1 Leo 324, 324; *Brett v Cumberland* (1619) Popham 136, 137.

²⁸ *Earl of Pembroke v Sir Henry Berkeley* (1595) Cro Eliz 384, 385.

²⁹ *A Reading on the Statute of Discontinuance* (1613) CUL MS Dd.11.87 f56, f60.

³⁰ *ibid.*

Treatise writers had generally accepted the new understanding of indentures. Coke approved Littleton's claim that 'each part of the indenture is the deed of both parties,'³¹ while West wrote that 'both parts of such deeds indented be the deeds of both the parties to the same: and every part of such indentures is the deed of either of the said parties.'³²

This changing view of indentures was paralleled by new language in the context of interpretation. We have already noted that the fourteenth-century courts very rarely considered the parties' intentions when interpreting a deed.³³ They generally only made exceptions when required to do so: for example, by the statute *De donis*, which directed them to observe 'the will of the donor.'³⁴ When they referred to the writer's intention in cases that did not involve entails, they used the same language. In one 1344 case on a lease, for example, Sjt Seton argued that 'it is reason and law, in all that a man may do, to draw out the will of the donor.'³⁵

This made sense, since, as we have seen, the party making the grant was presumed to be the writer of the deed.³⁶ If an indenture contained reciprocal grants, it could be carved up into the terms spoken by each party. In one 1469 case, Choke J observed that there was a difference between a deed poll and a 'deed of both' parties.³⁷ In the latter case, the court ought to consider 'who made the deed in that clause which belongs to him:' considering, for example, whose grant it was.³⁸ Since each party's terms were fundamentally independent of the other's, a term would simply be interpreted according to the intentions of the party who had spoken it.

However, as the courts began to consider the writer's intention in a wider variety of deeds, they moved beyond their focus on 'the will of the donor' alone. Since they recognised that 'each part of the indenture is the deed of both parties,' they began to consider the intentions of both parties when interpreting an indenture. By the sixteenth century, they were referring

³¹ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 230v.

³² William West, *The First Part of Symboleography* (Thomas Wight and Bonham Norton 1598) s 47.

³³ See 3.2.1. above.

³⁴ Kaye (n 1) 243. See, for example, (1316) YB Mich 10 Edw II pl 14, 52 SS 46-52, 47.

³⁵ (1344) YB Mich 18 Edw III pl 91, RS 362-365, 363.

³⁶ See, for example, (1423) YB Mich 2 Hen VI pl 2, f4b-5a, f4b, where Sjt Paston argued that a deed belonged to the party who made the feoffment.

³⁷ (1469) YB Trin 9 Edw IV pl 22, f19b-22a, f21b.

³⁸ *ibid.*

less often to ‘the will of the donor,’ and more frequently to ‘the intent of the parties’ or ‘of both the parties.’³⁹ In *Southwall v Huddelston* (1523), for example, Brudenell CJ held that ‘bargains and sales are [understood] in the way it has been concluded and agreed between the parties, as far as their intentions can be understood.’⁴⁰ Sjt Catlyn observed in *Browning* that ‘if any persons are agreed upon a thing... the law always regards the intention of the parties and will apply the words to that which in common presumption may be taken to be their intent.’⁴¹

However, unlike the question of who had spoken a deed’s terms, this shift was not confined to indentures. Even when interpreting deeds that bound only one party, the courts were beginning to refer to the intentions of both. This was apparent even in the fifteenth century. In 1440, for example, Paston J discussed the ‘intent between the plaintiff and the defendant’ where the plaintiff made an apparently unilateral release to the defendant.⁴² In a 1499 case, the plaintiff had been granted an annuity by a Prior. Although Bryan CJ distinguished between the grantor and grantee, he also referred to the writers of the deed in the plural.⁴³ This remained the case throughout the sixteenth century. While in some cases, the courts considered a deed poll solely from the grantor’s point of view,⁴⁴ in others they recognised that even a simple grant represented ‘the bargain and mutual agreement of the parties,’⁴⁵ and sought to discover the intention of both.⁴⁶

Thus, even if only one party was speaking the terms of the deed, it was not only his intention that was relevant to its interpretation. The intention of the ‘listening’ party also had to be taken into account. Perhaps this is not surprising. After all, deeds were frequently made in the context of a wider settlement, with multiple parties executing various interdependent instruments. Furthermore, a grantee who did not speak might still be contributing something to the bargain: for example, a lessee would have to pay the rent reserved by the lessor. Finally, even a passive grantee would be relying on the terms of the deed, and would therefore have an immediate interest in its meaning.

³⁹ *Throckmerton v Tracy* (1555) Plow 145, 161; *Chapman v Dalton* (1565) Plow 284, 291.

⁴⁰ *Southwall v Huddelston and Reynoldys* (1523) Hil 14 Hen VIII pl 1 (119 SS 150) 160.

⁴¹ *Browning v Beston* (n 11) 140.

⁴² (1440) YB Mich 19 Hen VI pl 7, f3b-4b, f4b.

⁴³ (1499) YB Trin 14 Hen VII pl 8, f31b-1a, f32b.

⁴⁴ *Davenport’s Case* (1610) 8 Co Rep 144b, 145a; *Maud’s Case* (1601) 7 Co Rep 28b, 28b.

⁴⁵ *Butt’s Case* (1600) 7 Co Rep 23a, 23a.

⁴⁶ *ibid* 24a.

Both parties' intentions could also be taken into account when interpreting a deed that limited a use. In some cases, only the settlor's intention was emphasised, even though the use was limited in an indenture;⁴⁷ in others, the courts referred to the intention of both parties;⁴⁸ and in still others, both ideas were deployed in quick succession. In *Edward Fox's Case* (1609), for example, the court held that 'the intention of the parties is the creation of uses' and enquired into 'the intent of the parties,' before coming to a conclusion about 'the intent of the grantor.'⁴⁹ And even where a deed poll was used, 'the intent of the parties' might still be relevant.⁵⁰ As Egerton observed in *Englande's Case*, 'the ground and foundation' of a use was 'the meaning and intent of the parties,' for 'trust must be guided and directed according to the meaning of those between whom the trust is.'⁵¹ It was not just the settlor's intention that was relevant, but also the intention of the feoffee, whom he was trusting.

While for some purposes, then, it was important to know which party was speaking the terms of a deed,⁵² both parties could be taken into account when identifying the intentions behind it, no matter who had spoken. Some lawyers tried to reverse engineer this principle, claiming that both parties' intentions were only relevant when both parties spoke. In *Browning*, for example, Stanford and Walsh argued that only in an indenture did the law make 'each party privy to the speech of the other.' In a deed poll, the words still belonged solely to the party who had spoken them. As a result, they 'ought not to make such construction of words in an indenture as in a deed poll.'⁵³ Egerton repeated this argument in *Saunders v Stanfourde*, observing that an indenture was 'in construction not like a deed poll,' since it 'contains the mutual agreement of both the parties, and the words in the indenture are the words of each party.'⁵⁴ Only an indenture, therefore, would be construed 'equally according to the meaning of the parties.'⁵⁵ As we have seen, however, this neat dichotomy was not borne out in practice. In fact, the courts only consistently spoke of 'the will of the donor' when construing the

⁴⁷ *Englefield's Case* (1591) 7 Co Rep 11b, 12b; *Sir Francis Englefields Case* (undated) 4 Leo 135, 141; *Scrope's Case* (1612) 10 Co Rep 143b, 144a; *Shelley's Case* (1581) 1 Co Rep 93b, 100a; *Anon* (undated) 1 And 67, 67.

⁴⁸ *Baldwin's Case* (1589) 2 Co Rep 23a, 23b; *Dowman's Case* (1586) 9 Co Rep 7b, 9a; *Mildmay's Case* (1584) 1 Co Rep 175a, 177a; *The Lord Cromwel's Case* (1601) 2 Co Rep 69b, 71a.

⁴⁹ *Edward Fox's Case* (1609) 8 Co Rep 93b, 94a.

⁵⁰ *Tibb v Poplewell* (1599) BL Add MS 25203 f129v, f130.

⁵¹ *Englande's Case* (undated) Hunt MS El 482 f53, f54v.

⁵² See 6.5.2. below.

⁵³ *Browning v Beston* (n 11) 134.

⁵⁴ *Saunders & Starkey v Stanfourde* (n 6) f72v.

⁵⁵ *ibid* f72v.

limitation of an entail. This was the case whether it was made in an indenture or a deed poll.⁵⁶ Here, focusing on the donor alone was mandated by the statutory language, which was accordingly reflected by the judges.

4.2.2. THE TIME OF THE INTENTION

As we have seen, a deed did not take effect until it was delivered.⁵⁷ Coke observed that, ‘when a deed is delivered, it takes effect by the delivery, and not from the day of the date’ on which it was made.⁵⁸ ‘The delivery is as necessary,’ he explained, ‘to the essence of a deed, as the putting of the seal to it.’⁵⁹ This meant that, in some cases, a further ambiguity arose. As Coke noted, ‘the order of making a deed is, first to write it, then to seal it, and after to deliver it.’⁶⁰ But was the parties’ intention to be identified at the time when the deed was written, or at the time when it became effective?

In *Earl of Huntingdon v Lord Clinton* (1557), this issue was discussed by the serjeants and judges. A. had covenanted to grant B. the fee simple of his manor, discharged of all encumbrances except leases on which the accustomed rent was payable. Between the date of the covenant and the delivery of the deed, A. made a new lease, reserving the accustomed rent. The question was whether this was a breach of the covenant. Sjs Morgan and Bendlowes argued that it was; Broke CB, Saunders CJ and Whyddon and Dyer JJ that it was not. Dyer does not explain the court’s reasoning. Presumably, however, Morgan and Bendlowes argued that the permissible exceptions to the grant were to be determined at the time when the covenant was made, while the others thought that it was the time of the delivery that counted.⁶¹

The point was apparently still unsettled almost 50 years later. In *White v Columbelle* (1601), Ogle and Frith made a lease of all their lands ‘now in the tenure or occupation of Columbelle.’ However, it seemed that Columbelle had lost possession of the land in question six days before

⁵⁶ See, for example, *Willion v Berkley* (1562) Plow 223, 235; *Shelley’s Case* (1580) Dyer 373b, 374a; *Rose v Morys* (1588) Hunt MS El 482 f282, f282; *Cottons Case* (1590) 1 Leo 211, 212; *Beresford’s Case* (1607) 7 Co Rep 41a, 42a; *Uses & Revocations de Uses* (undated) Moore 608, 611.

⁵⁷ See 1.4. above.

⁵⁸ *Goddard’s Case* (1584) 2 Co Rep 4b, 5a. See also *Le Serjaunts Case* (1567) Hunt MS El 482 f3, f5; William Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (Lee, Pakeman et al 1656) 407.

⁵⁹ *Goddard’s Case* (n 58) 5a.

⁶⁰ *ibid.*

⁶¹ *Earl of Huntingdon v Lord Clinton* (1557) Dyer 139a, 139a.

the lease was made, so that the lease was void.⁶² Gawdy J, however, raised another point: what if the land had been in Columbello's possession when the lease was written, but he lost it before the deed was delivered? Gawdy maintained that, in this case, the lease would still be good, since 'at the time of the writing of the lease it was in his possession, as the words of the lease require.'⁶³ Fenner J thought otherwise. 'This word "now" which is in the lease,' he argued, 'must refer to the time of the delivery of the lease and not to the writing of it.'⁶⁴

The position was different, however, if a feoffment were made pursuant to the condition of an earlier bond. Here, it was clear that the relevant time was when the obligation had been made. In *Colthirst v Bejushin* (1550), Sjt Pollard gave the example of one who was bound to enfeoff J.S. of a manor. If, between making the bond and the feoffment, he granted 20 acres of the manor to another, he would not have performed the condition. The parties' intention was to be assessed at the time the bond was made: 'the intent was that J.S. should have the whole manor, which intent he has not performed.'⁶⁵ Similarly, in the serjeants' case of 1567, Sjt Gawdy put the case of one who was obliged to make a feoffment of all his lands at Michaelmas. He need only grant the lands of which he was seised when he made the bond, explained Gawdy, 'for the intent will be taken according to that which the words import.'⁶⁶

In some cases, lawyers distinguished between the times at which different parts of the deed had been written. We have seen that, in *Browning v Beston*, Sjt Ramsey argued that a lessee could not add a condition to a lease; it must be reserved by the lessor. The reason he gave was that 'these words of the lessee are spoken after the lease is made' by the lessor. 'Although the words are contained in one indenture,' he explained, 'yet in consideration of law there are two different times therein:' the time at which the lessor made the lease, and the time at which the lessee added the condition.⁶⁷ The latter came too late: 'an estate first made shall not be defeated by a defeasance after the estate.'⁶⁸ Stanford and Walsh rejected this argument. The agreement had been

⁶² *White v Columbello* (1601) BL Add MS 25203 f416v, f416v.

⁶³ *ibid* f417.

⁶⁴ *ibid*.

⁶⁵ *Colthirst v Bejushin* (1550) Plow 21, 23.

⁶⁶ *Le Serjaunts Case* (n 58) f8v.

⁶⁷ *Browning v Beston* (n 11) 133.

⁶⁸ *ibid* 133.

made by one deed indented, so that no word of it takes effect before the delivery of the deed, and the deed is delivered all at one instant, and therefore all the words shall take effect at one same instant.⁶⁹

Sjt Ramsey's argument was based on a rule about the proper function of the different terms in a deed: a grant, once made, could not be altered by any subsequent words. However, lawyers also thought that a deed should be understood as a whole document. In *Kidwelly v Brand* (1551), the court held that later words in a deed must be understood by reference to the earlier words.⁷⁰ In *Sir Baptist Hix v Fleetwood* (1612), it was held that earlier words could be understood by the later words. Thus, if land were granted to one and his heirs male, and later to the heirs male of his body, the first reference to 'heirs male' would be understood to mean the same as the subsequent 'heirs male of his body'.⁷¹

As a deed came to be viewed as a single entity, it became difficult to insist that later terms should be ignored in favour of earlier ones.⁷² In *Baldwyn v Marton* (1589), the Earl of Westmorland demised land to the Baldwins and their heirs, *habendum* for 300 years. It was argued that 'the law must adjudge that it was the intent of the Earl to pass the land as is contained in the first part of the indenture:' that is, as a fee simple, and not a lease.⁷³ However, the judges replied that they must never 'take one part [of the deed] and ignore the others, for this is to no other purpose than to alter the intent of him who made the deed.'⁷⁴

In *Carter v Ringstead* (1590), on the other hand, the court equivocated on this point. John Berry had suffered a common recovery of all his lands to the use of him and his wife for life, and of the manor of Stapeley to his own use for life. Sjt Harris argued that his wife ought also to have an interest in Stapeley, 'for when the whole estate is limited at the beginning of a deed, it shall not be abridged afterwards.'⁷⁵ Peryam J replied that this rule did not apply to the limitation of a use, 'which shall be expounded according to the intent and will of the limiter.'⁷⁶ The court ultimately held that, since it was 'expressly shown, that the manor of Stapeley shall be to other

⁶⁹ *ibid* 135.

⁷⁰ *Kidwelly v Brand* (1551) Plow 69, 70.

⁷¹ *Sir Baptist Hix, and Fleetwood and Got's Case* (1612) Godbolt 197, 198.

⁷² It continued to be the case that a grant that was good by the first words could not be made void by a later clause: *Underhay v Underhay* (1592) Cro Eliz 269, 269; *Seaman's Case* (1610) Godbolt 166, 166.

⁷³ *Baldwyn v Marton* (1589) 1 And 223, 224.

⁷⁴ *ibid*.

⁷⁵ *Carter v Kingstead* (1590) Owen 84, 84.

⁷⁶ *ibid*.

uses, the law shall expound it so, and [it] shall not be carried to her by the first words in the deed.⁷⁷ Coke, discussing the case, treated this as a general rule for all deeds, but in fact the court's reasoning was closely confined to the limitation of uses by analogy to wills.⁷⁸

4.3. Wills

4.3.1. WHOSE INTENTION?

The question of whose intention was relevant to a will was a comparatively straightforward one. The only person whose intention mattered was the testator. This was implicit in the Statute of Wills, which, as lawyers reminded each other, gave 'liberty to every owner to dispose of his land by devise at his will and pleasure.'⁷⁹ Indeed, it was implicit in the nature of any will: as Robert Nowell observed in a 1561 reading, 'it is called a will because it rests in the will and pleasure of him that makes it.'⁸⁰ We have seen that, relying on civilian scholarship, common lawyers described a will as a signification of the testator's mind.⁸¹ Lawyers argued that, if the testator had not thought of a term, it could not form part of his will.⁸²

Although other people might be involved in the will-making process, their intentions were irrelevant. A will that had been inaccurately recorded by a clerk would be void, 'because it was not the will of the testator.'⁸³ The intentions of devisees were also irrelevant. For a start, they were clearly not speaking the terms of the will. Thus, for example, land devised by will could not be bound by a covenant, which had to be spoken by the grantee. As Popham CJ

⁷⁷ *Carter v Ringstead* (1590) Cro Eliz 208, 208.

⁷⁸ *Dr Bonham's Case* (1610) 8 Co Rep 113b, 118b.

⁷⁹ *Sulle v Gerrard* (1594) Cro Eliz 525, 525; see also *Bottenham v Herlakenden* (1587) Owen 92, 92. See 32 Hen VIII c. 1.

⁸⁰ MC Mirow, 'Readings on Wills in the Inns of Court 1552-1631' (PhD thesis, University of Cambridge 1993) 307.

⁸¹ See 3.3.1. above. Some lawyers, like Moore, seem to have adopted distinctive terminology: they identified the 'mind' of a testator or feoffor to use, but the 'intent' of parties to other kinds of deed. Contrast, for example, *Uses & Revocations de Uses* (n 56) 610; *Beckwiths Case* (1585) Moore 196, 197; *Lovice v Goddard* (1604) Moore 772, 773; and *Englefields Case* (1590) Moore 303, 307 on the one hand; with *Marsh v Curteis* (1596) Moore 425, 426; *Perrots Case* (1594) Moore 368, 373; and *Sir Henry Berkley v Le Countee de Pembroke* (1591) Moore 706, 707 on the other. Other lawyers, however, seemed to treat the two as synonymous: see, for example, *Saunders & Starkey v Stanfourde* (n 6) f72; *Sherington v Minoars* (1598) BL Add MS 25203 f3v, f3v-f4; *Mariot v Mascall* (1587) 1 And 202, 209.

⁸² *Maunchel v Dodenton* (1587) 1 And 197, 198.

⁸³ *Downhall v Catesby* (1594) Moore 356, 356.

explained, ‘a covenant ought always to come on the part of the lessee himself, which cannot be’ when the lease was made by will. The lessee ‘doth not speak any thing in the will to bind him, but they are all the words of the devisor himself comprised in a will.’⁸⁴ West observed that ‘the active making of a testament is that which belongeth to the testator, that he have right and power to make a testament.’ The executor, witnesses and devisees were only involved as ‘passive’ participants in the process.⁸⁵

We have seen that the intentions of a passive grantee could be considered when interpreting a deed poll. However, a devisee was in a very different position. Unlike a grantee, he could not give anything in exchange for the devise. Nor could he rely on it, given that it would not become effective or even irrevocable until the testator’s death.⁸⁶ Thus, the testator’s intentions did not have to be balanced against the interests of other parties. The courts were solely concerned with his own intention. When a will was too uncertain to enforce, for example, the concern was not that this would cause uncertainty for any other party, but simply that the testator had failed to make his intentions clear.⁸⁷

4.3.2. THE TIME OF THE INTENTION

Usually, a testator would make his will only a short time before his death.⁸⁸ This meant that the words of his will were unlikely to change their meaning before they took effect. In some exceptional cases, however, the testator made his will many years in advance. In *Brett v Rigden* (1568), for example, Giles Brett made his will in 1556, devising ‘all his lands and tenements’ to Henry and his heirs.⁸⁹ Giles later acquired twelve more acres of land. Henry had a son, Thomas, and died, before Giles himself died in 1561. It was clear from oral statements made by Giles after Henry’s death that he had intended Thomas to inherit all of his land.⁹⁰ However, there were two problems with the timing of Giles’ will. When Giles made his will, firstly, Thomas had not yet been born, and, secondly, Giles had not owned the new twelve acres of land. Two questions therefore arose: could Thomas inherit the land, although he had

⁸⁴ *Gibbons v Malyard and Martin* (n 3) 8.

⁸⁵ West (n 32) s 633.

⁸⁶ Sheppard (n 58) 932. See 1.5. above.

⁸⁷ See 3.3.2. above.

⁸⁸ See 1.5. above.

⁸⁹ *Brett v Rigden* (1568) Plow 340, 341. See 3.3.2. above.

⁹⁰ *ibid* 342.

not been alive when it was devised? And did ‘all my lands’ mean all the lands Giles had when he made his will, or all the lands he had at the time of his death?⁹¹

These were clearly controversial points, since they were chosen for seven newly-appointed serjeants to debate in a show case in Michaelmas term 1567.⁹² They were then argued again in *Brett* itself the following year. Plowden’s report of *Brett* was based partly on the 1568 hearings, but also on arguments made in the serjeants’ case.⁹³ A longer report of the serjeants’ case is also available: a copy was made by John Boune for the benefit of an unnamed judge, and was subsequently acquired by Egerton.⁹⁴ In *Brett*, the court held that Thomas could not inherit any of the land, and that, even if he could, the twelve acres would not pass by the will. On the face of it, this seems to be thwarting Giles’ clear intention to grant Thomas all his lands. However, the arguments made in the serjeants’ case show that the point was a much more subtle one.

All seven of the serjeants prefaced their arguments with a declaration that the testator’s intentions ought to be observed. Sjt Lovelace, for example, agreed that ‘in all things in testaments, the intent of the devisor is most favourably to be construed.’⁹⁵ However, this would not help a testator whose intention was unlawful or impossible to perform. A devise to one who had not yet been born was just as impossible to perform as a devise to a corporation that did not exist.⁹⁶ The problem was that a testament was understood to be a once-for-all conveyance, and was therefore to be interpreted as at the time of writing.⁹⁷ For Sjt Barham, it was fundamental that ‘the intent will be construed according to what was at the time of the

⁹¹ *ibid.*

⁹² *Le Serjaunts Case* (n 58). Serjeants’ cases were hypothetical cases based on controversial points of law, ‘used to exercise the wits of the serjeants’: *The Duke of Norfolk’s Case* (1681) 3 Chan Cas 1, 32.

⁹³ *Brett v Rigden* (n 89) 342.

⁹⁴ *Le Serjaunts Case* (n 58) f12v-13. John Boune was admitted to Lincoln’s Inn in 1560: *The Records of the Honorable Society of Lincoln’s Inn, Vol 1: Admissions from AD 1420 to AD 1799* (Lincoln’s Inn 1896) 66. In a letter appended to the bottom of the report, he sent his regards to (*inter alia*) Egerton, Thomas Walmesley and Peter Warburton, all of whom joined Lincoln’s Inn at a similar date. Since Egerton was mentioned in the third person, he was apparently not the recipient of the original letter. Boune described the manuscript as ‘the whole report of the serjeants’ case, as largely as I myself have it,’ and explained that he had it copied at such length due to ‘the brevity of Mr Plowden’s report of the said case’: *Le Serjaunts Case* (n 58) f12v.

⁹⁵ *Le Serjaunts Case* (n 58) f3.

⁹⁶ *ibid* f3v.

⁹⁷ Sir William Holdsworth, *A History of English Law*, vol 7 (2nd edn, Methuen 1966) 366.

making of it. For otherwise it will be the will of the interpreter and not of the testator.⁹⁸ Giles had not known Thomas when he wrote his will, and the law should not create devisees when the testator had ‘neither respected them nor put his trust in them.’⁹⁹ It was not, then, that Giles’ intentions were being ignored. It was that ‘the intent will be construed as if the deviser had died immediately’ after making his will.¹⁰⁰ Only the intentions he could have had when writing the will were relevant.¹⁰¹

Giles’ devise of ‘all his lands and tenements’ was more difficult. Sjt Manwood argued that it should be taken ‘according to the time of the death of the deviser, for a testament is confirmed by death.’¹⁰² While a ‘deed takes effect immediately by the livery... the will does not take effect until the death of the deviser.’¹⁰³ When Giles made his will, he ‘well knew that the word “all” must receive some construction and exposition after his death.’ Thus, the devise of ‘all his lands’ must have meant ‘all that he had at the last instant of his life,’¹⁰⁴ for ‘the death of the testator is precedent, and the construction of the words of his will is subsequent.’¹⁰⁵ The time at which he wrote the will was simply ‘not material.’¹⁰⁶

This argument was unsuccessful. As Sjt Lovelace explained, the difficulty was, again, one of timing: ‘the intent is to be taken according to that which it was at the time of the making, and at this time it could not be intended that he spoke of’ the new twelve acres.¹⁰⁷ It was true that a will did not take effect until the testator’s death, but ‘one same intent’ ran through the will, from the time it was made until the time it took effect.¹⁰⁸ Thus, ‘the intent of the testator, which subsisted in the making of the will, and in the publication of it, and in its consummation, excludes the devisee from having the 12 acres.’¹⁰⁹ Sjt Barham observed that ‘time is a good circumstance to know the truth, and in this case, having consideration of the

⁹⁸ *Le Serjaunts Case* (n 58) f11v.

⁹⁹ *ibid.*

¹⁰⁰ *ibid* f6.

¹⁰¹ This point seems later to have been overturned: see Mirow (n 80) 207.

¹⁰² *Le Serjaunts Case* (n 58) f5. See 1.5. above.

¹⁰³ *ibid.*

¹⁰⁴ *Brett v Rigden* (n 89) 343.

¹⁰⁵ *ibid* 342.

¹⁰⁶ *ibid* 343.

¹⁰⁷ *Le Serjaunts Case* (n 58) f3v.

¹⁰⁸ *Brett v Rigden* (n 89) 343.

¹⁰⁹ *ibid.*

time, it appears plainly that he was not seised of them at the time of the making of the will.¹¹⁰ If a testator wished to devise land he had not yet acquired, he could do so, but he must make that intention clear by naming the land specifically.¹¹¹ Here, there were simply ‘no words which show[ed] his intent’ to do so.¹¹²

Later lawyers and treatise writers emphasised this exception to the rule, which clearly fit better with their focus on the testator’s intentions.¹¹³ There was also a further exception: where there had been a new publication of the will since the land had been acquired. In *Beckford v Parnecott* (1596), for example, Richard Parsons had devised ‘all his lands’ in Aldworth to Barbara and Joan. He later acquired more land in Aldworth. Seven years after making his will, he had it read and added a codicil, but did not mention his new land. Gawdy J objected that, although the will had been newly published, it did ‘not manifest the intent to be that more shall pass by that than he intended at the first.’¹¹⁴ Clench J, however, pointed out that when he heard his will read again, he would have known that his new lands in Aldworth would pass by it.¹¹⁵ The court held that the new publication demonstrated ‘his intent sufficiently’ to pass all the land.¹¹⁶

As with deeds, there was also a question about the different times at which the parts of a will were written. In *Carter v Ringstead*, Anderson CJ had referred to the writing of a will. If he devised land to J.S., he argued, and later in the same will devised the land to J.D., ‘now J.S. shall have nothing, because it was my last will that J.D. should have it.’¹¹⁷ Peryam J responded that the will would be void for uncertainty, but Anderson stood his ground: ‘I am sure the law hath been taken as I have said.’ Peryam conceded that this would be right if he wrote the first part of his will on one day, and the second on another day, ‘for here is a difference in time.’ ‘So there is in my case,’ replied Anderson, ‘for when I am writing my will, I am thinking how I shall dispose of my estate, and it shall be intended that I have best advised concerning that which I have done last.’¹¹⁸

¹¹⁰ *Le Serjaunts Case* (n 58) f11v.

¹¹¹ *Brett v Rigden* (n 89) 344.

¹¹² *ibid.*

¹¹³ See, for example, *Jelsey v Robinson* (1583) Owen 88, 88; William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1601) 36v.

¹¹⁴ *Beckford v Parnecote* (1596) Gould 150, 151.

¹¹⁵ *ibid.*

¹¹⁶ *Beckford v Parnecott* (1596) Cro Eliz 493, 493.

¹¹⁷ *Carter v Kungstead* (n 75) 84.

¹¹⁸ *ibid* 85. But see *Anon* (1572) 1 And 33, where the opposite result was reached.

The courts, however, were generally prepared to consider a will as a whole document, just as they were a deed. In *Bullen v Bullen* (1600), Sjt Moore attempted to argue that the first words of a will would always be ‘controlled by implication of the later words,’ but was told to ‘be silent’ by Gawdy J.¹¹⁹ In some cases, the courts found that ‘the first words in the will are the intent of the devisor, which guide the subsequent words,’¹²⁰ while in others, ‘the later limitation must expound that which precedes.’¹²¹

Lawyers emphasised that this could only be decided ‘all the words of the will being compared together.’¹²² In *Paramour v Yardley* (1579), for example, William Robinson had bequeathed the residue of a lease to his son Thomas, and then granted the occupation and profits of the land to his wife Grace until Thomas turned 21. The defendant claimed that the grant to Grace was void, because it was repugnant to the prior devise to Thomas.¹²³ However, the plaintiff argued that the law must ‘marshal the words’ of wills, ‘contrary to the order in which they are placed,’ just as it did with deeds.¹²⁴ The court agreed, holding that ‘notwithstanding the whole term was first devised to the son, the devise afterwards to the wife is good, and in sense and intent shall precede the devise to the son.’¹²⁵ Similarly, in *Browne v Jerves* (1611), William Browne devised all his lands to John in tail. Later in the same will, he devised his lands in Ham to Henry. The court held that this was not a countermand of the devise to John, but the limitation of a remainder to Henry. In this way, they explained, ‘all the clauses of the will stand together.’¹²⁶

4.4. Conclusions

The courts were generally concerned with a very specific kind of intention when interpreting a legal instrument. When construing a will, the court was interested in the intention that the testator had when he was writing. If his situation had changed by the time of his death, the court would not assume that he had expected this to happen unless he had demonstrated so explicitly. The position with deeds was less clear. Some thought that the parties’ intention was

¹¹⁹ *Bullen v Bullen* (1600) BL Add MS 25203 f186, f186v.

¹²⁰ *Buck v Frencham* (1558) 1 And 8, 8.

¹²¹ *Mylner v Robinson* (1603) BL Add MS 25203 f660v, f661.

¹²² *ibid.*

¹²³ *Paramour v Yardley* (1579) Plow 539, 540.

¹²⁴ *Paramour v Yardley* (n 123) 541.

¹²⁵ *ibid* 546.

¹²⁶ *Brown v Jerves* (1611) Cro Jac 290, 290.

to be assessed at the time of writing, some at the time of delivery. If it was the latter, intervening events could be taken into account in a way they could not be with wills. With both kinds of document, however, the writer was presumed to have a single, overarching intention when writing. The court would therefore consider the instrument as a coherent whole, rather than as a series of separate terms that took effect independently.

In another way, the intention of the parties to a deed was conceptualised differently to that of a testator. When interpreting a will, only the testator's intention was to be taken into account. When interpreting a deed, however, both parties' intentions could be considered. This was the case even if it were a deed poll, or if its terms had been spoken by only one of the parties. This difference was highly significant. In the next chapter, we will see how it affected the ways in which the intentions behind these two kinds of document could be identified.

5. IDENTIFYING INTENTIONS

5.1. Introduction

In chapter four, we saw that a will was the pure expression of a testator's own intentions. The court's aim in interpreting the will was to identify and give effect to his stated wishes. In contrast, common lawyers had begun to think of a deed as the product of both parties' intentions. In *Browning v Beston* (1555), for example, Sjt Catlyn explained that 'if any persons are agreed upon a thing... the law always regards the intention of the parties and will apply the words to that which in common presumption may be taken to be their intent.'¹ This made identifying the intentions behind a deed much more complicated than identifying those behind a will. The courts were trying to find an intention that both parties shared. Lawyers recognised that this intention had to be, to some extent, fictitious: even Sjt Catlyn admitted that it was only 'taken' to be the parties' intention. This gave the courts greater scope to introduce their own ideas of what reasonable people would have intended such a deed to mean.

This chapter will explore the ways in which this difference between deeds and wills affected the process of identifying the intentions behind a document. We will see that the courts used different techniques to identify the intentions of a testator and the intentions of parties to a deed. In the former case, they were interested solely in the testator's own intention. To find it, they had little to go on other than the testator's words and the presumption that he had intended them to be effective. Aside from this, they developed few principles or presumptions that could be used to identify it. In the context of deeds, however, the courts made heavy use of appeals to reason. They sought to identify a 'reasonable and equal intention' behind the document,² presuming that this must accord with what the parties had agreed. They made correspondingly greater use of principles and presumptions to identify the intended meaning of the deed.

5.2. Deeds

5.2.1. INTENTIONS AND WORDS

To identify the parties' intentions, the obvious place to start was with the words of their deed. In chapter three, we examined cases in which the courts had overlooked the parties'

¹ *Browning v Beston* (1555) Plow 131v, 140.

² *Bold v Molineux* (1536) Dyer 14b, 15a.

intentions and instead applied the words they had used. Here, we are looking at cases in which the courts did consider the parties' intentions, but sought to identify them from the words of the deed. As the court explained in *Edrich's Case* (1603), in the context of statutory interpretation, 'nothing can so express the meaning of [the writers], as their own direct words, for *index animi sermo*' [speech is an indicator of the mind].³ We have seen that Popham CJ described a deed as 'an explanation in writing of the intent of the parties,'⁴ and Saunders J observed that the words of the deed were 'the testimony' of the parties' agreement.⁵

Sometimes, then, the parties' intentions could simply be gleaned from the words of their deed. In *Baldwin's Case* (1589), for example, the Earl of Cumberland had 'covenanted, granted, demised and to farm let' certain land to Anne Baldwin, her son, and his heirs, *habendum* for 300 years. The question was whether the premises of the deed had granted a fee simple, which was repugnant to the lease in the *habendum*. The court held that it had not, since 'it appeareth, that the intent of the parties was, that but a term should pass; for, in the premises, the parties use the usual words of a lease, *scil.* grant, demise, and to farm let.'⁶ Anne and her son therefore held a lease of the land, 'for so are the words and the intention of the parties.'⁷ Similarly, in *Saunders's Case* (1599), the court concluded that the lessor's 'intent is as general as his lease is.'⁸

Coke was particularly inclined to identify the parties' intentions with their words. In his reports, he frequently elided 'the intent of the parties' and the meaning of the document. In *Mildmay's Case* (1584), for example, he reported that Henry Sharrington had breached a proviso in his family settlement by limiting further uses. This was, Coke explained, 'as well against the intent of the parties, as against the words of the proviso,' since it would 'defraud the intent of the parties' rather than 'perform and pursue the intent and meaning of the proviso.'⁹ In other cases, judges equated 'the words of the proviso, and the intention of the parties,'¹⁰ asked what 'the intent and the words import,'¹¹ or discussed 'the words and intent of the condition.'¹²

³ *Edrich's Case* (1603) 5 Co Rep 118a, 118b.

⁴ *Broke v Smith* (1602) Moore 679, 679.

⁵ *Throckmerton v Tracy* (1555) Plow 145, 161. See 3.2.1. above.

⁶ *Baldwin's Case* (1589) 2 Co Rep 23a, 23b.

⁷ *ibid* 24b.

⁸ *Saunders's Case* (1599) 5 Co Rep 12a, 12a. See also *Cranmer, Archbishop of Canterbury's Case* (1572) Dyer 309a, 309b.

⁹ *Mildmay's Case* (1584) 1 Co Rep 175a, 177a.

¹⁰ *Fitzwilliam's Case* (1604) 6 Co Rep 32a, 33b.

However, identifying the words with the intention of the document could get lawyers into conceptual difficulties. This can be seen, for example, in Moore's report of *Shelley's Case* (1581). Edward Shelley had suffered a common recovery to his own use for life, remainder to others for 24 years, remainder to Edward's heirs male and the heirs male of their bodies. The question was whether Edward's heirs took directly by the conveyance, or by descent from Edward: that is, whether the words 'his heirs' were words of purchase, or words delimiting Edward's own estate. The plaintiff argued that they must be words of purchase, or the subsequent limitation to 'the heirs male of their bodies' would be void.¹³ Coke, on behalf of the defendant, responded that Edward's intention was 'manifestly' to limit the estate, 'and this is expressed by the words.' If the later words of limitation would

induce such construction in the sentence as to subvert the true intention of the gift and limitation, it is better to condemn them as superfluous and void words, than to receive them to do such wicked office in the deed.¹⁴

Essentially, Coke was arguing that he could identify Edward's 'true intention' from the first words of the deed, which demonstrated that the later words 'subverted' that intention. But how was the reader to tell which words really did reflect Edward's intentions, and which were 'wicked' impostors?

In fact, Coke's argument was somewhat more subtle than this. In his own report, he pointed out that the rest of the deed would make little sense if the words were ones of purchase. A whole host of other terms would become unclear,¹⁵ unnecessary,¹⁶ or impossible to fulfil.¹⁷ Thus, the whole document had to be considered in order to identify the true meaning of the particular term in question.¹⁸ By looking at the context of the term, the parties' intention could be ascertained.

¹¹ *Englefields Case* (1590) Moore 303, 336.

¹² *Marsh v Curteis* (1596) Moore 425, 426.

¹³ *Shelley's Case* (1581) Moore 136, 138.

¹⁴ *ibid* 140.

¹⁵ *Shelley's Case* (1581) 1 Co Rep 93b, 101a.

¹⁶ *ibid*.

¹⁷ *ibid* 104b.

¹⁸ In the context of uses, the court might even glean the parties' intention from other documents that formed part of the same transaction: see, for example, *Vavisor's Case* (1572) Dyer 307b, 308a; *Dolman v Vavasor* (1584) Moore 191, 192; *The Lord Cromwel's Case* (1601) 2 Co Rep 69b, 75a.

This point was often made by lawyers. In *Wrotesley v Adams* (1559), Dyer CJ and Anthony Browne J explained that the terms of a deed could not properly be construed in isolation. ‘It is impossible,’ they said, ‘to form a judgment upon one part only, without taking all the parts into consideration; so that one part shall answer to another, one shall minister to another, and the one shall not confound the other.’¹⁹ Similarly, in *Nokes’s Case* (1599), Coke maintained that ‘the best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree.’²⁰ This was closely connected to the courts’ view that a single intention lay behind all the terms of the deed.²¹ Thus, in *Mallory’s Case* (1601), it was held that a deed should be interpreted so that all the parts ‘together may stand and satisfy the intent and meaning of the parties.’²²

In some cases, it was impossible to read all the terms of the deed consistently. The courts therefore had to resort to other principles to identify the parties’ intention from their words. In *Baldwyn v Marton* (1589), the court observed that ‘it is a good rule in the law to expound deeds according to the intent of the makers of them, if it may appear what this was, and this intent must be taken by the words of the deed.’²³ However, they recognised that it could be difficult to identify this intention when the deed was ambiguous or repugnant. In such cases, there were other rules for ‘understanding how deeds are to be expounded’ and for finding ‘the intent of the donor.’²⁴

One such rule concerned the functions of the different components of a deed. The two main parts were the premises, containing the words of grant,²⁵ and the *habendum*, containing the words of inheritance.²⁶ As Coke explained, ‘the office of the premises of a deed of feoffment is to express the grantor, grantee and thing to be granted, and the office of the *habendum* is to limit the estate.’²⁷ If the two parts of the deed were contradictory, the *habendum* would

¹⁹ *Wrotesley v Adams* (1559) Plow 187, 196.

²⁰ *Nokes’s Case* (1599) 4 Co Rep 80b, 81a.

²¹ See 4.2.2. above. This was not a novel approach: see, for example, (1345) YB Pas 19 Edw III pl 17, RS 43-47, 45.

²² *Mallory’s Case* (1601) 5 Co Rep 111b, 111b. For example, if a word had been used in one part of the deed, it would be presumed to have the same meaning elsewhere: *Anon* (1564) Dyer 233b, 233b.

²³ *Baldwyn v Marton* (1589) 1 And 223, 225.

²⁴ *ibid* 224. See also *Thurman v Cooper* (1619) Popham 138, 138.

²⁵ JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 64.

²⁶ *ibid* 70.

²⁷ *Buckler’s Case* (1597) 2 Co Rep 54b, 55a.

generally be held to be void and the premises good.²⁸ In other cases, the whole deed could fail if the two parts were repugnant. In *Buckler's Case* (1597), for example, Buckler granted land to C., *habendum* from the Feast of St John the Baptist next following, for life. Here, the *habendum* was void, since a lease for life could not commence in the future.²⁹ However, without the *habendum*, it was not clear which estate Buckler had intended to pass, and the law would not imply an estate contrary to even the void *habendum*. The whole deed therefore failed.³⁰

As Hobart put it, the premises of a deed could be 'checked, restrained, corrected or explained' by the *habendum*,³¹ but the *habendum* could not be allowed to 'frustrate the grant precedent.'³² However, it could be difficult to determine whether the *habendum* was in fact repugnant to, or simply intended to expand upon, the premises. The courts generally preferred to read the two parts as a consistent whole. Coke explained that 'the general implication of the estate which shall pass, by construction of law, by the premises, is always controlled and qualified by the *habendum*.'³³ Thus, for example, if A. granted a rent to B., *habendum* for years, the *habendum* would be a good explanation of the premises.³⁴ Likewise, a grant to A. and B., *habendum* to A. for life, remainder to B. for life, was not repugnant. A deed could be good even if the grantee was not named in the premises: for example, if A. granted land, *habendum* to B. and his heirs.³⁵ As Egerton explained, the function of a *habendum* was not only to limit the estate, but also to 'express the thing granted more certainly and plainly than is contained in the premises,' or to 'declare more certainly the person of the grantee.'³⁶ However, Coke warned that such a deed was only good 'by construction', and that 'no well advised man will trust to' it.³⁷

²⁸ *Baldwin's Case* (n 6) 23b. There was an exception where the estate granted by the premises required an additional ceremony, such as livery of seisin or attornment, and the estate limited by the *habendum* passed by the delivery of the deed. Here, the *habendum* would take effect and the premises would be void: *ibid* 24a.

²⁹ *Buckler's Case* (n 27) 55a.

³⁰ *ibid* 55b.

³¹ *Stukeley v Butler* (1615) Hobart 168, 169.

³² *ibid* 170.

³³ *Buckler's Case* (n 27) 55a.

³⁴ *Baldwin's Case* (n 6) 24a.

³⁵ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 7.

³⁶ *The Dean and Chapter of Chester's Case* (1578) Hunt MS El 482 f32, f37.

³⁷ Coke (n 35) 7. In some cases, the courts held that this kind of deed was void: see *Anon* (1572) 4 Leo 37, discussed at 3.2.2. above.

As well as considering the express words of the deed, the courts could find that the parties had settled an issue by implication. Implied terms were thought to be just as much part of the document as the express terms were. In a case on statutory interpretation, for example, Egerton included both the express words of the statute and the ‘reasonable inference or implication to be deduced from it’ in his analysis of the ‘compass of the words.’³⁸ In another case, he observed that ‘the sages of the law have taken that which is inferred and deduced by necessary implication to be as strong as if it had been alleged by express and precise words.’³⁹ Although this was in the context of interpreting a verdict, he gave examples of the construction of all kinds of document, including deeds and wills.⁴⁰

In *Kidwelly v Brand* (1551), for example, rent was to be paid at Hyde Abbey at the Feasts of the Annunciation and St Michael, or within the next 40 days of either. Although the parties had not specified where the rent was to be paid on any of the 40 subsequent days, the court held that ‘the rent shall be paid at Hyde the last of the 40 days, although it is not so expressed in plain words.’⁴¹ In a similar way, the courts would infer that the person who ought to perform a certain task was the one with ‘the greatest knowledge and skill.’⁴² Thus, a customs official must weigh goods before duties were paid; a bellmaker must weigh a bell before recasting it; and a tailor must cut the cloth before making a gown.⁴³ In contrast, the courts would not find such an implied term if it was ‘not reasonable’ for them to do so. In *Mervyn v Lyds* (1553), a lessor had sold all the trees on his land that might reasonably be spared, but had not appointed anyone to judge how many trees this was. The court noted that the seller had ‘more knowledge’ of the trees than the buyer, but refused to appoint him as the judge because of his vested interest in the outcome. The agreement was therefore void for uncertainty.⁴⁴

Lawyers were careful not to go too far when implying terms into deeds. In *Sawyer v Hardy* (1595), for example, a messuage was leased to Margaret Sawyer for 40 years, on condition ‘that if the said Margaret should so long continue a widow’ and dwell on the premises.⁴⁵

³⁸ *Holcrofte’s Case* (undated) Hunt MS El 482 f89, f92.

³⁹ *Marburye v Wyrall* (1577) Hunt MS El 482 f64, f68.

⁴⁰ *ibid* f68v-69.

⁴¹ *Kidwelly v Brand* (1551) Plow 69, 70. See also *Ayer v Orme* (1563) Dyer 221b, 222b.

⁴² *Reniger v Fogossa* (1550) Plow 1, 15.

⁴³ *ibid*. See (1469) YB Pas 9 Edw IV pl 13, f3b-4a.

⁴⁴ *Mervyn et Ux v Lyds et Ux Executricem* (1553) Dyer 90a, 91a. See also *Stewkley v Butler* (1615) Moore 880, 882.

⁴⁵ *Sawyer v Hardy* (1595) Popham 99, 99.

Popham CJ and Clench and Gawdy JJ held that this condition was bad, ‘for it hath no certain conclusion upon the “that if.”’ The sentence was simply incomplete, and ‘none can imagine what the conclusion shall be in such a case.’⁴⁶ While Fenner J thought that the parties must have intended to make a condition of re-entry, the others concluded that it was impossible to ‘judge of their intention.’⁴⁷ In *Butt’s Case* (1600), Coke noted that a clause of distress for rent amounted to a grant of the rent ‘by construction of law,’ since otherwise ‘the grant should be of little force or effect.’⁴⁸ Similarly, the courts would imply a covenant to warrant the land against other titles into a lease.⁴⁹ However, they would not extend this to cover trespassers unless the parties had made it clear that this was their intention.⁵⁰

In *Richard Liford’s Case* (1614), the court held that the grant of a power to sell trees included the grant of any rights necessary to exercise that power. For example, the seller could ‘enter and show the trees to those who would have them.’⁵¹ Coke explained that ‘the law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit in the land of another, to enter into the land to mend it.’⁵² Again, however, the rule was strictly limited. In *Dike v Dunston* (1586), the defendant entered the plaintiff’s land to repair his right of way, which had flooded. It was held that he had no right to do so, since the way was not wholly unusable. Asked what remedy the defendant could have, Shute J replied, ‘If he went that way before in his shoes, let him now pluck on his boots.’⁵³ Even when examining the terms of a deed, then, judges had plenty of scope to determine what the parties’ agreement ought to look like, based on what seemed reasonable or necessary.

5.2.2. INTENTIONS AND CIRCUMSTANCES

The courts would also seek to identify the parties’ intentions by considering the context in which their deed had been made. Sometimes, this could demonstrate the purpose of the deed. In *Hawes v Davye* (1565), for example, Davye had bound himself to pay Hawes £60 before 24 September, on condition that his ship took a prize before that day. Davye argued that, if the ship did not take a prize, he was not bound to pay the £60 at all; Hawes, that the debt would

⁴⁶ *ibid.*

⁴⁷ *Hardy v Seyer* (1595) Cro Eliz 414, 414.

⁴⁸ *Butt’s Case* (1600) 7 Co Rep 23a, 24a.

⁴⁹ *Tisdale v Sir William Essex* (1615) Moore 861, 861.

⁵⁰ *Grococke v White* (1583) Moore 175, 175.

⁵¹ *Richard Liford’s Case* (1614) 11 Co Rep 46b, 52a.

⁵² *ibid.*

⁵³ *Dike and Dunston’s Case* (1586) Godbolt 52, 53.

fall due on 24 September if no prize were taken before then. The court looked at the background to the bond to explain it, finding that ‘it well appears that the sum of £60 was due before the bond was made, and the extremity of the payment was deferred until 24 September.’⁵⁴ Similarly, in *Hickmot’s Case* (1610), Hickmot released all bonds owed to him by Oxenbridge, and agreed to deliver them to him, except for one bond of £40. Hickmot then brought debt on the bond of £40. Oxenbridge pleaded that he had been released from all of the bonds, and that the exception applied only to the clause of delivery. However, the court held that the bond was excepted from the whole release. ‘There was reason,’ they explained, ‘that this bond of £40 should be excepted, for it was not then due.’⁵⁵

In other cases, the purpose of the deed was to make some kind of family settlement. As we have seen, in *Bold v Molineux* (1536), Bold’s father-in-law had promised to pay him £30 on a certain day, unless his wife had died without a son ‘then living.’ Fitzherbert J held that the parties had intended the payment to fail if the son died at any time before it fell due. This was, he explained, ‘the common practice of all men who give large sums of money with the marriage of their children,’ intending that ‘if the issue die, the payment shall immediately cease.’⁵⁶ In *Cooke v Baldwin* (1587), a lease was made to John Trewpeny and Elizabeth Read for 21 years, if John and Elizabeth or any of their children should so long live.⁵⁷ The question was whether the lease ended on Elizabeth’s death without issue. The court held that it did not. As Anderson CJ explained, the lease had been made to the couple before their marriage. It therefore seemed to be intended ‘to be a jointure for the wife... and then if by the death of one it should be gone, and she have nothing, could not be the meaning.’⁵⁸

The court could also extrapolate the meaning of the deed from actions the parties had taken pursuant to it. As we have seen, the question in *Baldwin’s Case* was whether the premises of the deed had granted Anne Baldwin a fee simple, or only a lease. The court observed that no livery of seisin had been made, and so ‘it appeareth it was the intent of the parties, that it should take effect by the delivery of the deed’ as a lease.⁵⁹ Likewise, in *Tibb v Poplewell* (1599),

⁵⁴ *Haves v Davye* (1565) Dyer’s Notebooks (109 SS) 119, 119.

⁵⁵ *Hickmot’s Case* (1610) 9 Co Rep 52b, 53a; See also *Shelley’s Case* (n 15) 95b.

⁵⁶ *Bold v Molineux* (n 2) 17b. See 3.2.1. above.

⁵⁷ *Baldwin v Coke* (1587) 1 And 161, 161.

⁵⁸ *Cooke v Baldwin* (1587) Owen 52, 53. Owen’s report initially has Anderson arguing ‘that after the death of one the lease is determined,’ but in context, it is clear that this is a misprint. See also the report of Anderson’s argument in *Cock v Baldwin* (undated) Gould 71, 71–2. Compare *Eare v Snow, &c* (1578) Plow 504, 515.

⁵⁹ *Baldwin’s Case* (n 6) 24a.

Popham CJ noted that, if livery had been made on a deed, it could not have been intended to raise a use.⁶⁰ Clench J agreed, adding that, if the deed had been enrolled, it suggested that the parties had intended to raise a use.⁶¹

In the last few decades of the sixteenth century, lawyers began to refer more frequently to what they described as the ‘circumstances’ of a deed. By this, however, they did not simply mean the document’s context. Rather, they seem to have been adopting a rhetorical term of art. Hutson explains that, for rhetoricians, circumstances were ‘the topics that made a deed intelligible and able to be narrated and proved,’ including ‘motive, time, place, opportunity, means, method and the like.’⁶² As we have seen, in the *ius commune*, the interpretation of private documents had traditionally been regarded as part of rhetoric, rather than the law *per se*.⁶³ Thus, civilian writers discussed contractual interpretation in rhetorical terms, explaining that a judge must look at the circumstances of the contract to discover the parties’ intentions.⁶⁴

It has been demonstrated that sixteenth-century common lawyers adopted this terminology in the law of evidence and in legal argument.⁶⁵ However, they also discussed ‘circumstances’ when interpreting deeds. Egerton, for example, argued that the courts should ‘seek diligently the true intent and plain meaning of the parties, as far as the words will bear, or as may be collected by other circumstances.’⁶⁶ They must depart from ‘the literal sense’ of words ‘when the intent and meaning, or the circumstance of the matter’ indicated that they should do so.⁶⁷

Similarly, in his *Parallel*, Fulbecke contrasted interpretation ‘according to the rigorous sense of the words’ with interpretation according to ‘the circumstances of a man’s speech or actions.’⁶⁸

⁶⁰ *Tibb v Poplewell* (1599) BL Add MS 25203 f129v, f131v.

⁶¹ *ibid*.

⁶² Lorna Hutson, ‘Rhetoric and Early Modern Law’ in Michael J Macdonald (ed), *The Oxford Handbook of Rhetorical Studies* (Oxford University Press 2017) 398.

⁶³ Adolfo Giuliani, ‘From Presumption to Interpretation’ in Ferdinando Treggiari (ed), *Giuristi dell’Università di Perugia* (Aracne 2010) 451–3. This distinction only collapsed in the sixteenth century: *ibid* 457. See 3.2.1. above.

⁶⁴ Giuliani (n 63) 473.

⁶⁵ See generally Barbara Shapiro, ‘Classical Rhetoric and the English Law of Evidence’ in Lorna Hutson and Victoria Kahn (eds), *Rhetoric & Law in Early Modern Europe* (Yale University Press 2001); Hutson (n 62) 402–6.

⁶⁶ *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f73v.

⁶⁷ *ibid* f76v.

⁶⁸ William Fulbecke, *The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1602) 68v–69.

He provided more detail in his *Direction* to law students. When the meaning of a document was unclear, he explained, it could be interpreted by ‘probable conjecture.’⁶⁹ Its ‘probable’ meaning could be established in many ways, including ‘by the common use of speech,’ by ‘agreement with the law,’ or ‘by the circumstances of a man’s actions.’⁷⁰ The writer’s mind could not only be known by his ‘speech,’ but also by ‘the concurrence of circumstances,’⁷¹ including ‘quantity, quality, place, time, precedents [and] consequents,’⁷² and ‘the circumstances before the act, in the act, and after the act.’⁷³ Fulbecke concluded that ‘the law traceth the meaning of a man by the circumstances, even as the hunter traceth the hare by the print of his foot.’⁷⁴

Which ‘circumstances’ were discussed by common lawyers in practice? In some cases, they were indications of the parties’ intention in the document itself. In *Tibb v Poplewell*, for example, Coke ‘observed four circumstances in the deed by which it appears clearly that they did not have any intent to raise a use.’⁷⁵ These included the tense in which it was written, the terms that had been included, and the specific words that had been used. In other cases, the circumstances were facts external to the document. Moore, for example, specifically contrasted words and circumstances, explaining that the limitation of a use could be ‘expressed by writing, words or circumstances.’⁷⁶ In the context of statutory interpretation, Egerton distinguished the words of the Act from its ‘foreign circumstances.’⁷⁷

Sometimes the two were mingled. In *Humphreston’s Case* (1575), for example, ‘circumstances’ included both the terms of a separate document and the wider context of the settlement. As we have seen, the question was whether William Humphreston had intended to grant a remainder to his eldest child, a daughter, or to his eldest son.⁷⁸ Having concluded that the words of the common recovery were ambiguous, the judges agreed that they ‘ought to

⁶⁹ William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 33v.

⁷⁰ *ibid.*

⁷¹ *ibid.* 34.

⁷² *ibid.*

⁷³ *ibid.* 35.

⁷⁴ *ibid.* 34v. This is very similar to an image used by Swinburne: the ‘meaning of the testator... ought to be sought for as earnestly as the hunter seeketh his game.’ Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* (John Windet 1590) 9v.

⁷⁵ *Tibb v Poplewell* (n 60) 130.

⁷⁶ *Uses & Revocations de Uses* (undated) Moore 608, 610.

⁷⁷ *Holcrofte’s Case* (n 38) f93.

⁷⁸ See 2.2. above.

consider the cause upon the circumstances.⁷⁹ Southcote J and Wray CJ focused on ‘the circumstances, which appear upon the parts of the indentures,’ where Humphreston had used the words ‘eldest child.’⁸⁰ Gawdy J, however, thought that there were ‘many circumstances to prove that he intended this [to go] to his son.’ Because Humphreston had made the settlement ‘for settling his inheritance... it shall not be supposed that he intended his daughter to have it.’⁸¹

Similarly, in *Shelley’s Case*, Coke sought to identify Edward Shelley’s intentions by ‘diverse circumstances apparent in the record.’⁸² He combined an analysis of the words of the deed with observations about its practical effects. For example, if Edward had intended his younger son Richard to have the land, it would have been strange for him to name only his ‘heir male,’ knowing that he might later have a grandson who would take precedence over Richard. It would also be odd to institute a 24 year gap before the 18-year-old Richard could take the land, and to let his recoverers circumvent the gift to Richard by waiting until a grandson was born.⁸³ In *Scott v Scott*, Egerton claimed that his construction of a proviso was derived ‘from good consideration of the circumstances of the deed.’ He argued from both the words and the context of the document. Firstly, the proviso must be an explanation of the preceding covenant, since, otherwise, the covenant would be uncertain. Secondly, it could not be a condition, because this would be inconsistent with the will that the deed had been made to implement.⁸⁴

Both Coke and Egerton also linked their discussion of ‘circumstances’ to reason. Coke concluded that, if Richard had been intended to have the land, the consequences would be ‘very absurd in reason.’⁸⁵ Egerton thought that it was ‘against sense and common reason’ to read the proviso as a condition.⁸⁶ Other lawyers connected circumstances with presumptions: again, terminology borrowed from rhetoricians.⁸⁷ In *Dolman v Vavasor* (1584), for example, the

⁷⁹ *Humphreston’s Case* (1574) 2 Leo 216, 217.

⁸⁰ *ibid.*

⁸¹ *Lane v Coups* (undated) Owen 64, 64.

⁸² *Shelley’s Case* (n 15) 101a.

⁸³ *ibid* 101a–101b.

⁸⁴ *Scott v Scott* (undated) Hunt MS El 482 f116, f118.

⁸⁵ *Shelley’s Case* (n 15) 101b.

⁸⁶ *Scott v Scott* (n 84) f118.

⁸⁷ Shapiro (n 65) 58, 60, 69; Barbara Shapiro, ‘Presumptions and Circumstantial Evidence in the Anglo-American Legal Tradition 1500-1900’ in RH Helmholz and W David H Sellar (eds), *The Law of Presumptions: Essays in Comparative Legal History* (Duncker und Humblot 2009) 163.

court held that the intention of the parties to a common recovery was to be ‘proved by presumptions and circumstances.’⁸⁸ If the jury found ‘circumstances and presumptions vehement enough to satisfy them of the intent’ to raise a use, they must give judgment accordingly.⁸⁹ Circumstances, then, covered a wide range of indicators of the parties’ intentions: the words of the document itself, its wider context, and presumptions and reason.

5.2.3. INTENTIONS AND REASON

We have seen that the courts would use reason to extrapolate the parties’ intentions from the words of their deed, or from the circumstances in which it was made. However, the parties’ intentions could also be deduced directly from reason. In many cases, the courts sought a ‘reasonable’ or ‘equitable’ interpretation of the instrument, and simply assumed that this was what the parties would have intended. In chapter six, we will see how the two ideas could also be detached: the courts could choose a reasonable construction of the document without reference to the parties’ intentions.⁹⁰ Here, however, we are considering only cases in which the courts explicitly identified the parties’ intentions with reason. Once again, Plowden’s *Commentaries* were highly influential in linking the two ideas.⁹¹

In *Chapman v Dalton* (1565), for example, Robert Dalton had covenanted to make a lease to ‘John Chapman and his assigns’ in 21 years’ time. Chapman died before the time elapsed without naming any assigns. Edward Baber and Christopher Wray claimed that Chapman had intended the lease to be made to both him *and* his assigns, which was clearly impossible after his death. After all, if he had meant him *or* his assigns, he would have named assigns in his will.⁹² However, Fleetwood and Plowden successfully argued that this could not have been Chapman’s meaning: ‘he who puts this exposition upon it expounds it contrary to all reason.’ On this construction, Chapman would not have been able to take the lease by himself even if he had been alive, which was ‘contrary to the intent of the parties to the covenant, and contrary to all common construction of the word “assigns” and merely absurd.’⁹³ Since the literal sense of the words ‘would be nonsense,’ they argued, ‘we ought not to follow it, but to

⁸⁸ *Dolman v Vavasor* (n 18) 192.

⁸⁹ *ibid* 192. Noy, too, wrote that ‘all uncertainty may be known by circumstances,’ and linked these circumstances to presumptions: William Noy, *A Treatise of the Principall Grounds and Maximes of the Lawes of This Kingdome* (Richard Hodgkinson 1641) 19.

⁹⁰ See 6.2. below.

⁹¹ The link was also made in Dyer’s reports: see, for example, *Bold v Molineux* (n 2) 15a.

⁹² *Chapman v Dalton* (1565) Plow 284, 286.

⁹³ *Chapman v Dalton* (n 92) 288.

make some other sense of it, and such as may stand with reason, and the intent of the parties, and that is, to take the word “and” for “or”.⁹⁴ In this way, the lease could be made to Chapman’s assigns even if he had died. Nobody could ‘imagine that he would be guilty of so much folly’ as to make a covenant that would be dissolved by his death, so ‘it shall be presumed that it was the intent of both the parties, that the lease should be made notwithstanding the death of him who should take it.’⁹⁵ And, since the parties’ intention was ‘the principal point in all agreements,’ the lease ought to be made to someone, even if he was not, strictly speaking, an assign of Chapman.⁹⁶

Here, it is clear how closely the courts identified the parties’ intentions with what was reasonable. The same was true in *Hill v Grange* (1556). We have already encountered the argument about the word ‘appertaining,’⁹⁷ but the plaintiff also claimed that he was not obliged to pay any rent for the first six months of his lease. The rent, he explained, had been reserved to be paid at the Feasts of the Annunciation and St Michael, and, since the Annunciation was named first, it should also be the first day of payment.⁹⁸ The court was unimpressed. This would give the defendant ‘half a year’s profit, without paying any rent for it; and there is no sort of reason to induce us to believe that the intent of the parties was such.’⁹⁹

Again, this approach continued to influence later lawyers and treatise writers. Hake wrote that a grant should not be interpreted ‘contrary to reason, which no doubt it should be if it were construed against the intent of the parties.’¹⁰⁰ Egerton also linked the parties’ intentions to reason. It will be remembered that, in *Saunders v Stanfourde*, the question was whether a lease had been avoided by an entry after the lessee’s death. We have already seen that Egerton’s argument about the parties’ intentions was strongly influenced by Plowden.¹⁰¹ Like Plowden, he also connected a reasonable interpretation of the lease to the intentions of the parties. His opponent’s construction, he argued, would be ‘absurd, contrary to reason and the meaning of

⁹⁴ *ibid* 289.

⁹⁵ *ibid* 291.

⁹⁶ The plaintiff in the case was Richard Chapman, the executor of Anne Chapman, John Chapman’s executrix.

⁹⁷ See 3.2.1. above.

⁹⁸ *Hill v Grange* (1556) Plow 164, 171.

⁹⁹ *ibid*.

¹⁰⁰ Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, Yale University Press 1953) 55.

¹⁰¹ See 3.2.1. above.

the parties.¹⁰² Instead, the court should seek ‘an apt and reasonable construction according to the intent of the parties.’¹⁰³ He lauded his own construction as ‘more reasonable, and more consonant to conscience and equity, and more agreeable to the intent and meaning of the parties,’¹⁰⁴ citing *Chapman* in support of his approach.¹⁰⁵ Coke, too, connected the two ideas. In *Humfrey Lofield’s Case* (1612), for example, the defendants seized on a drafting error in a lease to argue that no rent was due for the first year. Citing *Hill v Grange*, the court rejected their argument. Coke observed that ‘a reservation shall be expounded according to the reasonable intention of the parties’; here, it was ‘apparent’ that they had intended the rent to be paid for the whole time the lessee was in occupation.¹⁰⁶

One form in which the reason of the common law was expressed was in maxims,¹⁰⁷ and the courts often used interpretive maxims to identify the parties’ intentions. The two interpretive maxims that were most commonly linked to the intention of the parties were enjoiners to construe a deed *ut res magis valeat quam pereat* [so that the thing may take effect rather than be destroyed] and *contra proferentem* [against the one who put it forward]. In *Throckmerton v Tracy* (1555), for example, Stanford J connected both of these maxims to the parties’ intentions, explaining that there were ‘three rules for the understanding of deeds’:

First, that they shall be taken most beneficially for the party to whom they are made; secondly, that a deed shall never be void, where the words may be applied to any intent to make it good; and... thirdly, that the words shall be construed according to the intent of the parties, and not otherwise.¹⁰⁸

Similarly, Saunders J argued that ‘contracts shall be as it is concluded and agreed between the parties, according as their intents may be gathered.’ However, he also emphasised that ‘deeds ought to have a reasonable exposition,’ explaining that there was ‘a kind of equity in grants, so that they shall not be taken unreasonably against the grantor, and yet shall with reason be

¹⁰² *Saunders & Starkey v Stanfourde* (n 66) f76v; see also *ibid* f76.

¹⁰³ *ibid* f72.

¹⁰⁴ *ibid* f74v.

¹⁰⁵ *ibid* f76v.

¹⁰⁶ *Humfrey Lofield’s Case* (1612) 10 Co Rep 106a, 107b.

¹⁰⁷ Ian Williams, ‘The Role of Rules: Legal Maxims in Early-Modern Common Law Principle and Practice’ in Maksymilian Del Mar and Michael Lobban (eds), *Law in Theory and History: New Essays on a Neglected Dialogue* (Hart Publishing 2016) 191.

¹⁰⁸ *Throckmerton v Tracy* (n 5) 160.

extended most liberally for the grantee.¹⁰⁹ Neither Stanford nor Saunders thought that there was any need to explain precisely how all of these principles interacted. The parties' intentions were so strongly identified with reason that a 'reasonable exposition' and one in accordance with the parties' intentions would inevitably correspond. These maxims, and their relationships with the parties' intentions, will be explored in more detail in chapter six.¹¹⁰

The courts also used presumptions to understand ambiguous words. For example, they presumed that the parties would have intended to use words in their 'most excellent' sense.¹¹¹ Thus, as Gawdy J explained, a rent reserved at Michaelmas would be payable 'at the chiefest feast,' and a conveyance to J. S. would be to a J. S. who was a relative or neighbour of the grantor.¹¹² Similarly, Wray CJ argued that the court must 'have regard to the meaning of the parties,' and that a donor would prefer to make his grant to 'the most worthy' person. For example, an eldest daughter was more worthy than her younger sister, but a son was more worthy than a daughter.¹¹³ Egerton noted that 'St Stephen' would be taken to refer to the Protomartyr, and 'St James' to the Apostle.¹¹⁴

5.3. Wills

5.3.1. INTENTIONS AND WORDS

As we saw in chapter three, the words of a will were presumed to be an unreliable guide to the testator's intentions.¹¹⁵ However, the courts were also increasingly concerned that they should not interpret the will according to a 'secret intent' that could not be identified from its words.¹¹⁶ This meant that the testator's intention was, in fact, often identified by examining the words he had used in his will. Coke exposed the tensions of the courts' position in a somewhat convoluted formulation in *Matthew Manning's Case* (1609). He explained that 'the intention of the devisor expressed in his will is the best expositor, director, and disposer, of his

¹⁰⁹ *ibid* 161.

¹¹⁰ See 6.5. below.

¹¹¹ *Gregory's Case* (1596) 6 Co Rep 19b, 20a.

¹¹² *Lane v Coups* (n 81) 64.

¹¹³ *Humphreston's Case* (n 79) 219; see also *Anon* (1597) Owen 60, 60–61; *Collyns v Hardinge* (1598) BL Add MS 25203 f27, f27.

¹¹⁴ *Fysher v Boys* (undated) Hunt MS El 482 f190, f192.

¹¹⁵ See 3.3.1. above.

¹¹⁶ See 3.3.2. above.

words.¹¹⁷ Thus, the testator's intention could be used to understand his words, but must itself have been expressed in the words of the will. As we have seen, the courts would overlook the technical meaning of words if the testator seemed to have intended another meaning. However, indications of that intention generally had to be found elsewhere in the will.

The words of a will, then, were used as a guide to the writer's intentions, just as the words of a deed were. Egerton, for example, wrote that 'the words [of a will] are significant to express the will and intent of the donor.'¹¹⁸ Sometimes, judges would identify the particular words that had persuaded them as to the testator's intentions. In *Hawes v Coney* (1589), for example, Robert Smith had devised 'all his lands' to his executors for the performance of his will. The question was whether this included land he held in reversion, or only land in possession. Wray CJ held that it included land in reversion, and 'said, the word "all" persuaded him much that his intent was so.'¹¹⁹ Similarly, in *Ewar v Haydon* (1599), Rafe Haydon devised 'all his... lands, meadows and pastures' in Watford. The court held that this did not include his houses. Kingsmill J explained that, if Haydon had intended 'lands' to include his houses, he would not have added 'meadows and pastures' to explain its meaning.¹²⁰

In chapter three, we saw that a testator was presumed to be *inops consilii* and ignorant of the law. In practice, however, judges sometimes seemed to assume that a testator understood how his will would be interpreted by the courts. In *Brett v Ridgen* (1568), the serjeants were not just asking what the testator's words meant, but how he had expected them to be interpreted. Thus, Sjt Manwood argued that 'all my lands' meant all the lands the testator held at the time of his death, because he 'well knew that the word "all" must receive some construction and exposition after his death.'¹²¹ In *Wild's Case* (1599), the question was whether a devise to 'Rowland Wild and his wife, and after their decease to their children' passed a fee tail or an estate for life with a remainder to the children. The court held that, if these words had been used in a deed, they would only pass a life estate.¹²² Because the case concerned a will, the words could pass 'an estate tail by construction,'¹²³ but only if the testator's intent was 'manifest and certain, and so expressed in the will.'¹²⁴ If 'no such intent appear[ed],' the court

¹¹⁷ *Matthew Manning's Case* (1609) 8 Co Rep 94b, 95b.

¹¹⁸ *Rose v Morys* (1588) Hunt MS El 482 f282, f282.

¹¹⁹ *Hawes v Coney* (1589) Cro Eliz 159, 159.

¹²⁰ *Ewar v Haydon* (1599) BL Add MS 25203 f56v, f57; see also *Ewer v Heydon* (1599) 2 And 123, 124.

¹²¹ *Brett v Ridgen* (1568) Plow 340, 343. See 4.3.2. above.

¹²² *Wild's Case* (1599) 6 Co Rep 16b, 16b.

¹²³ *ibid.*

¹²⁴ *ibid* 17a.

would have to assume that ‘his meaning was to agree with the rule of the law’ and that he wished to grant a life estate.¹²⁵

Similarly, in *Lowen v Cox*e (1599), Lowen devised land to his two sons ‘equally, and to their heirs.’¹²⁶ The question was whether he had intended the brothers to be joint tenants or tenants in common. The lawyers and judges involved in the case assumed a high degree of legal literacy on the part of the testator. Coke, for example, argued that ‘this word “equally” may not show any intent in the devisor to make a tenancy in common.’¹²⁷ To demonstrate this intention, he referred to a number of cases in which fine distinctions had been made on the basis of language in a will: for example, the words ‘equally divided’ would create a tenancy in common, but ‘equally to be divided’ created a joint tenancy.¹²⁸ Altham and Tanfield, who were also counsel in the case, relied similarly on precedents to demonstrate what ‘the intent of the devisor’ must have been.¹²⁹ Gawdy J opined that the word ‘equally’ should be given ‘a reasonable construction according to the intent of the devisor,’ which seemed to be the creation of a tenancy in common.¹³⁰ However, he added that, if Tanfield could show him the case he had vouched, ‘peradventure he would change his opinion.’¹³¹ Even though Gawdy claimed to be identifying the intention of this particular devisor, he was evidently prepared to rely on previously-judged cases in order to do so. Precedent, then, could be important for the interpretation of wills. In the absence of any other indication of the testator’s intention, it would be assumed that he had intended to use words in their ordinary legal sense.

As we have seen, however, the proper signification of the testator’s words was not always conclusive.¹³² A more popular approach was to look at the whole will for indications of what a particular term was intended to mean. In *Paramour v Yardley* (1579), for example, William Robinson had devised ‘the occupation and profits of all his lands’ to his wife Grace.¹³³ One question was whether Grace took the land itself, or only a profit a prendre.¹³⁴ Plowden argued that it must be the land itself, or Grace would be without a remedy if she were ousted. William

¹²⁵ *ibid.*

¹²⁶ *Lowen v Cocks* (1599) BL Add MS 25203 f64, f64.

¹²⁷ *Lowen v Cox*e (1599) BL Add MS 25203 f89, f89.

¹²⁸ *ibid* f89v.

¹²⁹ *Lowen v Cocks* (n 126) f64.

¹³⁰ *ibid* f64.

¹³¹ *ibid* f64v.

¹³² See 3.3.1. above.

¹³³ *Paramour v Yardley* (1579) Plow 539, 539.

¹³⁴ *ibid* 541.

had provided that Grace was to use the profits to educate their son and to perform his will. This was a ‘matter of great importance, and shows how dear his issues were to him, and how desirous he was that they should be nourished and educated.’ It could therefore not ‘be presumed that it was the intent of the devisor to make a devise of a thing’ that Grace could not defend.¹³⁵ We have also seen that, in *Newis v Lark* (1571), the court read a condition in a will as a limitation in order to fulfil the testator’s intention.¹³⁶ This intention, they found, ‘manifestly’ appeared in another clause of the will, where the testator had expressly declared that ‘he would not have the estates defeated, but that they should endure in frugal and profitable manner, with thanks towards him for such his gentle remembrance of them.’¹³⁷ He therefore could not have intended the entail to be defeated by a breach of the condition.

Where an estate had not clearly been limited to a devisee, the court would look for the testator’s ‘intent through the whole will.’¹³⁸ In *Lovice v Goddard* (1604), for example, Leonard Lovice devised land to his son Thomas and the heirs male of his body for 500 years.¹³⁹ The question was whether Thomas was to have a fee tail or a lease. The court concluded that Leonard had intended to devise a fee tail, and that the limitation of 500 years was void. They reached this conclusion on the basis of a proviso that restrained Thomas’s male issue from alienating the land: Leonard’s intention to benefit the heirs male, they explained, was ‘proved by his care to advance them in the proviso.’¹⁴⁰ Similarly, in *Sonday’s Case* (1611), Merrick Sonday devised a house to his son Thomas and, if he had male issue, to his son, without specifying whether Thomas was to have a fee tail or a life estate with a remainder over.¹⁴¹ It was held that he must have intended the former. Later in the will, he had included a clause prohibiting Thomas or his heirs male from alienating the house. The mention of ‘heirs male’ suggested that Thomas’s son was intended to be his heir; the prohibition also implied that he would otherwise have had the power to alienate, which would not have been the case if he were only a tenant for life.¹⁴²

¹³⁵ *ibid* 542.

¹³⁶ See 3.3.1. above.

¹³⁷ *Newis et Ux v Lark and Hunt* (1571) Plow 403, 412.

¹³⁸ *Greeve v Dewel* (1620) Cro Jac 599, 599.

¹³⁹ *Lovice v Goddard* (1604) Moore 772, 772.

¹⁴⁰ *ibid* 773.

¹⁴¹ *Sonday’s Case* (1611) 9 Co Rep 127b, 127b.

¹⁴² *ibid* 128a. See also *Turke v Frencham* (1559) Dyer 171a, 171a; *Dutton v Engram* (1617) Cro Jac 427, 428.

Changes in the drafting of the will could also be significant. Coke observed that the ‘several pennings’ of different devises could ‘prove several intents in the testator.’¹⁴³ Thus, in *Kerry v Derick*, Richard Hunt devised his land in Middlesex and the rent of his land in Surrey to his wife Margaret. The question was whether the devise of the rent in Surrey was sufficient to give Margaret the land itself on the expiry of the lease.¹⁴⁴ Moore pointed out that this was especially doubtful ‘where the devisor in the same will makes a distinction in giving the rent of the land in Surrey, and the land itself in Middlesex,’ both lands being leased out at the time.¹⁴⁵ Similarly, in *Ward v Downing*, Robert Brown devised that, if his son George did not pay an annuity to William and Thomas, his land would remain to William, and William was to pay the annuity to Thomas.¹⁴⁶ Popham CJ held that Thomas had no remedy at common law if William did not pay. Robert had not bound William ‘upon condition, as in the other cases, which he might have done by express words of condition, if his intent had been so, as well he did in the other cases.’¹⁴⁷ He was, he noted, ‘the rather moved to be of his opinion’ because the devise to George ‘had an express condition’ annexed to it.¹⁴⁸

Sometimes it could be difficult to reconcile different parts of the will. In *Wodden v Osborne* (1599), the testator held land called Heysland in both Cookefield and Cranfield. He devised his land in Cookefield to his younger son, and provided that, if the son died without issue, his wife Johan would have Heysland. The question was whether Johan would have all of Heysland, or only the part in Cookefield. It was argued that the devisor had expressly stated that his will covered ‘the disposition of all [his] lands and tenements and hereditaments,’ and he had not disposed of the land in Cranfield elsewhere.¹⁴⁹ However, the court ultimately held that the devise did not extend to Cranfield. ‘The said words,’ they concluded, ‘will be expounded that this was his will touching all the lands that he intended to devise, and not all his lands generally.’¹⁵⁰

The court could also look at other written documents to establish the meaning of the will. In *Ross v Morris* (1588), for example, the testator devised his manor to one for life, and then to his

¹⁴³ *Leonard Lovies’s Case* (1613) 10 Co Rep 78a, 86a.

¹⁴⁴ *Kerry v Derick* (undated) Moore 771, 771.

¹⁴⁵ *ibid* 772. Judgment was ultimately given in Margaret’s favour: see also *Kerry v Derrick* (1602) Cro Jac 104. See also *Ewer v Heydon* (n 120) 124.

¹⁴⁶ *Ward v Downing* (undated) Popham 10, 10.

¹⁴⁷ *ibid* 12.

¹⁴⁸ *ibid* 11.

¹⁴⁹ *Wodden v Osborne* (1599) BL Add MS 25203 f64v, f64v.

¹⁵⁰ *ibid*.

right heirs in perpetuity, ‘*secundum antiquas evidencias*’ [according to the ancient evidence].¹⁵¹ Egerton argued that he must have been referring to a grant of the land in tail which had been made in 1351.¹⁵² The heirs would therefore have an estate tail ‘according to the intent of the devisor.’¹⁵³ It seemed that the evidence of the 1351 grant was, in principle, admissible. However, the court held that the testator had failed to identify it clearly enough. There were ‘diverse evidences’ relating to the land, and the testator had not specified the one to which he was referring. ‘It is hard for a man in extremity to remember’ the terms of such grants, observed the court, especially one that was made such a long time before.¹⁵⁴

The courts were prepared to imply terms into wills, just as they were with deeds. Again, this seems to have been viewed as an aspect of interpreting the express words. In *Inchley v Robinson* (1587), Sjt Shuttleworth quoted Fyneux CJ: ‘every will ought to be construed and taken according as the words do import, or as it may be intended or implied by the words, what the meaning of the testator was.’¹⁵⁵ In contrast, the devisor’s intention could not be implemented if ‘it doth not appear upon the words of the will.’¹⁵⁶

When the courts waived the usual words required to limit an estate, they often explained that an estate had been limited ‘by implication’ of the will. For example, Egerton wrote that if a man devised land to J.S. after the death of his wife, ‘the wife has an estate for life by implication.’¹⁵⁷ Precisely the same conclusion was reached in one 1616 case.¹⁵⁸ In the same case, the testator also devised land to his son and the son’s heirs, and to his daughters if they outlived the son and his heirs. The court held that the son had a fee tail, rather than a fee simple, ‘by implication of the words.’ It was ‘the apparent implication that the heirs are intended to be the heirs of his body, not heirs in fee, because so long as the daughters live, the son cannot die without a collateral heir.’¹⁵⁹ Implications could also be made from conditions. In *Warren v Lee* (1556), for example, it was held that the heir could enter on the devisee for

¹⁵¹ *Ross v Morris* (1588) Cro Eliz 108, 108.

¹⁵² *ibid* 109; *Rose v Morys* (n 118) f282.

¹⁵³ *Ross and Morrice’s Case* (1588) 2 Leo 23, 27.

¹⁵⁴ *Ross v Morris* (n 151) 109; *Ross and Morrice’s Case* (n 153) 27.

¹⁵⁵ *Inchley and Robinson’s Case* (1587) 2 Leo 41, 42. See (1500) YB Trin 15 Hen VII pl 22, f11b-12b, f12a.

¹⁵⁶ *Inchley and Robinson’s Case* (n 155) 42.

¹⁵⁷ *Marburye v Wyrall* (n 39) f68v. Again, this was a quote from Fyneux CJ: see (1498) YB Hil 13 Hen VII pl 22, f17b, f17b.

¹⁵⁸ *Anon* (1616) Moore 852, 853.

¹⁵⁹ *ibid*. See also *Webb v Hearing* (1617) Cro Jac 415, 416.

breach of a condition ‘although no re-entry or entry are expressly reserved to him, because it is tacitly implied in law when the condition is to be performed by the devisee.’¹⁶⁰

It might be thought that implication could be deprecated as an illicit pursuit of a testator’s ‘secret intent’, contrary to the express words of his will. However, lawyers very rarely made this point. In the context of ‘superstitious’ uses, which had been prohibited by a statute of Edward VI, the courts would refuse to save a devise by implying another intention alongside the express intention to provide for divine services.¹⁶¹ Moore warned that, in these cases, ‘no implied intent will be received contrary to that which is expressed.’¹⁶² Outside this special context, lawyers only occasionally cautioned against taking implication too far. In *Sanders v Byng*, for example, Egerton explained that ‘the intent is not to be imagined and hunted out of the words of the will according to our fancy,’ but was ‘to be plausibly collected and inferred, from the words themselves.’ In this case, he argued, his opponent had gone too far, and had ‘strained’ the words, seeking to ‘by implication vest the inheritance’ contrary to ‘sense or reason.’¹⁶³ In *Bacon v Hill* (1597), the court warned that ‘the intent of the devisor may be implied where the words are defective, but never against the express words of the will.’¹⁶⁴ In general, though, this point does not seem to have overly concerned the courts.¹⁶⁵

5.3.2. INTENTIONS AND CIRCUMSTANCES

The courts might also use the context in which the will had been made as a guide to the testator’s intentions. For example, if the testator did not limit an estate when devising ancient demesne land, it would be presumed that he intended it to pass by the custom of the manor.¹⁶⁶ A devise to a man and his wife for life, and then to their children, would ordinarily take effect as an estate for life with a remainder over. However, where the couple had no children at the time of the devise, the court would find that an estate tail had been passed,

¹⁶⁰ *Warren v Lee and Others* (1556) Dyer 126b, 127a.

¹⁶¹ *Adams and Lambert’s Case* (1602) 4 Co Rep 104b, 106a. See 1 Edw VI c. 14.

¹⁶² *Whetstone v Mintam* (1601) Moore 657, 659; compare *Adams v Lambert* (undated) Moore 648, 648.

¹⁶³ *Sanders v Byng* (undated) Hunt MS El 482 f182, f183v.

¹⁶⁴ *Bacon v Hill* (1597) Moore 464, 464.

¹⁶⁵ In one later case, the court refused to imply a cross-remainder into a devise, but on the basis of a specific policy concern about the kind of term, rather than the propriety of implied terms in general: *Gilbert v Witty and Others* (1623) Cro Jac 655, 656.

¹⁶⁶ *Betridge v Trott (no 2)* (1571) Dyer’s Notebooks (110 SS) 221, 221.

for the intent of the devisor is manifest and certain that his children or issues should take, and as immediate devisees they cannot take, because they are not *in rerum natura* [in existence]; nor were they intended to take by way of remainder.¹⁶⁷

Where testators had provided for ‘superstitious’ uses, it would ‘be intended that their intentions were to advance such uses, and not the private advantages of the devisees.’ After all, the devisors had been ‘taught’ and ‘persuaded’ that such uses were necessary ‘for the health of souls,’ and it would therefore have been sacrilegious for the devisees to benefit by them.¹⁶⁸

Lawyers were also beginning to adopt the language of ‘circumstances’ when interpreting wills, just as they were with deeds. English civilians used this terminology to discuss the interpretation of wills. The canon lawyer Swinburne, for example, wrote that a testator’s ‘mind and purpose must be proved by circumstances,’ appending a note to the writings of Giacomo Menochio.¹⁶⁹ Common lawyers, too, had adopted the term. In *Portman v Willis* (1594), for example, it was held that the court would allow ‘circumstances to guide the intent of the devisor.’¹⁷⁰ In the serjeants’ case of 1567, Sjt Barham explained that ‘where the will is obscure in words it will be expounded by the circumstances.’¹⁷¹ Here, there were ‘no circumstances’ to suggest that the devisor had intended to pass land he bought after making his will. Indeed,

by the circumstance of time it appears directly contrary... The time is a good circumstance to know the truth, and in this case, having consideration of the time, it appears plainly that he was not seised of [the land] at the time of the making of the will.¹⁷²

¹⁶⁷ *Wild’s Case* (n 122) 17a.

¹⁶⁸ *Adams and Lambert’s Case* (n 161) 106a.

¹⁶⁹ Swinburne (n 74) 8v. See also William Fulbecke, *A Parallele or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1601) 45v.

¹⁷⁰ *Portman v Willis* (1594) Moore 352, 352.

¹⁷¹ *Le Serjaunts Case* (1567) Hunt MS El 482 f3, f1 1v.

¹⁷² *ibid.* Time was one of the circumstances that Quintilian had advised rhetoricians to use in order to identify the meaning of an act: Hutson (n 62) 398.

Lawyers generally emphasised that circumstances could only be used to explain ambiguous words.¹⁷³ In *Lovice v Goddard*, the court held that, if ‘the circumstances’ established ‘the mind of the deviser,’ they were ‘to be preferred,’ but only in cases ‘where the words will serve.’¹⁷⁴ Again, these circumstances might simply be other parts of the will. In both *Englande’s Case* and *Sanders v Byng*, Egerton discussed *Clache’s Case* (1573).¹⁷⁵ In the former, he explained that the court there had identified the testator’s intention from ‘other circumstances,’¹⁷⁶ but in the latter, he described the intention as ‘collected from the other words’ of the will.¹⁷⁷ Indeed, in *Englande*, Egerton’s argument was not based on circumstances extraneous to the will, but on the testator’s declaration of his intentions elsewhere in the document.¹⁷⁸ In *Sanders*, he emphasised the close connection between the words of the will and its circumstances, twice explaining that the testator’s intention must be ‘inferred by the words and circumstances of the will.’¹⁷⁹

In other cases, the circumstances did not seem to relate to the facts of the case at hand, but were rather general presumptions about what any testator would be likely to intend. For example, it was presumed that a testator would intend to follow the common law rules of descent.¹⁸⁰ In *Towers v Burrows* (1575), the court held that ‘by the circumstances of the will... it cannot be intended that the father designed otherwise, but that every daughter should have an equal portion and advancement,’ as she would at common law.¹⁸¹ In *Sanders v Byng*, Egerton strongly emphasised the circumstances of the will. His argument was that the testator must have intended all of his daughters to inherit, because it would have been ‘unnatural and wrongful’ to exclude two of them.¹⁸² This is similar to Gawdy J’s argument about the common recovery in *Humphreston’s Case*: as we saw above, he thought that, ‘upon the circumstances,’ it would be ‘intended that W. Humphreston had a greater desire that his son should have his

¹⁷³ Sjt Barham gave the example of a devise to the testator’s son John, where he had two sons named John: *Le Serjaunts Case* (n 171) f11v. See 3.4. above.

¹⁷⁴ *Lovice v Goddard* (n 139) 773.

¹⁷⁵ *Clache’s Case* (1573) Dyer 330b.

¹⁷⁶ *Englande’s Case* (undated) Hunt MS El 482 f53, f55v.

¹⁷⁷ *Sanders v Byng* (n 163) f184.

¹⁷⁸ *Englande’s Case* (n 176) f57.

¹⁷⁹ *Sanders v Byng* (n 163) f183; see also *ibid* f183v.

¹⁸⁰ But compare the cases cited at n 222 in chapter six.

¹⁸¹ *Alice Towers v Burrows* (1575) Dyer 342a, 342b.

¹⁸² *Sanders v Byng* (n 163) f183v.

inheritance, than his daughter.¹⁸³ The circumstances of this particular testator, then, could be extrapolated from the circumstances of testators in general.

5.3.3. INTENTIONS AND REASON

Lawyers also maintained that a testator's intention could be deduced from reason. In *The Case of Thetford School* (1609), for example, the testator had devised land worth £35 to maintain a preacher, a grammar school, and certain poor people. The land was now worth £100, and the question was whether the devisees could take the surplus. The judges held that they could not: the testator 'had intended the whole should be employed in works of piety and charity.' Their conclusion, they explained, was 'grounded on evident and apparent reason.' If the lands had decreased in value, the charities would have lost out, so it was only fair that they should gain now. They also noted that 'the price of victuals' had increased along with the value of land.¹⁸⁴

As with the intentions of parties to a deed, the intentions of the testator could be presumed to correspond with what was reasonable. In *Paramour v Yardley*, Plowden claimed that the defendant's interpretation of the will 'cannot reasonably be presumed to be [the testator's] intention.'¹⁸⁵ In *Ross v Morris*, Egerton argued that 'reasonable and favourable construction ought to be made of this devise according to the intent of the devisor,'¹⁸⁶ and in *Sanders v Byng*, he advised the court to seek 'an apt and reasonable intent' in the will.¹⁸⁷ Similarly, in *Ewer v Heydon* (1599), the court held that wills would be 'taken most reasonably and according to the intention of the devisor.'¹⁸⁸

However, the idea of a reasonable intention was discussed less often in connection with wills than with deeds. The courts also had a more limited conception of exactly what it would entail. In most cases, it would simply be presumed that a testator had intended his will to be effective, and, in particular, to pay his debts. Coke, in his *Commentary upon Littleton*, wrote that wills were to be construed so as to provide 'for the speedy payment of debts.'¹⁸⁹ In one 1580 case, the testator had devised land to pay his debts. It was held that the executor would have

¹⁸³ *Humphreston's Case* (n 79) 217.

¹⁸⁴ *The Case of Thetford School, &c* (1609) 8 Co Rep 130b, 131a.

¹⁸⁵ *Paramour v Yardley* (n 133) 542.

¹⁸⁶ *Ross and Morrice's Case* (n 153) 27.

¹⁸⁷ *Sanders v Byng* (n 163) f183v.

¹⁸⁸ *Ewer v Heydon* (n 120) 124.

¹⁸⁹ Coke (n 35) 236.

the power to sell the land and use the money for this purpose, since ‘that by good reason and circumstance was the intention of the testator... for the speedy payment of his debts.’¹⁹⁰ In *Boraston’s Case* (1587), the court observed that Thomas Boraston had devised a twelve year term to his executors for the payment of his debts and the performance of his will. It would be presumed, they explained, that ‘he hath computed’ that twelve years’ worth of profits from the land ‘would suffice to pay his debts, and perform his will.’ As a result, they found that ‘he did not intend’ the term to end early, since this would leave his debts unpaid and his will unperformed.¹⁹¹

The courts would also presume that the testator intended his will to be performed for the benefit of his devisees. In *Hawes v Coney* (1589), for example, Wray CJ observed that a ‘devise shall be taken in the most liberal manner for the performance’ of the bequests.¹⁹² In *Collier’s Case* (1595), the testator had devised land to his brother, on condition that he pay certain sums of money to others. It was held that, if the sums were required to be paid annually, the brother would have only a life estate, since he could pay them out of the annual profits of the land and was ‘sure to have no loss.’ However, since they were one-off payments, he might die before he recouped them from the profits of the land. The brother would therefore have a fee simple, ‘for the law doth intend that the devise was for his benefit, and not for his prejudice.’¹⁹³ In *Whitlock v Harding*, the testator had devised land to one for 99 years, and then to his daughter Agnes.¹⁹⁴ It was held that Agnes would have the fee simple of the land, rather than a life estate to commence following the 99 year term. ‘The intent appeared [to be] to pass the inheritance,’ explained Moore, ‘because an estate for life after 99 years was of little value, and could not be understood.’¹⁹⁵

Such cases were clearly linked to the maxim *ut res magis valeat quam pereat*, since the court was seeking to secure an effectual performance of the testator’s will. This maxim was occasionally cited in cases involving wills. Egerton, for example, observed that deeds were to be taken *ut res magis valeat quam pereat*,¹⁹⁶ and ‘thus, in construction of wills, it has been received as a principle that the intent of the deviser will be preferred.’¹⁹⁷ Similarly, Coke wrote that the law would

¹⁹⁰ *Anon* (1580) Dyer 371a, 371b.

¹⁹¹ *Boraston’s Case* (1587) 3 Co Rep 19a, 20b.

¹⁹² *Hawes v Coney* (n 119) 159.

¹⁹³ *Collier’s Case* (1595) 6 Co Rep 16a, 16a.

¹⁹⁴ *Whitlock v Harding* (undated) Moore 873, 873.

¹⁹⁵ *ibid* 874.

¹⁹⁶ *Englande’s Case* (n 176) f55.

¹⁹⁷ *ibid* f55v.

‘supply the intent of the devisor’ and construe ambiguous words ‘so that they might take effect.’¹⁹⁸ Both Coke and Egerton cited *Newis v Lark* as authority for this approach, which will be considered in more detail in chapter six.¹⁹⁹

The courts also presumed that ambiguous words in wills were intended in their ‘most worthy’ sense, as they were in deeds. In *Chapman’s Case* (1575), for example, Richard Chapman devised two houses to remain to his ‘house,’ being ‘the next of the name and blood that are males.’ It was held that he had intended them to pass to an elder brother’s son, rather than to a younger brother, as ‘the chief and most worthy and eldest person of the family.’²⁰⁰ It could not, however, be assumed that a devise to the testator’s son, where he had two sons, referred ‘to the eldest more than to the other.’ Such a devise would fail for uncertainty.²⁰¹ The word ‘purchase’ would be taken to mean ‘an absolute purchase in fee,’ as it did ‘in common speech.’ In the same way, ‘fee’ would mean ‘fee simple, and the Feast of St Michael the most notorious and eminent feast,’ unless it had been otherwise specified.²⁰²

5.4. Conclusions

In his treatise on the law of conscience, Christopher St German warned that ‘of the intent inward in the heart, man’s law cannot judge.’²⁰³ However, this did not seem overly to concern early modern lawyers, who had a whole host of methods for doing so. Indeed, they thought that intentions were so ‘apparent’ that ‘every man may discover’ them.²⁰⁴

To an extent, the courts used similar techniques to identify the intentions of parties to a deed and the intentions of a testator. In both cases, they looked at the instrument as a whole, drawing out its implicit meanings and the connections between its different provisions. They also made general presumptions about what a writer would ordinarily intend in the relevant context. Both of these techniques could be described as extrapolating intentions from the ‘circumstances’ of the document, terminology likely adopted from the field of rhetoric.

¹⁹⁸ *Mary Portington’s Case* (1613) 10 Co Rep 35b, 41a.

¹⁹⁹ See 6.5.1. below.

²⁰⁰ *Chapman’s Case* (1574) Dyer 333b, 333b.

²⁰¹ *Taylor, and Joan his Wife, v George Sayer* (1600) Cro Eliz 742, 743.

²⁰² *Green v Armsteed* (1614) Hobart 65, 65.

²⁰³ Christopher St German, *Doctor and Student* (TFT Plucknett and JL Barton eds, Selden Society 1974) 230. See also (1477) YB Pas 17 Edw IV pl 2, f1a-2b, f2b, per Bryan CJ: ‘the intent of a man will not be tried, because the Devil does not know the intent of man.’

²⁰⁴ *Throckmerton v Tracy* (n 5) 159.

However, there were also differences between the courts' approaches to deeds and wills. We saw in chapter four that only one person's intention was relevant to the construction of a will. In contrast, the creation of a deed involved at least two parties, even if one had played only a passive role. As a result, when seeking the intention of a testator, lawyers tended to hew closely to expressions of that intention in the will itself. Although they presumed that a testator's intention was reasonable, they would make only limited assumptions about what that would entail. For example, they would presume that a testator intended to follow the common law rules of inheritance, to pay his debts, and to make effective devises. Beyond that, reason could not help them to identify the testator's intentions.

However, the courts derived more assistance from reason when identifying the intentions of parties to a deed. Reason could even mediate between the interests of the two parties. Thus, for Saunders J, a 'reasonable exposition' of a deed was one that created 'a kind of equity' between the parties.²⁰⁵ Reason, in the context of deeds, encompassed principles like the *contra proferentem* rule, which directed the courts towards an even-handed result. Judges were not interested in the parties' inner thoughts, but in the 'reasonable and equal intention' that could be extracted from their agreement.²⁰⁶ They were therefore more inclined to formulate rules and presumptions for the identification of this intention.

It is worth briefly comparing this to the process by which the courts identified the legislator's intention when interpreting a statute. Statutes, like deeds, were made by multiple parties: 'so many statute makers, so many minds.'²⁰⁷ Parliament, too, was presumed to intend what was reasonable, so that the meaning of a statute could be identified by asking what 'an upright and reasonable man' would have intended it to mean.²⁰⁸ The construction of statutes was 'guided by the intent of the legislator,' which the courts took 'according to that which is consonant to reason.'²⁰⁹ Indeed, lawyers were prepared to admit that this Parliamentary intention was sometimes all but fictitious. Robert Broke observed that the courts had 'construed the minds of the makers of the statute, out of mere necessity to avoid a mischief.'²¹⁰ As Georg Behrens

²⁰⁵ *ibid* 161.

²⁰⁶ *Bold v Molineux* (n 2) 15a.

²⁰⁷ Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (Huntington Library 1942) 151.

²⁰⁸ *Eyston v Studd* (1574) Plow 459, 467.

²⁰⁹ *Stradling v Morgan* (1560) Plow 199, 205. See also Egerton's argument in *Butler v Baker* (1591) Hunt MS El 482 f286, f288v.

²¹⁰ *Reniger v Fogossa* (n 42) 14.

puts it, the search for the legislator's intention was 'guided principally by normative rather than by factual constraints', seeking a just result rather than an 'actual state of mind.'²¹¹

It was less often acknowledged in the case of deeds or wills that the courts were eliding the difference between the writer's actual intentions and the intentions he was simply presumed to have. However, it is clear that the courts relied heavily on reason to help them to identify a writer's meaning, especially when interpreting a deed. In chapter six, therefore, we will look beyond the writer's intentions. We will examine other sources of guidance on the interpretation of legal documents: in particular, reason and authority.

²¹¹ Georg Behrens, 'Equity in the Commentaries of Edmund Plowden' (1999) 20 *Journal of Legal History* 25, 35.

6. REASON, AUTHORITY AND MAXIMS

6.1. Introduction

In chapter five, we saw that lawyers could use reason to identify what the intentions of a writer had been. The role of reason in the interpretation of legal documents will now be examined in more detail. We will see that reason could also be an important principle in its own right. Lawyers argued that the common law required deeds to be given a ‘reasonable construction,’ quite aside from the intentions of the parties who had made it. In contrast, they very rarely asserted that wills ought to be given this kind of reasonable construction.

We will also examine a shift in lawyers’ styles of argument, as the ways in which they argued from reason changed during our period. In the mid-sixteenth century, lawyers generally relied on *a priori* reason and intellectual persuasiveness to identify the right interpretation of a document. By the end of the century, however, they had grown more sceptical about the powers of ‘natural reason.’ Arguments from authority became more important than arguments from reason *per se*, and previously-judged cases took on a greater role in the law of interpretation. Lawyers were also keen to present interpretation as a logical system of rules and maxims. Rather than making broad claims about what was reasonable or what the parties had intended, writers like Coke and Bacon preferred to distill the results of interpretation cases into specific interpretive maxims. The result was a fundamental change in the common law’s approach to the construction of documents.

This chapter will conclude by examining two popular interpretive maxims: *ut res magis valeat quam pereat* and the *contra proferentem* rule. In one form or another, these were the maxims that were most frequently cited by lawyers in our period. It is therefore important to understand their operation. They also provide useful illustrations of the developments discussed throughout this chapter. Through the lens of these two maxims, we will see how lawyers sought to balance the parties’ intentions, the words of the document, the requirements of reason and the dictates of authority. We will also see further evidence of lawyers’ different approaches to the construction of deeds and wills.

6.2. Reason and intentions

In chapter five, we saw that lawyers presumed that testators and parties to a deed would have had reasonable intentions.¹ By arguing that an instrument should be construed according to the writer's intention, and that this intention was a reasonable one, the courts were able to give the document a reasonable interpretation. However, lawyers also directly asserted that deeds should be given a reasonable construction, without resting this point on the parties' intentions. It might be thought that they were only arguing from reason on the implicit presumption that the parties had had reasonable intentions. However, it is notable that lawyers very rarely asserted that wills should be given a reasonable construction. This suggests that construing a deed reasonably was seen as desirable *per se*, even if the parties had not, in fact, had reasonable intentions.

The idea that 'every deed must have a reasonable construction'² was well-established by the end of the fifteenth century. The courts discussed this 'reasonable construction' as if it were a requirement of the common law, rather than something the parties had intended. Thus, a bond would not be construed so as to require the impossible, because 'the law is about possibility and reason.'³ A party would be given a reasonable amount of time to perform a condition in his deed, because 'the law is reasonable, and it wills that everyone should have what reason wills.'⁴

Plowden, on the other hand, was careful to connect reasonable construction to the intentions of the parties. We saw in chapter five that, in his reports of cases like *Chapman v Dalton* (1565) and *Hill v Grange* (1556), lawyers and judges maintained that 'reason, and the intent of the parties' would lead them to the same conclusions.⁵ However, even in Plowden's reports, there was some ambiguity about the relationship between the two. In *Colthirst v Bejushin* (1550), for example, Bejushin had been granted land on the proviso that he reside there during his whole term.⁶ Hales J held that, since 'conditions have always a reasonable construction,' Bejushin ought to live on the land for the whole term. Any other construction would be 'contrary to reason, and the apparent intent of the lessor.'⁷ Mountague CJ agreed that a condition 'ought

¹ See 5.2.3. and 5.3.3. above.

² *Ferrers v Prior of Newark* (1501) YB Trin 16 Hen VII pl 2, f9a-10b, f10b.

³ (1468) YB Mich 8 Edw IV pl 9, f8a-13a, f12b.

⁴ *Southwall v Huddelstone and Reynoldys* (1523) YB Hil 14 Hen VIII pl 1, 119 SS 150-163, 160.

⁵ *Chapman v Dalton* (1565) Plow 284, 289. See 5.2.3. above.

⁶ See 3.2.3. above.

⁷ *Colthirst v Bejushin* (1550) Plow 21, 30.

to be taken according to the intent of it... so that conditions have a reasonable intendment.⁸ Both men, therefore, linked the reasonable construction of the condition to the intentions of the parties. However, Mountague CJ added that, if Bejushin were sometimes away from the land, and his family remained behind, ‘this shall be a performance of the condition; for our law construes all things with reason.’⁹ He did not connect this point to the lessor’s intentions: it was simply the law that required the condition to be reasonably understood. Similarly, in *Browning v Beston* (1555), Sjt Catlyn explained that ‘the reasonable construction of the law... inclines the words of the party to the minds of the parties, and to that which may most aptly stand with reason.’¹⁰ Here, it was the law’s ‘reasonable construction’ that was paramount, nudging the courts towards an interpretation of the words which accorded both with the parties’ intentions and with the demands of reason.

Even in Plowden’s *Commentaries*, then, a reasonable construction might simply be mandated by the common law itself. In particular, the courts were always keen to give destructive conditions a reasonable construction. We saw in chapter three that these conditions were viewed as ‘odious’ because they led to the destruction of estates.¹¹ There was a tension between lawyers’ consequent desire to construe conditions as narrowly as possible, and their general inclination to take every part of a deed according to the parties’ intentions. Sometimes, a narrow construction was ‘reasonable’: thus, it would not be a breach of the condition if Bejushin were briefly absent from his land. At other times, reason required the condition to be interpreted more extensively than was suggested by the words. In *Andrews v Blunt* (1573), for example, Dyer CJ argued that a condition must be performed in ‘due and reasonable time,’ even if no time limit had been specified.¹² In *Hill v Grange*, the court held that, if a condition required the payment of rent on a certain day, the lessee would have until ‘the last instant’ of that day to tender it.¹³ However, Broke CJ and Saunders J added that, if the lessee owed a ‘great sum,’ he ought to pay it ‘a convenient time before sunset,’ so that the lessor could count the money before darkness fell.¹⁴ This principle did not just apply to

⁸ *ibid* 34.

⁹ *ibid*. Hales J also thought that Peter would be excused for his breach if he were absent from the land ‘for some reasonable cause’: *ibid* 30.

¹⁰ *Browning v Beston* (1555) Plow 131v, 140. This is my own translation from the Law French. The usual English translation does not convey the nuance of Sjt Catlyn’s argument.

¹¹ See 3.2.3. above.

¹² *Andrews v Blunt* (1573) Dyer 311a, 311b.

¹³ *Hill v Grange* (1556) Plow 164, 172.

¹⁴ *ibid* 173.

conditions: as Anthony Browne J explained in another case, ‘the law allows convenient time for the doing of every act.’¹⁵

Later lawyers also maintained that the law would not require the impossible or the inconvenient. In *Grococke v White* (1583), for example, the question was whether a condition requiring the defendant to ‘warrant and defend’ land included defence against trespassers. Anderson CJ explained that, ‘because it is not convenient or easily possible to defend land against all trespassers, the law has construed this word “defend” solely as defence against titles.’¹⁶ In *The Earl of Pembroke v Symes* (1600), the court refused to give a condition a meaning that was ‘insensible and impossible,’ holding that, instead, ‘it shall be as it may well stand with reason.’¹⁷ And in *Bothy’s Case* (1605), the court explained that a condition must usually be performed ‘in convenient time.’¹⁸ However, if the condition was to make livery of seisin, the obligee must make an appointment with the obligor for performance. It was ‘not reasonable’ for the obligor to perform whenever he chose, because ‘then the obligor will be forced to stay always upon the land, which will be inconvenient.’¹⁹

In other cases, lawyers appealed to reason in the sense of avoiding absurdity. In *Hungate’s Case* (1601), for example, Hungate brought debt on a bond against Mese and Smith. The condition of the bond was that they would perform the arbitration that would be delivered to ‘*utriusque partium*’ [each party].²⁰ The defendants pleaded that the arbitration had not been delivered to Smith, and judgment was given in their favour. Coke explained that the word ‘*uterque*’ could be taken jointly or severally, and that ‘the rule to know in what sense it shall be taken’ was ‘to make construction according to congruity of reason, *ut evitetur absurdum*’ [to avoid absurdity]. Here, it was ‘reason’ that the bond required the arbitration to be delivered to both the parties, since both were ‘subject to penalty and danger.’²¹ In *Justice Windham’s Case* (1589), the absurdity was that the deed would lose its effectiveness. Coke argued that a grant should be construed ‘*ne res destruat, & ut evitetur absurdum*’ [that the thing may not be destroyed, and to avoid absurdity], and so that ‘by reasonable construction, the words may well stand

¹⁵ *Say v Smith* (1564) Plow 269, 272. See also *Wade’s Case* (1601) 5 Co Rep 114a, 114b.

¹⁶ *Grococke v White* (1583) Moore 175, 175.

¹⁷ *The Earl of Pembroke v Symes* (1600) Cro Eliz 781, 782.

¹⁸ *Bothy’s Case* (1605) 6 Co Rep 30b, 30b.

¹⁹ *ibid* 31a.

²⁰ *Hungate’s Case* (1601) 5 Co Rep 103a, 103a.

²¹ *ibid*.

together.²² Similarly, in *Saunders v Stanfourde*, Egerton argued that it would be ‘a manifest and gross absurdity’ if part of the lease were held to be void.²³

Like Plowden, Coke slid between references to the reasonable intentions of the parties and a reasonable construction imposed by the law. However, Coke’s understanding of a reasonable construction was different to Plowden’s. In *Knight’s Case* (1588), for example, Coke observed that ‘the true intent of the parties... is always to be observed, when it may by reasonable construction consist with the rule and reason of the law.’²⁴ For Plowden, reasonable construction had pointed both towards the parties’ intentions and towards reason. For Coke, in contrast, reasonable construction mediated between the parties’ intentions and reason, with reason acting as a limiting factor on the implementation of those intentions. The reason in question, moreover, was no longer reason in general, but the specific reason of the law. As we will see below, the ‘reason of the law’ was a concept to which Coke was deeply committed, and which he thought could be important enough to trump even the intentions of the parties.

There was, then, a presumption that the law required deeds to be taken reasonably, independent of the presumption that the parties had reasonable intentions. By Coke’s time, there even seems to have been a shift towards explaining certain cases in terms of reason, rather than in terms of the parties’ intentions. For example, in *Chapman v Dalton*, the court held that a duty owed to ‘Chapman and his assigns’ ought to be performed to Chapman’s executor, if he had not nominated an assign before his death.²⁵ The judges’ reasoning was based on the parties’ presumed intention ‘that the lease should be made notwithstanding the death of him who should take it.’²⁶ In contrast, in *Goodall’s Case* (1597), the King’s Bench discussed a 1581 case in which John Brown had owed £400 to Edward ‘Randal, his heirs or assigns.’²⁷ The Court of Wards had held that, if Randal failed to nominate an assign before his death, the law would ‘make construction what person will be most proper as his assignee in law to receive the said money.’ This was because ‘the law... will never reject any word, if by any reasonable construction it may take effect.’²⁸ Here, the court preferred to reason on the basis that it was ‘the law’ which appointed the executors to receive the money. In contrast to

²² *Justice Windham’s Case* (1589) 5 Co Rep 7a, 8a.

²³ *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f76.

²⁴ *Knight’s Case* (1588) 5 Co Rep 54b, 55a.

²⁵ See 5.2.3. above.

²⁶ *Chapman v Dalton* (n 5) 290a.

²⁷ *Goodall’s Case* (1597) 5 Co Rep 95b, 96b.

²⁸ *ibid* 97a.

Chapman, the judges did not base their conclusion on the intentions of the parties, but on the law's mandate to construe words reasonably.

Again, it is worth briefly comparing this development with the courts' approach to statutes. Thorne explains that, in the Year Books period, the extension of a statute by equity was not connected to the intentions of Parliament.²⁹ Only in the mid-sixteenth century did lawyers like Plowden begin to link the two, justifying an equitable construction of a statute on the basis that Parliament must have intended it.³⁰ At the same time, other lawyers continued to hold that it was the reason of the common law that ultimately determined how a statute must be understood.³¹ Famously, Coke would argue strongly for this view in *Dr Bonham's Case* (1610).³² There seems, then, to have been general disagreement as to whether a reasonable construction of a deed or statute was required by the common law, or whether it could simply be mandated by the document's writer.

In stark contrast, however, lawyers hardly ever asserted that the law required wills to be taken reasonably. An isolated incidence was in *Bullen v Bullen* (1601), where Tanfield argued that a will ought to have a 'reasonable construction.'³³ Similarly, in *Englande's Case*, Egerton argued that it would be 'unreasonable' to interpret the testator's instructions so that they were 'impossible' and 'against the law.' The true meaning of the will, he argued, should be identified using 'reason and common sense.'³⁴ However, aside from the presumption that wills should be construed so as to be effective, reason generally played little explicit role in the interpretation of wills.³⁵

²⁹ Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (Huntington Library 1942) 47.

³⁰ *ibid* 59; Georg Behrens, 'Equity in the Commentaries of Edmund Plowden' (1999) 20 *Journal of Legal History* 25, 32–35.

³¹ Behrens (n 30) 42.

³² *Dr Bonham's Case* (1610) 8 Co Rep 113b, 118a; see also Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 272v; Ian Williams, 'Dr Bonham's Case and "Void" Statutes' (2006) 27 *Journal of Legal History* 111, 121.

³³ *Bullen v Bullen* (1601) BL Add MS 25203 f285v, f285v. This seems to have been an appeal to reason in the sense of avoiding absurdity: Tanfield was arguing that the devisor would not have intended his devisees to pay for the same land three times.

³⁴ *Englande's Case* (undated) Hunt MS El 482 f53, f57.

³⁵ See 5.3.3. above.

6.3. Reason and authority

Lawyers' understanding of reasonable construction, then, was evolving throughout the sixteenth century. However, attitudes to reason were also changing in another way. Ian Williams has shown that, during the sixteenth century, there was a general shift in common lawyers' approach to legal reasoning. In the early part of the century, when St German was writing, reason was central to legal theory, and a successful legal argument was one that was intellectually persuasive.³⁶ For Plowden, too, reason was a concept that every lawyer could access, simply by applying his intellect. In *Eyston v Studd* (1574), for example, he advised his readers how to identify the legislator's intention when construing a statute. They must 'suppose that the law-maker is present,' and ask him what the statute meant, then 'give yourself the same answer which you imagine he, being an upright and reasonable man, would have given.' In this way, the reader would 'form a right judgment' on the statute's meaning.³⁷ Plowden assumed that his reader would be able to identify the interpretation that reason required, simply through his own processes of reasoning. In a similar discussion in *Nichols v Nichols* (1575), he proclaimed that 'every reasonable man' would construe a statute in a way that 'stands with reason and justice.'³⁸

Later in the century, however, lawyers began to doubt whether reason alone was enough to identify the correct legal answer in every case. Coke and Bacon, for example, both acknowledged that there might be a range of possible solutions to a case, all of which complied with reason.³⁹ Relying on reason alone, therefore, meant that the law was underdetermined. Coke's solution was to redefine reason. He contrasted 'every man's natural reason' with the reason of the law, which was 'an artificial perfection of reason.'⁴⁰ The law's reason had been refined by 'long experience' so that it was now wiser than any individual's 'own private reason.'⁴¹ Unlike Plowden, Coke did not think that an individual could access the law's reason through his own powers of reasoning. Rather, he must identify it by studying the rules of the law.⁴² A good law report would enable 'the right reason of the rule (the beauty of the law)' to 'be clearly discerned' by studious readers.⁴³

³⁶ Ian Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (PhD thesis, University of Cambridge 2008) 11, 68, 151.

³⁷ *Eyston v Studd* (1574) Plow 459, 467.

³⁸ *Nichols v Nichols* (1575) Plow 477, 487.

³⁹ Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (n 36) 13–14.

⁴⁰ Coke (n 32) 97b.

⁴¹ *ibid*; *Calvin's Case* (1608) 7 Co Rep 1a, 3b.

⁴² Coke (n 32) 62; see Williams, 'English Legal Reasoning and Legal Culture, c.1528-c.1642' (n 36) 23.

By the late sixteenth century, common lawyers were increasingly inclined to make arguments from authority.⁴⁴ Legal texts, cases, and especially judgments in cases were coming to be described as ‘authorities.’⁴⁵ Williams argues that, by the end of the century, the basis of legal reasoning had shifted from *a priori* reason to the authority of previously-judged cases.⁴⁶ He suggests that this resulted from procedural changes, which abolished tentative pleading and focused lawyers’ minds on final judgments dealing with points of law. Lawyers may also have been influenced by styles of argument in the rhetorical tradition,⁴⁷ and by the new availability of reliable printed texts.⁴⁸ Although reason remained centrally important to legal argument at the turn of the century, it was conceptualised and implemented in a very different way.⁴⁹ It was now the reason of the law, not natural reason, that was key.

These changes affected the way in which lawyers approached the interpretation of documents. This can be seen most clearly by comparing the approaches of Plowden and Coke. While Plowden was content to leave the identification of the right construction to lawyers’ natural reason, Coke consistently linked interpretation to ‘the rule and reason of the law.’⁵⁰ Thus, he emphasised that a correct interpretation was one made in accordance with the authority of previous cases, rather than an individual’s idea of what was reasonable. In *Vynior’s Case* (1609), for example, the condition of a bond was that William Wilde would perform an arbitration made by William Ruge, who had been appointed by the two parties. Wilde subsequently revoked the authority he had given to Ruge. It was held that this was a breach of the condition. Coke explained that the condition in question had been ‘invented by prudent antiquity’ precisely in order to ensure that the obligor did not revoke the arbitrator’s authority. ‘It is good,’ he continued, ‘to follow in such cases the ancient forms and precedents,

⁴³ *The Reports of Sir Edward Coke*, vol V (Joseph Butterworth and Son 1826) 9 Co Rep xxxviii.

⁴⁴ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 24; David Ibbetson, ‘Authority and Precedent’ in Mark Godfrey (ed), *Law and Authority in British Legal History, 1200-1900* (Cambridge University Press 2016) 72–3.

⁴⁵ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 25, 68; Ibbetson, ‘Authority and Precedent’ (n 44) 74–83.

⁴⁶ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 71, 94, 151.

⁴⁷ *ibid* 75–7; Ibbetson, ‘Authority and Precedent’ (n 44) 80.

⁴⁸ See generally Ian Williams, ‘“He Creditted More the Printed Booke”: Common Lawyers’ Receptivity to Print, c. 1550-1640’ (2010) 28 *Law and History Review* 39.

⁴⁹ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 13.

⁵⁰ *Knight’s Case* (n 24) 55a.

which are full of knowledge and wisdom,⁵¹ and cited a 1465 case in which the meaning of such a condition had been considered.⁵² He did not mention reason or the parties' intentions.

Another striking case is *Edward Altham's Case* (1610). Marcia Lawrence made a deed releasing all her 'actions... suits, quarrels and demands' against Thomas Nash.⁵³ The question was whether her dower had thereby been extinguished. As we have seen, Coke relied heavily on authorities in which these words had previously been interpreted.⁵⁴ To define 'right,' for example, he cited 14 cases from the Year Books, Broke's *Abridgement*, Littleton's *Tenures*, and *Nichols v Nichols* from Plowden's *Commentaries*.⁵⁵ It is particularly interesting to compare Coke's method to that recommended by Plowden in *Nichols*. Plowden did not provide any authorities for his definition of the word 'right,' but asserted that 'every reasonable man' would interpret it so that it 'stands with reason and justice.'⁵⁶ Indeed, he specifically warned that 'to rest upon the strict definition of the word' was 'manifestly injurious,' since 'reason is the key which pierces and opens the sense of obscure words.'⁵⁷

Coke's approach was very different. For Coke, the apparent demands of reason could be outweighed by sufficient authority. In *Lewis Bowles's Case* (1615), for example, the question was whether a 'without impeachment of waste' clause in a feoffment to use would entitle the feoffees to the timber of a barn that had blown down. The court held that it was 'the continual and constant opinion of all ages' that it did. 'It would be dangerous now to recede from' this view, they proclaimed, since 'it is better that there should be a defect, than that the law should be changed.'⁵⁸ In *The Lord Cromwel's Case* (1601), Coke warned that '*fucatus error nuda veritate in multis est probabilior, & saepenum rationibus vincit veritatem error*' [artificial error is in many cases more probable than naked truth, and error often overcomes truth by reasoning].⁵⁹ He approvingly cited similar *dicta* from the philosopher Theophrastus ('*qui rationem in omnibus quaerunt, rationem subvertunt*' [he who seeks reason in everything, subverts reason])⁶⁰ and the jurist Paul ('*non est recedendum a communi observantia, & minimè mutanda sunt quae certam*

⁵¹ *Vynior's Case* (1609) 8 Co Rep 81b, 82b.

⁵² (1465) YB Trin 5 Edw IV pl 2, f3b.

⁵³ *Edward Altham's Case* (1610) 8 Co Rep 150b, 150b.

⁵⁴ See 2.3. above.

⁵⁵ *Edward Altham's Case* (n 53) 151b-152b.

⁵⁶ *Nichols v Nichols* (n 38) 487.

⁵⁷ *ibid* 488.

⁵⁸ *Lewis Bowles's Case* (1615) 11 Co Rep 79b, 83a.

⁵⁹ *The Lord Cromwel's Case* (1601) 2 Co Rep 69b, 73a.

⁶⁰ *ibid* 75a.

interpretationem habuerunt [there should be no departure from common usage, and those things which have had a certain interpretation should be changed least]).⁶¹ Again, he insisted that natural reason was unreliable, and that it was better to trust in the rules of the common law to achieve the right result.

Lawyers also emphasised that the interpretation of a document should not be permitted to undermine substantive rules of law. This was not a new idea. In *Colthirst v Bejushin*, for example, Hales J observed that a person may dispose of his property ‘where, when, and how he pleases, so that his intent be not against law or reason.’⁶² However, it is striking how often Coke, in particular, thought it necessary to insist that deeds must be construed in accordance with rules of substantive law. In *Baldwin’s Case* (1589), for example, he explained that ‘such construction shall always be made, that the intent of the parties shall take effect, if the same by any construction may stand with the rule of law.’⁶³ Likewise, in *Butt’s Case* (1600), he observed that ‘the law will not make an exposition against the express words and intent of the parties, when it may stand with the rule of law.’⁶⁴ In *Shelley’s Case* (1581), as in *Knight’s Case* (1588), he coupled this with a reference to reason: ‘such construction is always to be made of a deed that all the words (if possible) agreeable to reason and conformable to law, may take effect according to the intent of the parties.’⁶⁵

Lawyers were particularly keen to establish this point in the context of uses. *Newis v Lark* (1571) had sanctioned the use of perpetuity clauses in the limitation of a use, although they were abhorred by the common law. As we have seen, the court’s reasoning in *Newis* was based on principles of interpretation: the court did not wish to thwart the testator’s intention by destroying the entail he had limited.⁶⁶ *Newis* was reversed in a series of cases at the turn of the century.⁶⁷ In *Corbet’s Case* (1600), the first of the three, the judges emphasised that rules of law must take priority over principles of interpretation. Anderson CJ held that the settlor’s ‘intent is repugnant to the rules of law, and against sense and reason,’ and that the perpetuity ‘clause

⁶¹ *ibid* 74a. See D.1.3.23.

⁶² *Colthirst v Bejushin* (n 7) 31.

⁶³ *Baldwin’s Case* (1589) 2 Co Rep 23a, 23b.

⁶⁴ *Butt’s Case* (1600) 7 Co Rep 23a, 24a.

⁶⁵ *Shelley’s Case* (1581) 1 Co Rep 93b, 95b.

⁶⁶ See 3.3.1. above.

⁶⁷ AWB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 211, fn 7.

which he hath inserted out of his own conceit and imagination [is] repugnant to law and reason.⁶⁸

Lawyers were also insistent that the intention of a testator must comply with the rules of law. In *Lovice v Goddard* (1605), the judges agreed that ‘the intent of the devisor... ought to be maintained if it stands with law.’⁶⁹ Thus, in *Butt’s Case*, a man was seised of Blackacre in fee and Whiteacre for years, and granted a rent out of both for the grantee’s life. It was held that this contravened a rule of law: ‘one entire rent cannot be a freehold out of Black-acre, and a chattel out of White-acre.’ Although the ‘mutual agreement of the parties’ was clear, they could not ‘charge such thing with rent, which is not chargeable by the law.’⁷⁰

This point seems to have caused some difficulty towards the end of the sixteenth century. After all, the Statute of Wills had authorised devises ‘at the free will and pleasure of the devisor.’⁷¹ In *Bottenham v Herlakenden* (1587), for example, the question was whether rent could be reserved on a devise of land. ‘Wherefore,’ asked Sjt Gawdy, ‘cannot a man devise land, reserving rent, when by the statute 32 H. 8. he may devise at his pleasure?’ ‘Because,’ replied Peryam J, ‘his pleasure must correspond with the law.’⁷² Similarly, in *Soullé v Gerrard* (1594), Sjt Glanville argued that a remainder could not depend on a fee simple at common law. However, he continued, ‘the statute gives liberty to every owner to dispose of his land by devise at the will and pleasure: so thereby the land ought to pass according to the will of the devisor.’⁷³ Anderson CJ replied that ‘he may dispose at his will and pleasure, so as it be according to the rules of law, otherwise it is a vain will: and if other construction should be made thereof, there would many absurdities ensue thereupon.’⁷⁴ Walmsley and Beaumont JJ agreed: the Statute of Wills enabled the testator to devise ‘to what person what quantity of land and what estate he will according to the rules of law; but it enables him not to make any devises against the rules of law.’⁷⁵

⁶⁸ *Corbet’s Case* (1600) 1 Co Rep 83b, 84b. *Corbet’s Case* was a fictitious case, though the judges were unaware of this: Simpson, *A History of the Land Law* (n 67) 211, fn 7.

⁶⁹ *Loves v Goddard* (1605) Cro Jac 61, 61.

⁷⁰ *Butt’s Case* (n 64) 23a.

⁷¹ 32 Hen VIII c. 1. See Simpson, *A History of the Land Law* (n 67) 197.

⁷² *Bottenham v Herlakenden* (1587) Owen 92, 92.

⁷³ *Soullé v Gerrard* (1594) Cro Eliz 525, 525.

⁷⁴ *ibid*.

⁷⁵ *ibid* 526.

Lawyers, then, were increasingly deferential to legal rules and precedents when interpreting a document. Similarly, they were no longer content to derive principles of interpretation from reason alone. Instead, they sought to demonstrate that these principles were founded on good authority. Williams observes that, throughout the sixteenth century, there was a decline in putting hypothetical cases and an increase in the citation of genuine, judged cases.⁷⁶ In *Throckmerton v Tracy* (1555), for example, Stanford J cited *Bracton*, two specific Year Books cases, and ‘put several cases’ to ground his approach to interpretation.⁷⁷ Saunders J cited several specific cases, as well as the writings of Cicero, but largely relied on putting apparently hypothetical cases: for example, ‘if an abbot grants a corody to one for him and his servant to sit at his mess, he may not bring one that has a noisome disease.’⁷⁸ Humphrey Brown J cited no authorities, while Broke CJ cited a handful of specific cases.⁷⁹ However, the relative paucity of case law here may be due less to the judges’ predilections than to the reporter’s. Plowden noted that Stanford J’s judgment was ‘much more amplified with many cases,’ but apparently did not think that these were worth recording.⁸⁰ In *Hill v Grange*, Plowden recorded only four specific cases cited by the judges in their speeches, though he noted that ‘many other cases were put where a word shall be taken out of its natural sense.’⁸¹ He did not record any other authorities relied on by the judges, except for *Bracton*.⁸² Instead, he focused on reporting their arguments from first principles.⁸³

In Coke’s *Reports*, in contrast, any statement about principles of interpretation tended to be supported by the citation of multiple cases.⁸⁴ For example, we have seen that, in *Hungate’s Case*, Coke argued that a deed should be interpreted reasonably, so as to avoid absurdity. He cited two cases as authority for this principle.⁸⁵ In *Mallory’s Case* (1601), Coke reported that words in a deed should be interpreted so that ‘all together may stand and satisfy the intent and

⁷⁶ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 66–68.

⁷⁷ *Throckmerton v Tracy* (1555) Plow 145, 160.

⁷⁸ *ibid* 161.

⁷⁹ *ibid* 162.

⁸⁰ *ibid* 161.

⁸¹ *Hill v Grange* (n 13) 171.

⁸² *ibid* 170.

⁸³ *ibid*.

⁸⁴ In terms of raw numbers, Plowden may have included more references to cases in each of his reports. However, given that Plowden’s reports were so much longer than those of his contemporaries, the proportion of points he referenced with a specific case was considerably smaller.

⁸⁵ *Hungate’s Case* (n 20) 103a. Coke cited ‘39 Hen 6 7’, but seems to have meant (1460) YB Mich 39 Hen VI pl 15, f9a-12a, as well as *Anon* (1536) Dyer 19b.

meaning of the parties.’ He cited *Hill v Grange* for the point, as well as discussing *Chapman v Dalton* and three Year Books cases.⁸⁶ In *Butt’s Case* (1600), he explained that a grant of a distress for rent amounts to a grant of rent, on the basis of the principle ‘*ut res magis valeat*.’⁸⁷ He emphasised that this point was ‘often ruled and resolved,’ citing eleven cases from the Year Books as well as Littleton’s *Tenures*.⁸⁸ Similarly, Moore, reporting his own argument in *Bullen’s Case* (1594), cited eight cases on the words needed to grant a fee tail in a will:⁸⁹ five from Dyer and three from the Year Books, two of which were taken from Broke’s *Abridgement*.⁹⁰

Egerton also cited many cases as authorities for his approach to interpretation. Since Egerton’s draft arguments have not been edited by a reporter, we have references to all of the cases on which he relied. In his notes for *The Dean and Chapter of Chester’s Case*, for example, Egerton made 75 references to earlier cases, including six to cases in Plowden. The rest came from the Year Books.⁹¹ His draft argument in *Saunders v Stanfourde* included 45 references to cases, 36 from the Year Books and nine from Plowden.⁹² Egerton also referred frequently to *Bracton*⁹³ and, less often, to Broke,⁹⁴ Littleton,⁹⁵ or St German⁹⁶ for arguments relating to interpretation. It is clear that, following the publication of Plowden’s and Dyer’s reports, lawyers were fully exploiting the opportunity to cite cases that specifically discussed principles of interpretation in detail. Egerton had both the Year Books and Plowden’s *Commentaries* in his library, while Coke owned many volumes of reports, including Dyer’s and Plowden’s.⁹⁷

Approaches to legal reasoning in interpretation cases had therefore changed in a number of ways. Authorities were increasingly used to establish the meaning of words or phrases in a document, and could even trump the apparently reasonable meaning of a term. Lawyers drew

⁸⁶ *Mallory’s Case* (1601) 5 Co Rep 111b, 111b.

⁸⁷ *Butt’s Case* (n 64) 24a.

⁸⁸ *ibid*.

⁸⁹ *Bullens Case* (1594) Moore 361, 362.

⁹⁰ Robert Brooke, *La Graunde Abridgement* (Richard Tottell 1573) 264, 296v.

⁹¹ *The Dean and Chapter of Chester’s Case* (1578) Hunt MS El 482 f32.

⁹² *Saunders & Starkey v Stanfourde* (n 23).

⁹³ *The Dean and Chapter of Chester’s Case* (n 91) f34v; *Englande’s Case* (n 34) f55; *Saunders & Starkey v Stanfourde* (n 23) f72; *Fysher v Boys* (undated) Hunt MS El 482 f190, 190v.

⁹⁴ *Englande’s Case* (n 34) f78v; *Lepur v Woolf* (undated) Hunt MS El 482 f157, f159.

⁹⁵ *Saunders & Starkey v Stanfourde* (n 23) f78v.

⁹⁶ *Lepur v Woolf* (n 94) f159.

⁹⁷ WO Hassall, *A Catalogue of the Library of Sir Edward Coke* (Yale University Press 1950) 22–37.

clear boundaries for the province of interpretation: it must not be allowed to undermine existing legal rules. And principles of interpretation themselves were to be supported by previously-judged cases, rather than derived from *a priori* reason. In all of these ways, legal authority began to displace reason in the law of interpretation.

6.4. Reason and maxims

Another significant trend in our period was the rise of maxims of interpretation. Today, maxims are often associated with short Latin sentences. However, early modern lawyers took a broader approach to maxims, understanding them to include legal rules and principles in general.⁹⁸ Coke, for example, wrote that a maxim was ‘all one’ with ‘a principle... a rule, a common ground, postulatam or an axiom.’⁹⁹ Some maxims were very general principles, while others were quite specific rules.¹⁰⁰ Maxims were ‘conclusions of reason,’¹⁰¹ and could not be ‘questioned’¹⁰² or ‘proved,’¹⁰³ since, as Coke put it, ‘nothing may be more high and supreme than the principles themselves.’¹⁰⁴ Though maxims could not logically be proved, their existence could be proved by citing previous cases.¹⁰⁵

An inclination to set out maxims of interpretation is evident in Plowden’s *Commentaries*, as judges attempted to systematise the principles of construction. For example, we have seen that Stanford J sought to lay ‘down three rules for the understanding of deeds’ in *Throckmerton v Tracy*,¹⁰⁶ and that the court in *Hill v Grange* gave instructions about ‘the office of judges’ in interpretation cases.¹⁰⁷ The principles they established, however, were relatively general. One of Stanford J’s rules was simply that ‘the words shall be construed according to the intent of the parties,’¹⁰⁸ and the court’s direction in *Hill* was that words should be understood according to their intended meaning.¹⁰⁹

⁹⁸ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 27–28.

⁹⁹ Coke (n 32) 11.

¹⁰⁰ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 28.

¹⁰¹ *Colthirst v Bejushin* (n 7) 27; Coke (n 32) 11.

¹⁰² Coke (n 32) 11.

¹⁰³ *Ratcliff’s Case* (1592) 3 Co Rep 37a, 40a.

¹⁰⁴ *ibid.*

¹⁰⁵ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 32.

¹⁰⁶ *Throckmerton v Tracy* (n 77) 160.

¹⁰⁷ *Hill v Grange* (n 13) 170.

¹⁰⁸ *Throckmerton v Tracy* (n 77) 160.

¹⁰⁹ *Hill v Grange* (n 13) 170.

This didactic tone continued to appear in cases throughout the sixteenth century. However, the rules that judges laid down became increasingly specific. In *Baldwyn v Marton* (1589), for example, the court began by echoing the language of cases like *Throckmerton* and *Hill*: ‘it is a good rule in the law, to expound deeds according to the intent of their makers,’ and ‘it is not the office of the justice’ to ‘alter the intent of him who made the deed.’¹¹⁰ They continued, however, to

make diverse good divisions for understanding how deeds will be expounded: for instance, when the words are ambiguous, and do not include any certain thing: for instance, when one grants land, and limits no interest, there is no estate except at will without livery, if there is livery it is franktenement; for the livery makes the estate of franktenement, and by this the intent of the donor appears... and they further spoke of repugnancies in words, one sentence, and diverse sentences, and put diverse cases on this... and also when words in deeds will be void, and when not.¹¹¹

As well as asserting the general principle, that deeds ought to be construed according to the writers’ intention, the judges also sought to deal with specific problem cases: ambiguous, repugnant or void words. They also gave examples of when these problems might arise in practice, and how they should be resolved. As such specific rules of interpretation grew more popular, they began to displace other, broader principles of construction.

Coke, in particular, preferred to present cases on interpretation as if they had been resolved by a specific rule or maxim, rather than on the basis of reason or the parties’ intentions. In *Shelley’s Case*, for example, much of the argument was couched in terms of establishing Edward Shelley’s intention.¹¹² However, when Coke came to report the court’s decision, he did not mention Edward’s intention at all. In Coke’s telling, Wray CJ simply held that the words of the conveyance were ‘words of limitation, and not of purchase.’¹¹³ The reason was left obscure.¹¹⁴ Baker finds it ‘significant that the judges rejected the defendant’s argument that it was simply a matter of giving effect to the settlor’s intention.’¹¹⁵ However, as David A. Smith

¹¹⁰ *Baldwyn v Marton* (1589) 1 And 223, 225.

¹¹¹ *ibid.*

¹¹² See 5.2.1. and 5.2.2. above.

¹¹³ *Shelley’s Case* (n 65) 106b.

¹¹⁴ AWB Simpson, *Leading Cases in the Common Law* (Oxford University Press 1995) 33.

¹¹⁵ JH Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2007) 287.

has observed, it is not clear that this was in fact what happened: Edward's intention had, after all, been crucial to the defendant's argument.¹¹⁶ His intention also seems to have been playing on the judges' minds. In Dyer's report of the case, he recorded that the land passed by descent, 'and that seems also to have been the intent and will of the creator of this special tail.'¹¹⁷ A number of commentators have suggested that Coke's report was a 'sleight of hand.'¹¹⁸ He may have been deliberately suppressing the importance of Edward's intention in favour of establishing a legal rule. As Smith points out, the purpose of Coke's reports was to provide clear and certain legal rules to guide future lawyers.¹¹⁹ A clear-cut rule on the meaning of specific words was more useful for this purpose than a direction to establish the settlor's intention.

Lawyers' increasing fondness for specific maxims was starting to displace broader discussions about the parties' intentions and about reason. Analysis that would once have turned on identifying the parties' reasonable intentions was now expressed in terms of maxims. In *Goodall's Case*, for example, the court explained that the payment of £400 could not be made to Randal's executors, since he had 'expressly named' his heir to receive it, and '*expressum facit cessare tacitum*' [what is express silences what is implied].¹²⁰ Exactly the same issue had arisen in a 1560 case reported by Dyer. For Dyer, however, no maxim was needed: the question was simply one of identifying the parties' intentions. 'The law,' he explained, 'does not determine to whom the tender shall be made, when the parties themselves are agreed expressly.'¹²¹ In *The Bishop of Bath's Case* (1605), the court observed that a term on the commencement of a lease would be taken 'most beneficially for the lessee.'¹²² They cited *Wrotlesley v Adams* (1559), in which, they explained, a lease was given 'a good commencement' by 'reasonable construction.'¹²³ Again, this was a gloss: neither reason nor the *contra proferentem* rule was mentioned in the relevant part of *Wrotlesley*, but only 'the intent of the lessor and of the plaintiff.'¹²⁴ Discussion of the parties' intentions had been displaced by the mandates of both reasonable construction and a more specific interpretive maxim.

¹¹⁶ David A Smith, 'Was There a Rule in Shelley's Case?' (2009) 30 *Journal of Legal History* 53, 66.

¹¹⁷ *Shelley's Case* (1580) Dyer 373b, 374a.

¹¹⁸ Smith (n 116) 69; Simpson, *Leading Cases in the Common Law* (n 114) 34.

¹¹⁹ Smith (n 116) 69–70.

¹²⁰ *Goodall's Case* (n 27) 97a.

¹²¹ *Anon* (1560) Dyer 180b, 181b.

¹²² *The Bishop of Bath's Case* (1605) 6 Co Rep 34b, 36a.

¹²³ *ibid* 36b.

¹²⁴ *Wrotlesley v Adams* (1559) Plow 187, 198.

Coke, with his great love of formulating rules, bore particular responsibility for the proliferation of these maxims.¹²⁵ In one short passage in his *Commentary upon Littleton*, he jammed around a dozen Latin maxims of interpretation together, devoid of any context or explanation.¹²⁶ In general, however, Coke used maxims in a much more sophisticated way than this rather disorderly list would suggest. In his *Reports*, Coke usually attempted to place specific maxims in a wider context, drawing links between them and treating them as integral parts of his overall approach to construction.

In *Humfrey Lofield's Case* (1612), for example, Dorothy Young demised a wine cellar to Humfrey Lofield for a year, and, if the parties so agreed, for a further three years, rendering £40 rent annually. Lofield failed to pay the first instalment of rent. The defendant, Lofield's executrix, claimed that no rent had in fact been reserved for the first year of the lease, but only for the subsequent three year term. 'Every reservation,' she argued, 'shall be taken strictè against the lessor, and beneficially for the lessee.'¹²⁷ This was rejected. The maxim that a lease must be taken against the lessor could not be relied upon in isolation. It must be seen in the context of the court's search for the parties' reasonable meaning. Coke cited a case from 1581, which, he explained, 'proves that a reservation shall be expounded according to the reasonable intention of the parties, to be collected by the words of their deed.'¹²⁸ In fact, the case in question mentioned no such general principle, but only reiterated that a reservation was 'to be intended the most strongly against the reserver.'¹²⁹ For Coke, however, the maxim itself was less important than the context in which it was applied. In the 1581 case, the maxim accorded with 'the reasonable intention of the parties,' and so it could be relied upon. Here, in contrast, it would be unreasonable to invoke the maxim, and so it failed to obtain.

Maxims were conclusions of reason, and the parties to a deed were presumed to intend what was reasonable. In principle, then, there was no conflict between specific interpretive rules and more general references to reason and the parties' intentions. The former were examples of the latter, and the latter could be distilled into the former. Thus, in *Nokes's Case* (1598), Popham CJ held that a general covenant would be qualified by a more specific term. This was, he explained, 'by the mutual consent of both parties,' and '*quia clausa general[is] non refert[ur] ad expressa*' [because a general clause is not referred to matters expressly

¹²⁵ Simpson, *Leading Cases in the Common Law* (n 114) 39.

¹²⁶ Coke (n 32) 36.

¹²⁷ *Humfrey Lofield's Case* (1612) 10 Co Rep 106a, 106b.

¹²⁸ *ibid* 107b; see *Anon* (1581) Dyer 376b.

¹²⁹ *Anon* (n 128) 377a.

mentioned].¹³⁰ Just as the parties' intentions were thought to coincide with reason, they also necessarily coincided with more specific maxims based upon reason.

It is also worth noting the form that these maxims took. Although a maxim could be any kind of legal rule, short Latin sentences were certainly in vogue. Coke, Bacon and Egerton all collected Latin maxims of interpretation,¹³¹ and Coke seems to have had a preference for expressing maxims in Latin, rather than the vernacular. In *Edward Altham's Case*, for example, he referred to 'a maxim and principle of the law' that '*quando carta continent generalem clausulam, posteaque descendit ad verba specialia, quae clausulae generali sunt consentanea, interpretanda est carta secundum verba specialia*' [when a deed contains a general clause, and afterwards descends to special words, to which the general clauses are agreeable, the deed is interpreted according to the special words].¹³² As he pointed out, 'the same rule almost word for word' was put in a 1333 case.¹³³ In that case, however, the rule had been expressed in the Law French vernacular. Coke therefore made the deliberate choice to translate it into Latin when describing it as a 'maxim.'

Coke's Latin maxims are often described as 'spurious,' or more-or-less invented.¹³⁴ However, this was not generally true of his maxims of interpretation. Some he did coin himself: for example, '*maledicta expositio est quae corrumpit textum*' [it is a bad exposition that corrupts the text] seems to have been a Coke original.¹³⁵ However, as Hans Baade has observed, 'virtually all of the Latin-language maxims on interpretation' from Coke's *Reports* and *Institutes* 'are readily traced to' the *ius commune*.¹³⁶ For example, '*expressum facit cessare tacitum*,' which we encountered

¹³⁰ *Nokes's Case* (1599) 4 Co Rep 80b, 80b.

¹³¹ Coke (n 32) 36; James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 327-87. Egerton kept many notes of Latin maxims, which often related to interpretation: see, for example, Hunt MS El 475, Hunt MS El 481, and Hunt MS El 496.

¹³² *Edward Altham's Case* (n 53) 154b.

¹³³ (1333) YB Hil 7 Edw III pl 20, f9b-10a, f10a.

¹³⁴ Samuel Thorne, 'Sir Edward Coke, 1552-1952', *Essays in English Legal History* (Hambledon Press 1985) 227; TFT Plucknett, *A Concise History of the Common Law* (5th edn, Little, Brown and Company 1956) 283.

¹³⁵ *Edward Altham's Case* (n 53) 154b; *Baldwin's Case* (n 63) 24a. Other lawyers had expressed a similar thought in the vernacular: see, for example, *Chapman v Dalton* (n 5) 288.

¹³⁶ Hans W Baade, 'The Casus Omissus: A Pre-History of Statutory Analogy' (1994) 20 *Syracuse Journal of International Law and Commerce* 45, 92.

in *Goodall's Case*, derived from Bartolus.¹³⁷ *'Lex est cuicumque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit'* [the law is that whoever grants a thing is understood to grant that without which the grant would have no effect], cited by Coke in *Richard Liford's Case*, was from Nicolaus Everardus.¹³⁸ Coke's maxim in *Edward Altham's Case* bore a striking resemblance to the canon law rule, *'generi per speciem derogatur'* [the specific derogates from the general].¹³⁹ *'Expressio unius est exclusio alterius'* [the expression of one is the exclusion of the other] was quoted by Coke in his *Commentary upon Littleton*,¹⁴⁰ as well as by many civilian authors.¹⁴¹ Both Coke and Egerton cited the maxim *'omne maius continet minus'* [every greater thing contains the lesser thing],¹⁴² a close relation to the *ius commune's* *'cui licet quod est plus, licet utique quod est minus'* [one who may do what is more may also do what is less].¹⁴³ Many of the maxims Coke cited in his short passage on deeds focused on the importance of the parties' intentions, and also had civilian origins.¹⁴⁴ *'Verba intentioni non e contra debent inservire'* [words should serve the intentions, and not the reverse],¹⁴⁵ for example, was another maxim of the canon law.¹⁴⁶ The same trend held true for Coke's maxims that related specifically to statutory interpretation.¹⁴⁷ And Coke was not alone in his penchant for borrowing Latin maxims. Bacon explicitly attributed his maxims of construction to the 'civilians,'¹⁴⁸ while Egerton derived many of his maxims of interpretation from non-legal sources. In *Saunders v Starkey*, for example, he cited maxims from Bernard of Clairvaux,¹⁴⁹ Augustine¹⁵⁰ and Panormitanus¹⁵¹ to

¹³⁷ Stefan Vogenauer, *Die Auslegung von Gesetzen in England Und Auf Dem Kontinent: Eine Vergleichende Untersuchung Der Rechtsprechung Und Ihrer Historischen Grundlagen* (Mohr Siebeck 2001) 768.

¹³⁸ *ibid* 767.

¹³⁹ VI.5.12.34.

¹⁴⁰ Coke (n 32) 210.

¹⁴¹ Vogenauer (n 137) 768.

¹⁴² *Wade's Case* (n 15) 115a; *Holcrofte's Case* (undated) Hunt MS El 482 f89, f92v.

¹⁴³ See D.50.17.21 and VI.5.12.53.

¹⁴⁴ See 3.2.1. above.

¹⁴⁵ Coke (n 32) 36; *Edward Fox's Case* (1609) 8 Co Rep 93b, 94a.

¹⁴⁶ Vogenauer (n 137) 468.

¹⁴⁷ These fall outside the scope of this thesis. See *ibid* 766–772.

¹⁴⁸ Spedding, Ellis and Heath (n 131) 336.

¹⁴⁹ *Saunders & Starkey v Stanfourde* (n 23) f72. *'Rerum causa, non materia: nec exitus actuum, sed intentionis propositum, causas discernit'* [it is the motive, not the matter; not the result, but the intention of actions, which distinguishes the cases].

¹⁵⁰ *ibid* f72. *'Vera virtus ex fine, non ex actione indicatur'* [true virtue is determined by the end, not by the act].

¹⁵¹ *ibid* f76v. *'In fraudem legis facit, qui salvis verbis legis sententiam eius circumvenit'* [he works a fraud upon the law who, observing the letter of the law, circumvents its spirit]. See also D.1.3.29.

argue that a deed should be interpreted ‘according to the intention and minds of the parties.’¹⁵²

Why, then, did lawyers begin to recast the law of interpretation in terms of specific maxims? And why did they adopt so many of these from the *ius commune*? We have already seen that Coke was aiming to provide clear legal rules for the instruction of lawyers when he wrote his *Reports*. He lamented that the common law ‘consisteth upon so many, and almost infinite particulars,’ with the result that ‘the right reason and rule of the judges’ could easily be mistaken.¹⁵³ By framing his cases in terms of specific maxims, rather than more general principles of interpretation, Coke was able to provide clearer directions for his readers. He could present the law of interpretation as a system of specific rules, which would guide his readers through a morass of complex case law.¹⁵⁴ This approach was consistent with legal trends more generally.¹⁵⁵ Maxims were increasingly popular, used to help both law students¹⁵⁶ and practitioners¹⁵⁷ navigate the ‘confusedly scattered and utterly undigested’ common law.¹⁵⁸

Maxims also helped to summarise the law memorably and succinctly: hence, they were often expressed in Latin. Bacon, for example, noted that he had chosen Latin for his treatise on maxims because it was ‘the briefest [language] to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be avouched and alleged in argument.’¹⁵⁹ Latin maxims were pithy and elegant. They were also imbued with the intellectual respectability of the *ius commune*,¹⁶⁰ demonstrating the speaker’s taste and learning.¹⁶¹ Because the civil law was understood to be based on reason,¹⁶² the citation of a civilian maxim could strengthen an argument by showing that it was founded on reason.¹⁶³

¹⁵² *ibid* f72. He also appended a marginal note to Lambert Daneau.

¹⁵³ *The Reports of Sir Edward Coke*, vol I (Joseph Butterworth and Son 1826) 1 Co Rep xxvii.

¹⁵⁴ David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578-1616* (Cambridge University Press 2014) 143.

¹⁵⁵ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 26; Smith (n 154) 158.

¹⁵⁶ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 27.

¹⁵⁷ Smith (n 154) 159.

¹⁵⁸ Abraham Fraunce, *The Lawier’s Logike* (William How 1588) 3v.

¹⁵⁹ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 322.

¹⁶⁰ Williams also suggests that the use of Latin in maxims was a means of associating them with *sententiae* in the rhetorical tradition: Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 36.

¹⁶¹ *ibid* 117. See, for example, Spedding, Ellis and Heath (n 159) 321.

Sometimes, these civilian maxims were simply ornaments to the argument.¹⁶⁴ Egerton, for example, did not make his maxims the substantive foundation of his arguments, but dropped them in as asides. Some were no more than marginal notes.¹⁶⁵ His commonplace books contained whole lists of maxims, from which he would select the most appropriate for each occasion.¹⁶⁶ In other cases, a civilian maxim was used as ‘a pithy summation of an existing common law position.’¹⁶⁷ We have seen that this was how Coke used maxims in *Goodall’s Case* and *Edward Altham’s Case*. Similarly, when Egerton relied on civilian maxims in his arguments, he immediately followed them with references to common law authorities. After quoting Bernard and Augustine in *Saunders v Stanfourde*, for example, he began to discuss *Hill v Grange*, and assured his listeners that examples of similar common law cases were ‘infinite.’¹⁶⁸

As David Seipp observes, the origins of these maxims in the *ius commune* often went unacknowledged: they were simply treated as part of the common law.¹⁶⁹ Some had been floating around the common law for centuries. In the medieval period, continental jurisprudence had swiftly made its way to English canonists.¹⁷⁰ Many Chief Justices prior to the fourteenth century were clerics, who would have been perfectly familiar with canon law.¹⁷¹ As a result, Latin maxims used by common lawyers were often derived from civilian *regulae*

¹⁶² Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 128. See, for example, Egerton’s Speech touching the *Post-Nati*: Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press 1977) 221.

¹⁶³ JH Baker, ‘Roman Law at the Third University of England’ (2002) 55 *Current Legal Problems* 123, 146.

¹⁶⁴ David Ibbetson, *Common Law and Ius Commune* (Selden Society 2001) 16; Baker (n 163) 374.

¹⁶⁵ As in *Scott v Scott* (undated) Hunt MS El 482 f116, f119; *Saunders & Starkey v Stanfourde* (n 23) f76v; or *Bracebridge’s Case* (undated) Hunt MS El 482 f124, f126v.

¹⁶⁶ See, for example, Hunt MS El 496.

¹⁶⁷ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 118.

¹⁶⁸ *Saunders & Starkey v Stanfourde* (n 23) f72. See also *Hawes v Wyngge* (undated) Hunt MS El 482 f244, f245v. Egerton followed a reference to ‘the civil law’ by declaring that the same ‘may be proved by many cases in our law.’

¹⁶⁹ David J Seipp, ‘The Reception of Canon Law and Civil Law in the Common Law Courts before 1600’ (1993) 13 *Oxford Journal of Legal Studies* 388, 391; Baker (n 163) 389.

¹⁷⁰ Vogenauer (n 137) 759.

¹⁷¹ Paul Brand, ‘The Common Lawyers of the Reign of Edward I and the Canon Law’ in Troy L. Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 28.

iuris.¹⁷² Beresford CJ, for example, was particularly fond of quoting from the *Liber sextus*.¹⁷³ Material borrowed from the *ius commune* by medieval lawyers was assimilated into the common law; its similarity to the civilian rules was then remarked on by common lawyers in our period.¹⁷⁴ Two maxims that underwent this process, *ut res magis valeat* and the *contra proferentem* rule, will be discussed below.

It should also be noted that the more specific maxims we have discussed were not applied to wills. The courts used only a limited set of maxims when interpreting a will. Most of these were very general, emphasising only the intentions of the writer. Egerton, for example, cited some theological sources on the subject, enjoining an interpretation according to the intention of the testator. In *Scott v Scott*, he quoted a dictum of Hilary of Poitiers, which also formed part of the *Liber extra*: ‘*intelligentia dictorum ex causis summenda est dicendi*’ [the understanding of things said must be taken from the reason for which they were said].¹⁷⁵ Similarly, in *Englande’s Case*, he referred to Anselm of Canterbury’s observation that ‘*omnis voluntas habet quid & cur, quia omnis voluntas sicut vult aliquid, ita vult propter aliquid, et quemadmodum videndum est quid velit, ita considerandum est cur velit*’ [every will has a what and a why, because every will which wills something, also wills it for the sake of something, and just as we must see what it wills, we must consider why it wills].¹⁷⁶ As we saw in chapter five, lawyers believed that a testator would have had a reasonable intention, but were only prepared to make limited assumptions about what that might entail.¹⁷⁷ The only Latin maxim that was applied to wills with any kind of regularity was *ut res magis valeat quam pereat*, which will be discussed further below.

The fact that narrow, and often civilian, maxims were colonising the interpretation of deeds was not, in one sense, a substantive change. In theory, maxims were simply being used to summarise the results that the courts were already reaching.¹⁷⁸ However, in another sense, the law was being refashioned in the image of these maxims. Coke, for example, drew together disparate cases that had not previously been seen as instances of the same rule. In *Richard*

¹⁷² Vogenauer (n 137) 763; Baker (n 163) 374; Norman Doe and Simon Pulleyn, ‘The Durability of Maxims in Canon Law: From *Regulae Iuris* to Canonical Principles’ in Troy L. Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 309.

¹⁷³ Peter Stein, *Regulae Iuris: From Juristic Rules to Legal Maxims* (Edinburgh University Press 1966) 154.

¹⁷⁴ See, for example, the distinction between positive and negative statutes: Thorne, *A Discourse upon the Exposition & Understandinge of Statutes* (n 29) 36.

¹⁷⁵ *Scott v Scott* (n 165) f119.

¹⁷⁶ *Englande’s Case* (n 34) f57.

¹⁷⁷ See 5.3.3. above.

¹⁷⁸ Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (n 36) 28–9.

Liford's Case (1614), for example, it was held that a lessor who had the power to sell trees on the land would also have the power to enter the land and show the trees to a potential buyer. Coke explained that '*lex est cuicumque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit*, and this is a maxim in law.'¹⁷⁹ He cited over a dozen cases in which a similar argument had been made. Some were directly on point;¹⁸⁰ the relevance of others was much more tenuous.¹⁸¹ However, none had purported to lay down a general principle, let alone a maxim, except the most recent case, which Coke himself had reported.¹⁸² While the substantive law of interpretation was not new, the way in which the law was being described had changed. Instead of attributing an interpretation solely to the parties' intentions or to a reasonable construction, lawyers were now inclined to explain it in terms of specific maxims and rules. By reshaping how the case law was understood, lawyers like Coke were altering the common law itself.

Furthermore, while reason and the parties' intentions remained central to the courts' interpretive approach, lawyers were now trying to play this down. Instead, they preferred to emphasise the primacy of clear legal rules and a systematic approach to construction. This bore the risk of divesting the law of some of its flexibility. Plowden, for example, had used the metaphor of a nut and shell to describe interpretation: the letter of the law was the shell, but the 'fruit and profit' lay in the sense of the law.¹⁸³ Coke, in contrast, wrote that the 'thick and hard shell' of the law was any matter that distracted from the 'right reason of the rule' in a case.¹⁸⁴ For Plowden, the problematic 'shell' was a formalistic approach to interpretation, and the means to getting at the 'kernel' was to enquire into the intentions of the writer. For Coke, on the other hand, this kind of enquiry was part of the 'shell.' The 'sweetness of the kernel' could only be 'tasted' by identifying a clear rule, which would aid in the resolution of future cases.¹⁸⁵ As lawyers focused on rules derived from legal authorities, they sidelined arguments about interpretation that focused on *a priori* reason or the parties' intentions alone.

¹⁷⁹ *Richard Liford's Case* (1614) 11 Co Rep 46b, 52a.

¹⁸⁰ See, eg, (1378) YB Mich 2 Ric II pl 2, AF 38-43; (1431) YB Trin 9 Hen VI pl 34, f29b; (1469) YB Mich 9 Edw IV pl 10, f34b; *Report of Plowden's argument in Basset and Morgan v Manxel, at Serjeant's Inn* (1564) Plow 1, 13.

¹⁸¹ (1346) YB Hil 20 Edw III pl 12, RS 50-53.

¹⁸² *Saunders's Case* (1599) 5 Co Rep 12a, 12a.

¹⁸³ *Eyston v Studd* (n 37) 465. This metaphor was, itself, a borrowing from the civil law: see 3.2.1. above.

¹⁸⁴ *The Reports of Sir Edward Coke* (n 43) 9 Co Rep xxxviii.

¹⁸⁵ *ibid.*

6.5. Maxims: two case studies

We will now examine the use of two particular maxims of interpretation: *ut res magis valeat quam pereat* and the *contra proferentem* rule. These were two of the most consistently popular interpretive maxims in our period. This discussion will therefore shed more light on the approach the courts took to construing documents. The two maxims also provide case studies of the relationships, already discussed in this chapter, between reasonable construction, the intentions of the parties, and the authority of legal rules.

6.5.1. *UT RES MAGIS VALEAT QUAM PEREAT*

The maxim *ut res magis valeat quam pereat* had been formulated by the glossators of the medieval *ius commune*.¹⁸⁶ It was adopted by *Bracton*, with an explanation added: ‘favourable interpretations are to be made so that the thing may take effect rather than be destroyed, because of the ignorance of laymen.’¹⁸⁷ It thereby made its way into the common law phrasebook.

This maxim was clearly linked to the intentions of the writer: after all, he must have intended his deed to have some effect, or else he would not have made it. Invocations of the principle thus often made some link to the writer’s intentions. For example, in *The Dean and Chapter of Chester’s Case* (1578), Egerton argued that the judges ‘must supply the rudeness and imperfection of the deed, by favourable construction according to the intent of the parties, *ut res magis valeat quam pereat*.’¹⁸⁸ In *Fish v Bellamy* (1605), the Bishop of Bath and Wells made a lease of land to Robert Clerk, to begin after the deaths of the existing lessees. It was objected that the second lease was not good, because the first lease would not terminate on the deaths of the lessees.¹⁸⁹ However, a majority of judges in the Common Pleas held that the second lease could begin at any time after the deaths of the lessees, for ‘in deeds such construction ought to be made, that they may well stand, according to the intent of the parties, and not to be destroyed.’¹⁹⁰

¹⁸⁶ Vogenauer (n 137) 461.

¹⁸⁷ Samuel Thorne (tr), *Bracton on the Laws and Customs of England*, vol II (Harvard University Press 1968) 274.

¹⁸⁸ *The Dean and Chapter of Chester’s Case* (n 91) f38v.

¹⁸⁹ *Fish v Bellamy* (1605) Cro Jac 71, 71.

¹⁹⁰ *ibid* 72.

In these cases, lawyers argued that the deed or term as a whole ought to be given effect. The maxim was also used to make the point that every word in the deed was intended to be effectual. In *Bold v Molineux* (1536), Fitzherbert and Baldwin JJ pointed out that, if the words ‘then living’ referred to the time of Johan’s death, there would have been no point in including them; the term would make equal sense without them. This interpretation therefore fell foul of the rule that ‘in all conditions, a man ought to expound every word that purports a meaning of the parties.’¹⁹¹

Similarly, in *Sharplus v Hankinson* (1595), the parties had made a bond on condition that the obligor pay £20 ‘which shall be in the year 1599, in and upon 13 Oct. next ensuing the date hereof.’ The question was whether this meant 13 October in 1593, the year after the bond was made, or in 1599.¹⁹² The majority of the judges thought that the money must be due in 1599, since by this construction, the fewest words would be void. Popham CJ, for example, argued that ‘by this exposition, all the words but “the date hereof” stand.’ Clench J thought the same, explaining that ‘by this exposition and interplacing of the words, all parts may stand together; and so without doubt was the intent of the parties.’¹⁹³ This principle was closely connected to the mandate to construe all parts of a deed consistently.¹⁹⁴ Thus, when quoting *Bracton’s* version of the maxim in *Knight’s Case* (1588), Coke emphasised that ‘all the parts’ of the deed ought to ‘agree with themselves,’ because ‘the words of the indenture... import the intent of the parties.’¹⁹⁵

In other cases, however, the maxim did not apply, since the court found that a particular term had not actually been intended to have any legal effect. In *Englefield’s Case* (1590), for example, Francis Englefield had covenanted to stand seised of land to the use of his nephew. However, in order to dissuade his nephew from ‘intolerable vices,’ he provided that the uses would be void if he tendered the nephew with a ring.¹⁹⁶ Popham AG successfully argued that the ring could be tendered for any reason. The mention of ‘intolerable vices’ was ‘nothing but a flourish, devised by Mr Plowden, which imports some of the colourable causes that moved Sir Francis to make the condition, but it is not part of the condition.’¹⁹⁷

¹⁹¹ *Bold v Molineux* (1536) Dyer 14b, 17a.

¹⁹² *Sharplus v Hankinson* (1595) Cro Eliz 420, 420.

¹⁹³ *ibid.*

¹⁹⁴ See 5.2.1. above.

¹⁹⁵ *Knight’s Case* (n 24) 55b.

¹⁹⁶ *Englefield’s Case* (1590) Moore 303, 303.

¹⁹⁷ *ibid* 327. See also *Shelley’s Case* (n 65) 104b.

In these cases, the courts framed the maxim as a guide to the parties' intentions. However, in other instances, it was treated as an independent legal principle. This was particularly evident in Coke's works. He cited the principle many times in his *Commentary upon Littleton*: in his passage on 'deeds and their distinctions,'¹⁹⁸ and when discussing grants of rents,¹⁹⁹ grants to joint tenants,²⁰⁰ and confirmations of grants.²⁰¹ He did not explicitly connect it to the parties' intentions, however. Instead, he explained that the grant would be good 'by construction of law,'²⁰² or that 'the law shall make such a construction as the gift by possibility may take effect.'²⁰³ In the latter case, Coke was commenting on a passage in which Littleton had based the operation of the principle on reason. Littleton wrote that, if it were impossible for a grant to take effect according to the literal meaning of its words, 'the law wills that their estate and their inheritance will be such as reason wills.'²⁰⁴ Coke therefore connected the maxim to his own concept of the law's reason, explaining that when his reader understood 'the right reason of the law,' it would 'not only serve him for the understanding of that particular case, but of many others.'²⁰⁵ In one case, he even linked the maxim to a policy aim: protecting the quiet possession of estates. Discussing the law of misnomer, he argued that deeds should not be 'impeached and overthrown' because of 'too much niceness and curiosity,'²⁰⁶ in order to ensure 'the surety and quiet' of the parties to the deed, as well as 'their farmers and others claiming from them... *ut res magis valeat quam pereat*.'²⁰⁷

We have seen that Coke made sure to record plenty of previous cases as authorities for the maxim: for example, citing eleven cases in *Butt's Case*.²⁰⁸ Sometimes these were authorities for the general principle, and sometimes they related to the specific term in question. In *Mallory's Case*, for instance, the question was whether a reservation of rent to the Abbot and Convent of Sawtry 'or their successors' could be read as 'and their successors.'²⁰⁹ The court began by

¹⁹⁸ Coke (n 32) 36.

¹⁹⁹ *ibid* 147.

²⁰⁰ *ibid* 183v.

²⁰¹ *ibid* 301v.

²⁰² *ibid* 147. See also *Butt's Case* (n 64) 24a.

²⁰³ Coke (n 32) 183v.

²⁰⁴ *ibid* 183.

²⁰⁵ *ibid* 183v.

²⁰⁶ *The Reports of Sir Edward Coke* (n 43) 10 Co Rep xviii.

²⁰⁷ *ibid* 10 Co Rep xix. As we will see in chapter seven, the safeguarding of settled estates was a significant concern for lawyers at the time.

²⁰⁸ *Butt's Case* (n 64) 24a.

²⁰⁹ *Mallory's Case* (n 86) 111b.

discussing *Hill v Grange*, in which the words of a reservation were ‘so marshalled and transposed’ as to not lose their effect.²¹⁰ However, they then moved on to the specific facts of the case, discussing authorities where ‘or’ had been read as ‘and,’ and vice versa.²¹¹ Here, again, the court focused less on what the parties’ intentions had been and more on what the law ought to do. Fenner J briefly mentioned ‘the intent’ of the deed, but Gawdy J emphasised ‘the construction of the law,’ and Popham CJ observed that ‘the law must make such construction of deeds that they may stand with possibility.’²¹²

It has already been mentioned that *ut res magis valeat* was the only Latin maxim to be cited consistently in cases involving the interpretation of wills. Lawyers were not prepared to make many presumptions about a testator’s wishes, but they could be confident that he had intended his will to be effective. We saw in chapter five that the principle was often justified on the basis of the testator’s intention.²¹³ In *Welcden v Elkington* (1578), for example, Thomas Davis devised a term to his wife Johan for her life, and, after her death, to his son Francis. The defendant claimed that, when a life estate was granted in a lease for years, it was impossible to limit a remainder over.²¹⁴ However, Sjt Anderson and Manwood J successfully argued that it was ‘the office of the court... so to marshal and construe the words that the intent may take place, and the thing be effected, and not destroyed.’²¹⁵ If the devise to Francis had been made first and the devise to Johan second, both would undoubtedly be good. Since this devise was ‘in substance to that purpose,’ the court ought ‘so to place [the words] that the one part may not destroy the other, but that each may stand together.’²¹⁶ It was ‘reasonable and the office of the judges to make such exposition of the words’ as was ‘agreeable to the intent of the testator,’ by construing ‘the latter devise to the son to precede the former devise to the wife.’²¹⁷ Similarly, in *Matthew Manning’s Case* (1609), the court held that a remainder could be limited on a term for years by will, ‘*ut res magis valeat*.’²¹⁸

²¹⁰ *ibid* 112a.

²¹¹ *ibid*. Similarly, in *Butt’s Case*, Coke cited only cases that related to grants of distress for rent, rather than more general statements of the *ut res magis valeat* maxim: *Butt’s Case* (n 64) 24a.

²¹² *Mallorye v Payne* (1601) BL Add MS 25203 f358, f360.

²¹³ See 5.3.3. above.

²¹⁴ *Welcden v Elkington* (1578) Plow 516, 520.

²¹⁵ *ibid* 522.

²¹⁶ *ibid* 523.

²¹⁷ *ibid*.

²¹⁸ *Matthew Manning’s Case* (1609) 8 Co Rep 94b, 95b.

The principle meant that, if a will could only have one possible effective construction, the courts would be obliged to take this as its meaning. In the serjeants' case of 1567, for example, Sjt Lovelace argued that general words in a will would not pass land that was purchased after the will had been made. However, if the testator had specifically named a piece of land that he bought later, the devise would be good, 'for otherwise it is void for all purposes.'²¹⁹ Similarly, in *Heigham's Case* (1583), Windham J argued that a devise must be given the only construction by which it could have any effect.²²⁰ And in *Sir Edward Clere's Case* (1599), the court held that, where the testator had no power to devise his land at law, it would 'of necessity enure as a limitation of an use, or otherwise the devise shall be utterly void.'²²¹ On the same principle, the courts sometimes rejected a construction of a will that would simply replicate the position at law. In one 1588 case, Peryam J argued that, if the will were 'nothing but in accordance with the course of the common law,' the devisee would take 'as heir, and not by the will, and the will will be void, which is a bad construction.'²²²

In some cases, the principle was rejected, because the proposed effect would diverge too far from the words of the will. In *Michell v Dunton* (1588), a lessor made a lease of messuages for 21 years, with covenants to keep them in good repair. By his will, he devised that the lessee should have the messuages for 30 more years with the same covenants.²²³ However, since only the lessor could enforce the covenants, this provision was useless. It was therefore suggested that the testator must have intended to convert the covenants into conditions, which could be enforced by the remainderman.²²⁴ 'If they are not taken in this sense they will be void,' it was argued, 'which the law will not suffer if they may be taken by any reasonable intendment to be available.'²²⁵ The court replied that 'the words neither express nor imply that the tenements will be enjoyed on condition,' and that 'to make such words make a condition is against the sense of the words.'²²⁶ It was argued that the testator must have intended to make a condition, since 'otherwise the words the words will be vain and void.' However, this was not enough to prove his intention. Perhaps he 'never thought of a condition, and if he did not

²¹⁹ *Le Serjaunts Case* (1567) Hunt MS El 482 f3, f3v.

²²⁰ *Heigham's Case* (1583) Godbolt 16, 17.

²²¹ *Sir Edward Clere's Case* (1599) 6 Co Rep 17b, 18b.

²²² *Anon* (1588) Savile 92, 93. See also *Anon* (1572) 4 Leo 37, 37.

²²³ The lessor is identified as a woman in Owen's report, but as a man by Anderson and Gouldsbrough: *Michell v Dunton* (1588) Owen 54; *Maunchel v Dodenton* (1587) 1 And 197; *Michell v Dunton* (1588) Gould 74.

²²⁴ *Michell v Dunton* (n 223) Owen 54, 54.

²²⁵ *Maunchel v Dodenton* (n 223) 197.

²²⁶ *ibid* 198.

think of a condition, he never intended it.’²²⁷ The words of covenant in the will were therefore void, despite the maxim.²²⁸ It can be seen here how reluctant the courts were to make any presumptions at all about what a testator might have intended, if he did not clearly spell it out in his will.

In other cases, lawyers sought to argue that every word of a will must be given an effective construction. Again, this could be controversial. Perhaps, because wills were presumed to be drafted *inops consilii*, it was less surprising if they included meaningless or redundant words. In *Lowen v Coxe* (1599), for example, Lowen devised his messuage to his two sons, ‘to them equally, and to their heirs.’²²⁹ The question was whether the sons took as tenants in common or as joint tenants. Altham, counsel for the plaintiff, argued that the word ‘equally’ must have been intended to make them tenants in common. If they were joint tenants, the heir of the survivor would take the whole messuage, and so their heirs would not hold ‘equally.’²³⁰ The ‘word “equally” will be idle and in vain, and always each word said will be construed to some effect.’²³¹ Gawdy and Clench JJ agreed: ‘otherwise the word “equally” will be utterly vain and to no purpose, which will not be when it may have a reasonable construction according to the intent of the devisor.’²³² After all, it was ‘understood that the devisor put each word for some purpose.’²³³ Judgment was given for the plaintiff in the King’s Bench. Coxe then brought a writ of error, and the case was argued again in the Exchequer Chamber. Here, Walmsley J rejected Altham’s argument. The testator, he claimed, must be presumed to be ‘an illiterate man, in which case it is no marvel if he used an idle word.’²³⁴ However, it was again held that the brothers were tenants in common, by a majority of four to three.²³⁵

The courts, then, were somewhat uncertain about the propriety of applying the maxim to wills. Perhaps this is why, in *Welcden v Elkington*, Sjt Anderson and Manwood J were quick to observe that ‘this sort of exposition will by no means seem strange to us, if we do but cast our eyes back, and consider in what manner the judges in former times have expounded the

²²⁷ *ibid.*

²²⁸ *Michell v Dunton* (n 223) Owen 54, 54.

²²⁹ *Lowen v Cocks* (1599) BL Add MS 25203 f64, f64. See 5.3.1. above.

²³⁰ *ibid.*

²³¹ *Lowen v Coxe* (1599) BL Add MS 25203 f89, f89v.

²³² *Lowen v Cocks* (n 229) f64; see also *Lowen v Coxe* (n 231) f89v.

²³³ *Lewin v Cox* (1599) Moore 558, 558.

²³⁴ *Coxe v Lowen* (1600) BL Add MS 25203 f154, f154.

²³⁵ *ibid.*; *Lewen v Cox* (1599) Cro Eliz 695, 696.

words of wills.²³⁶ Sjt Anderson cited three cases, none of which were directly on point, but which, he claimed, showed that ‘the intent is the principal point to be considered in wills.’²³⁷ In *Matthew Manning’s Case*, Coke reminded his reader that ‘it has been of late often adjudged according to these resolutions,’ citing *Welcden* and *Paramour v Yardley*.²³⁸ And in *Lowen v Coxe*, Altham and Gawdy J relied on *Bold v Molineux* to establish that ‘there is not any word in a deed or will which shall be idle, if it may be taken to any reasonable intent.’²³⁹ Even such a well-established maxim of interpretation as *ut res magis valeat* had occasionally to be bolstered by the citation of authorities.

6.5.2. *CONTRA PROFERENTEM*

The *contra proferentem* rule also originated in the *ius commune*, as a medieval amalgam of several older principles of Roman law.²⁴⁰ It had percolated into the common law courts by at least the late fourteenth century.²⁴¹ Unlike *ut res magis valeat*, it was not discussed by *Bracton*, but it was regularly cited in court as the admonition that a party’s words must be taken ‘most strongly against him.’²⁴² In 1535, Audley LC declared that ‘we have a maxim in the law that every grant or deed of a man will be taken most strongly against him who made it.’²⁴³ The rule did not only apply to deeds, but also to pleadings.²⁴⁴ Coke seems to have been the first to introduce the Latin tag *contra proferentem*,²⁴⁵ followed by Bacon, who described the maxim as ‘one of the most common grounds of the law.’²⁴⁶

²³⁶ *Welcden v Elkington* (n 214) 523.

²³⁷ *ibid.*

²³⁸ *Matthew Manning’s Case* (n 218) 96a.

²³⁹ *Lowen v Cox* (n 235) 696; *Lowen v Coxe* (n 231) f89v.

²⁴⁰ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 640; Hans Erich Troje, ‘Ambiguitas Contra Stipulatorem’ (1961) 27 *Studia et documenta historiae et iuris* 93, 99.

²⁴¹ One early case is *Plessington v Mowbray & Ellerton* (1382) YB Mich 6 Ric II pl 17, AF 147-151, 148. Canon law may have been an intermediary: the principle is discussed at length in the ordinary gloss to VL5.13.57. See, for example, the 1582 *Editio Romana*, col. 836.

²⁴² This phrasing was almost totally consistent throughout the fifteenth century: compare, for example, Babington CJ in (1430) YB Mich 9 Hen VI pl 31, f49b-50b, f50b with Broke J in (1522) YB Pas 14 Hen VIII pl 9, f29b-31a, f30a.

²⁴³ (1535) YB Trin 27 Hen VIII pl 6, f14b-20a, f18b.

²⁴⁴ On pleadings, see, for example, (1423) YB Mich 2 Hen VI pl 1, f1a-4b; (1464) YB Mich 4 Edw IV pl 15, f32b-34b; (1505) YB Mich 21 Hen VII pl 47, f38a-38b.

²⁴⁵ Coke (n 32) 36a.

²⁴⁶ Spedding, Ellis and Heath (n 131) 333.

In the fifteenth century, the maxim was used in the interpretation of both ambiguous words and contradictory deeds.²⁴⁷ Indeed, lawyers saw the issues as two sides of the same coin: both were cases in which a deed could ‘be taken to different purposes.’²⁴⁸ Examples of the two kinds of case were used interchangeably to demonstrate the application of the maxim.²⁴⁹ By the sixteenth century, however, lawyers were generally content to apply the rule that the premises of a repugnant deed were effective,²⁵⁰ and the *contra proferentem* rule was primarily applied to ambiguous terms.²⁵¹ It is also worth noting that the *contra proferentem* rule did not just license a restrictive reading of an ambiguous term. In *Ewer v Heydon* (1599), for example, the court held that the word ‘land’ would be taken as extensively as possible in a grant, because this was the most favourable interpretation for the grantee.²⁵²

The *contra proferentem* rule was much more difficult to explain than *ut res magis valeat* had been. The first problem was identifying the *proferens* of the words. As we saw in chapter four, the medieval law had strict rules about which party must ‘speak’ which words in a deed.²⁵³ This made it relatively easy to identify the party who put forward the words in question. For example, since a grantor was responsible for setting out the terms of the grant, they would be taken most strongly against him. Thus, in a 1423 case, Sjt Paston explained that a feoffment would be taken ‘most strongly against him who enfeoffed me, because it is his own deed.’²⁵⁴ If an indenture contained terms spoken by both parties, each term could be taken most strongly against its own *proferens*. In 1469, Choke J observed that an indenture was ‘the deed of both,’

²⁴⁷ In the late fourteenth and early fifteenth centuries, *contra proferentem* was most often cited in cases involving contradictory deeds. These had become a major problem due to the effects of *De donis*: M Dominica Legge and Sir William Holdsworth (eds), *Year Books of 10 Edward II* (Selden Society 1934) xx. Lawyers mooted a range of principles to deal with the issue, such as holding the first part of the deed or the most certain part of the deed to be valid, or allowing the grant of a fee simple to trump any other estate if livery had been made. See, for example, (1345) YB Pas 19 Edw III pl 17, RS 43-47, 44 and (1371) YB Trin 45 Edw III pl 22, f19b-20a, f20a.

²⁴⁸ (1406) YB Trin 7 Hen IV pl 9, f16b-17a, f16b.

²⁴⁹ See, for example, (1423) YB Mich 2 Hen VI pl 2, f4b-5a, f4b.

²⁵⁰ See 5.2.1. above.

²⁵¹ Spedding, Ellis and Heath (n 131) 333.

²⁵² *Ewer v Haydon* (1599) BL Add MS 25203 f56v, f57.

²⁵³ See 4.2.1. above.

²⁵⁴ (1423) YB Mich 2 Hen VI pl 2, f4b-5a, f4b.

and would therefore 'be taken most strongly against him who made the deed in that clause which belongs to him.'²⁵⁵

The standard explanation for the maxim in this period was that the party who set the terms was responsible for them, and it was his own fault if they turned out to his disadvantage. This was closely connected to the principle that a party would not generally be excused if his obligation turned out to be impossible to perform.²⁵⁶ In a 1462 case, for example, Sjt Billing argued that

if I am obliged to L. on condition... that I enfeoff one R. and R. does not want to take the estate, I forfeit the obligation, because it is my folly thus to be bound: so there I am bound to perform the condition at my own peril. And my deed will be taken the most strongly against me.²⁵⁷

Similarly, in a 1492 case, Sjt Rede argued that the condition of a bond must be strictly performed, because 'it was his folly that he wanted to be thus bound, and also the deed of a man is taken the most strongly against him who made the deed.'²⁵⁸ This rationale was also applied to cases involving pleadings: if a party pleaded incorrectly, 'it was his deed and his folly, and will be most strongly against him.'²⁵⁹

As we have seen, however, fifteenth-century lawyers were debating whether a term in an indenture, although spoken by one party, was in fact made by the agreement of both of the parties.²⁶⁰ If so, this would make it much more difficult to explain the *contra proferentem* rule. In one 1480 case, for example, Sjt Townshend argued that a bond must be 'interpreted more beneficially for the grantee.' Bryan CJ responded, 'You speak well of a deed not indented, but when it is indented, there it is the deed of both of them, by my understanding, so it cannot be taken more beneficially to one than to the other.'²⁶¹

²⁵⁵ (1469) YB Trin 9 Edw IV pl 22, f19b-22a, f21b.

²⁵⁶ See generally AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1st edn, Oxford University Press 1975) 29–33; David Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (1997) 18 *Journal of Legal History* 1.

²⁵⁷ (1462) YB Pas 2 Edw IV pl 6, f2a-4a, f2a.

²⁵⁸ (1494) YB Hil 9 Hen VII pl 11, f17a-18a, f17b.

²⁵⁹ (1423) YB Mich 2 Hen VI pl 1, f1a-4b, f3b.

²⁶⁰ See 4.2.1. above.

²⁶¹ (1480) YB Mich 20 Edw IV pl 2, f8b-9a, f8b.

This issue continued to trouble the courts throughout the sixteenth century. As we saw in chapter four, lawyers were increasingly of the view that both parties' intentions were relevant to the interpretation of any deed, no matter who had technically spoken its terms.²⁶² Because they continued to distinguish between the speakers of certain terms, it was still possible to identify the *proferens*. Thus, sixteenth-century lawyers explained that a grant was to be 'taken most strongly against the grantor,'²⁶³ and 'most beneficially for them to whom the grant or gift was made.'²⁶⁴ Reservations 'shall always be taken most strongly against the reservors, because it is their words and act,'²⁶⁵ while a release of actions 'shall be most beneficially for him to whom the release is made, and most strongly against him who makes it.'²⁶⁶ However, if the term had been made by the agreement of both parties, it was difficult to explain why it should matter who had spoken it.

Some lawyers took Bryan CJ's approach, and simply denied that the *contra proferentem* rule could apply to indentures at all. Sjt Stanford and Walsh took this tack in *Browning v Beston*. In a deed poll, they explained, 'the words shall be taken most strongly against the grantor, and most available to the grantee.' However, 'it is not so in a deed indented, because the law makes each party privy to the speech of the other.'²⁶⁷ Other lawyers later repeated this argument. For example, in *Saunders v Stanfourde*, Egerton observed that an

indenture contains the mutual agreement of both the parties, and the words in the indenture are the words of each party, and therefore will not be construed more to the advantage of the one than of the other, but equally according to the meaning of the parties.²⁶⁸

If this were the case, the traditional rationale for the rule need not be disturbed. Indeed, this rationale was still relied upon when applying the maxim to pleadings. In *Stradling v Morgan* (1560), for example, when applying the rule to the plaintiff's declaration, the Barons of the Exchequer observed that it was 'reasonable to take it in that sense which makes against [the

²⁶² See 4.2.1. above.

²⁶³ *Throckmerton v Tracy* (n 77) 152.

²⁶⁴ *Reniger v Fogossa* (1550) Plow 1, 10.

²⁶⁵ *Hill v Grange* (n 13) 171.

²⁶⁶ *Justice Windham's Case* (n 22) 7b.

²⁶⁷ *Browning v Beston* (n 10) 134.

²⁶⁸ *Saunders & Starkey v Stanfourde* (n 23) f72v. See also *Scovell and Cavels Case* (1588) 1 Leo 317, 318; William Sheppard, *An Epitome of All the Common & Statute Laws of This Nation, Now in Force* (Lee, Pakeman et al 1656) 398–9.

plaintiff], for if his complaint lies in the other point it is his folly that he did not show it precisely.²⁶⁹ Sjt Saunders, discussing pleadings in *Colthirst v Bejushin*, argued that ‘the law interprets the words and actions of every man most strongly against himself.’ He drew an analogy to the interpretation of deeds: if a lessee covenanted to keep the land in good repair, he would be liable for damage caused by an act of God, ‘for his special agreement alters the law, and makes his words to be taken most strongly against himself.’²⁷⁰ The courts’ uncompromising attitude towards foolish promisors had not relaxed. They distinguished between obligations created by law, from which one might be excused, and those created by the parties themselves, which would be interpreted strictly.²⁷¹ Thus, in *Mallory v Payne* (1601), Mallory warned that, while a general reservation of rent would be interpreted broadly by the courts, ‘when a man takes it on himself to limit the precise form of the reservation, there the law makes a strict construction of his words, so that he will not have more than he reserves.’²⁷² Similarly, illness might excuse a person from performing an obligation imposed by the law, but not an obligation created by ‘his own act.’²⁷³

However, this attitude was no longer closely linked to the *contra proferentem* rule in the same way that it had been in the fifteenth century. After all, it did not make much sense when the obligation was not created by the obligor alone, but by the agreement of both parties. The basis of Stanford and Walsh’s and Egerton’s critiques was that the maxim was inconsistent with the courts’ new focus on the intentions of both the parties. Stanford and Walsh, for example, argued that an indenture should not be taken *contra proferentem* but ‘in such manner as the intent of the parties shall be supposed to be.’²⁷⁴ Similarly, Egerton rejected the *contra proferentem* rule and argued that an indenture should instead be construed ‘equally according to the meaning of the parties.’²⁷⁵ Although ‘the maxim is that a deed will be taken more strongly against him’ who made the deed, the cases showed that the law often qualified the words of a deed in accordance with ‘the true intent and plain meaning of the parties.’²⁷⁶

Other lawyers also noticed this problem with the maxim, and proposed alternative explanations. For example, one of the participants in Hake’s *Dialogue on Equity* volunteered

²⁶⁹ *Stradling v Morgan* (1560) Plow 199, 202.

²⁷⁰ *Colthirst v Bejushin* (n 7) 29.

²⁷¹ Ibbetson, ‘Fault and Absolute Liability in Pre-Modern Contract Law’ (n 256) 16.

²⁷² *Mallory v Payne* (n 212) f358v.

²⁷³ *Anon* (1583) Moore 124, 124.

²⁷⁴ *Browning v Beston* (n 10) 134. See also *Scovell and Cavels Case* (n 268) 318.

²⁷⁵ *Saunders & Starkey v Stanfourde* (n 23) f72v.

²⁷⁶ *ibid* f73v.

that he had ‘heard it often said and partly have read it myself that the grant of every common person is to be expounded most strongly against himself.’²⁷⁷ Hake, however, had informed them that deeds were to be ‘taken and construed according to the intent of the parties.’²⁷⁸ Were these two rules not inconsistent? Not at all, Hake replied: a grant was to be construed ‘altogether for the benefit of the grantee,’²⁷⁹ but only if ‘the intent of the parties be found not to the contrary thereunto.’²⁸⁰ For example, ‘if I grant unto you common throughout all my manor, yet you shall not thereby put your cattle into my garden.’²⁸¹ This was the same example that Egerton had used in *Saunders v Stanfourde* to argue that the maxim should not apply at all.²⁸² However, Hake’s explanation was that, although grants ‘must be expounded most for the benefit of grantees,’ the grantees were ‘not so to be favoured, as that the grant thereby should be expounded contrary to reason, which no doubt it should be if it were construed against the intent of the parties.’²⁸³ Hake therefore sought to integrate the maxim into an approach to interpretation that was based on reason and the intentions of the parties. However, he did not really explain why the *contra proferentem* rule should be applied at all. He seems to have viewed reason as something that could qualify, rather than justify, the use of the maxim.

Other lawyers attempted to find a solution, re-conceptualising the rule as a means of identifying the parties’ reasonable intentions. This was not an entirely new idea. In 1406, for example, Thirning CJ had argued that an ambiguous deed should be taken ‘for the greater advantage of him to whom the deed was made, and to any meaning that may be understood... so that the grant may be performed, and the will of the donor observed.’²⁸⁴ This was, however, an isolated claim, and may only have been prompted by the fact that the grant in question was of an entail.²⁸⁵ Sixteenth-century lawyers, on the other hand, were keen to integrate *contra proferentem* into their general approach to the interpretation of deeds. In *Throckmerton v Tracy*, for example, one of Stanford J’s three rules for the construction of deeds

²⁷⁷ Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts* (DEC Yale ed, Yale University Press 1953) 54.

²⁷⁸ *ibid.*

²⁷⁹ *ibid.*

²⁸⁰ *ibid.* 55.

²⁸¹ *ibid.*

²⁸² *Saunders & Starkey v Stanfourde* (n 23) f73v. See (1430) YB Mich 9 Hen 6 pl 8, f35b-36a, f36a.

²⁸³ Hake (n 277) 54.

²⁸⁴ (1406) YB Trin 7 Hen IV pl 9, f16b-17a, f16b.

²⁸⁵ See 3.2.4. above.

was that ‘they shall be taken most beneficially for the party to whom they are made.’²⁸⁶ He evidently thought that this was perfectly compatible with the principles that ‘a deed shall never be void, where the words may be applied to any intent to make it good’ and that ‘the words shall be construed according to the intent of the parties,’ although he did not explain exactly how he thought his three rules would interact.²⁸⁷ Coke also emphasised that the maxim could serve the intentions of the parties. In *Justice Windham’s Case*, he explained that ‘a grant shall be taken more strong against the grantor, and shall take effect as near as may be according to the intent of the parties.’²⁸⁸ After all, if the parties wished the grant to be made, it was reasonable to assume that they intended the grantee to benefit by it.

Lawyers who argued in this way were facing something of an uphill battle. As we have seen, lawyers like Stanford, Walsh and Egerton thought that the maxim was incompatible with an approach to interpretation that was based on the parties’ intentions. When speaking of wills, lawyers also seemed to take it for granted that an interpretation *contra proferentem* could be contrasted with an interpretation according to the intentions of the writer. In the serjeants’ case of 1567, for example, Sjt Lovelace argued that ‘in all things in testaments the intent of the devisor is most favourably to be construed. But in deeds the intent will be most strongly taken against the feoffor.’²⁸⁹ In *Ewer v Heydon*, the question was whether a devise of all the testator’s lands would pass his house to the devisee. The court held that a grant of ‘all his lands’ would pass a house, because ‘the deed will be most strongly taken against him who made it.’²⁹⁰ However, ‘in wills it is otherwise, for there they will be most reasonably taken and according to the intent of the devisor.’²⁹¹

The problem was that the *contra proferentem* rule required the interests of the two parties to be set against each other. As Hake had pointed out, it was somewhat strange to claim that a deed was being interpreted according to the intentions of both parties, and also more favourably to one of the parties than the other. Why, then, did lawyers think that the *contra proferentem* rule could be compatible with construction according to the intentions of the parties? The answer is that, as we have seen, there was a strong presumption that the parties would have intended what was reasonable.²⁹² Like other interpretive maxims, the *contra proferentem* rule was

²⁸⁶ *Throckmerton v Tracy* (n 77) 160.

²⁸⁷ *ibid.*

²⁸⁸ *Justice Windham’s Case* (n 22) 8a.

²⁸⁹ *Le Serjaunts Case* (n 219) f3.

²⁹⁰ *Ewer v Heydon* (1599) 2 And 123, 123.

²⁹¹ *ibid* 124.

²⁹² See 5.2.3. above.

grounded on reason. It was associated with other precepts of reason: we have seen, for example, that Stanford J linked it to the maxim *ut res magis valeat*. In *Green v Edward* (1590), Anderson CJ also argued that ‘deeds shall be taken most beneficially for the grantee, and most strongly against the grantor, especially *ut res magis valeat quam pereat*.’²⁹³ Coke linked the two maxims in *Butt’s Case*, explaining that a ‘grant shall be taken more strong against the grantor, and shall not be void, when by any construction it may be made good.’²⁹⁴ Bacon wrote that the *contra proferentem* rule could be used to ensure that grants would be read so as to take effect.²⁹⁵

Like *ut res magis valeat*, then, the *contra proferentem* rule could be used to establish what the parties must reasonably have intended. In *Dashper v Dashper* (1592), for example, Edward Pomerey granted the reversion of certain ‘land’ to John Dashper. It was objected that ‘land’ was not a sufficient word to pass the reversion of a messuage, meadow and pasture.²⁹⁶ However, Dashper successfully argued that it could not have been the grantor’s intention to make ‘a grant that was utterly void, and therefore it may not reasonably be taken that the grantor intended a void and idle thing or act; for which reason the law must expound this grant most beneficially for the grantee.’²⁹⁷ In this case, however, *ut res magis valeat* seems to have been the principle doing most of the justificatory heavy lifting. The court was largely concerned that the grant not be void, and it was only coincidental that a construction *contra proferentem* would avoid this result.

Indeed, there were other cases in which the two maxims were opposed to each other. In *Mallorye v Payne*, for example, the Abbot had reserved rent to himself ‘or’ his successors. If the reservation were read *contra proferentem*, the rent would determine on the Abbot’s death.²⁹⁸ Reading the reservation *ut res magis valeat*, to preserve the rent, would mean taking it in favour of the Abbot.²⁹⁹ It was the latter construction that the court ultimately chose.³⁰⁰ Bacon also advised that the *contra proferentem* rule would not be relied upon when it conflicted with other maxims of interpretation. It was, he explained, ‘the last to be resorted to, and is never to be

²⁹³ *Green and Edwards Case* (1590) 1 Leo 218, 218. See also *Thurman v Cooper* (1619) Popham 138, 138.

²⁹⁴ *Butt’s Case* (n 64) 23a.

²⁹⁵ Spedding, Ellis and Heath (n 131) 333.

²⁹⁶ *Dashper v Dashper* (1592) 1 And 289, 289.

²⁹⁷ *ibid* 290.

²⁹⁸ *Mallorye v Payne* (n 212) f358v.

²⁹⁹ *ibid* f360.

³⁰⁰ *ibid* f360v.

relied upon but where all other rules of exposition of words fail.³⁰¹ The courts would prefer to apply ‘other rules which are of more equity and humanity,’³⁰² such as ‘*ut res magis valeat, quam pereat*.’³⁰³

Lawyers faced the same problem when associating the maxim with reason in general. Sometimes, a construction *contra proferentem* would be a reasonable one, but in many cases it would not. We have seen, for example, that Hake viewed reason as a principle that qualified the application of the maxim. Similarly, in *Throckmerton*, Saunders J held that ‘deeds ought to have a reasonable exposition, which shall be without wrong to the grantor, and with the greatest advantage to the grantee.’³⁰⁴ His examples were similar to those given by Hake and Egerton: for example, ‘if one grants to another common in his land for all his cattle, yet he shall not have common for goats or geese, which are things hurtful to the land.’³⁰⁵ He was unwilling to fully endorse the *contra proferentem* rule, concluding rather that ‘there is a kind of equity in grants, so that they shall not be taken unreasonably against the grantor, and yet shall with reason be extended most liberally for the grantee.’³⁰⁶

The courts would not apply the *contra proferentem* rule where it conflicted with what they regarded as a reasonable construction of a deed. In *Hill v Grange*, for example, the plaintiff relied on the rule to claim that no rent had been reserved for the first six months of his lease. ‘Reservations,’ he explained, ‘shall always be taken most strongly against the reservors, because it is their words and act, and therefore they shall not be extended beyond the words.’³⁰⁷ Thus, a reservation of rent to be paid at the Feasts of the Annunciation and St Michael could not be ‘extended’ to require a first payment at Michaelmas. As we have seen, however, the court found that there was ‘no sort of reason’ in this construction, since the lessee would have the land for six months rent-free.³⁰⁸ Exactly the same result was reached in *Humfrey Lofield’s Case*. The defendant argued that ‘every reservation and exception shall be taken strictè against the lessor,’³⁰⁹ but the court held that ‘a reservation shall be expounded

³⁰¹ Spedding, Ellis and Heath (n 131) 336.

³⁰² *ibid.*

³⁰³ *ibid.*

³⁰⁴ *Throckmerton v Tracy* (n 77) 161.

³⁰⁵ *ibid.*

³⁰⁶ *ibid.*

³⁰⁷ *Hill v Grange* (n 13) 171.

³⁰⁸ *ibid.* See 5.2.3. above.

³⁰⁹ *Humfrey Lofield’s Case* (n 127) 106b.

according to the reasonable intention of the parties.³¹⁰ In this case, the *contra proferentem* rule did not help to identify the parties' reasonable intentions, and so was not used by the court.

Lawyers also encountered difficulties when applying the rule to conditioned bonds. These were a hugely popular means of contracting in the medieval period.³¹¹ In the standard form of a bond, the obligor would confess his obligation in the first person.³¹² The condition formed a separate part of the instrument, and was often written on the back.³¹³ It seems to have been generally accepted that the obligor was the maker of the bond, and that the *contra proferentem* rule required the condition to be interpreted most strongly against him.³¹⁴ In a number of cases, however, lawyers argued for precisely the opposite result. Because the condition was made for the benefit of the obligor, to save him from paying the penalty sum, they contended that it ought to be taken most beneficially for him.³¹⁵ This line of argument persisted throughout the sixteenth century. In *Laughter's Case* (1595), for example, the court reached the opposite result to that mandated by *contra proferentem*. 'The condition is made for the benefit of the obligor,' they explained, 'and shall be taken beneficially for him.'³¹⁶ Similarly, in *Hawford v Andros* (1599), Dodderidge argued that the condition of a bond is made 'for the benefit of the obligor, and therefore, by the assent of the parties, may be enlarged for the benefit of him for whose benefit it was made.'³¹⁷ Yet in *Lamb's Case* (1599), it was held that, since 'the condition is for the benefit of the obligor, and the performance thereof shall save his bond, he hath taken upon him to perform it at his peril.'³¹⁸ He would therefore be strictly obliged to perform the condition. There does not, then, seem to have been a consistent line on the construction of conditioned bonds. Perhaps this was because, in these cases, the *contra proferentem* rule conflicted with what the courts thought the parties would reasonably have intended the condition to mean.

³¹⁰ *ibid* 107b.

³¹¹ Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (n 256) 88. See 1.4. above.

³¹² *ibid*.

³¹³ *ibid* 91.

³¹⁴ *ibid* 102. See, for example, (1456) YB Mich 35 Hen VI pl 25, f15b-17b, f17a; (1462) YB Pas 2 Edw IV pl 6, f2a-4a, f2a; (1468) YB Mich 8 Edw IV pl 9, f8a-13a, f12a; (1494) YB Hil 9 Hen VII pl 11, f17a-18a, f17a.

³¹⁵ See, for example, (1456) YB Mich 35 Hen VI pl 25, f15b-17b, f16a, per Sjt Boef; (1467) YB Pas 7 Edw IV pl 10, f4a-4b, f4b, per Sjt Fairfax. The argument was not adopted by the court in either case.

³¹⁶ *Laughter's Case* (1595) 5 Co Rep 21b, 22a.

³¹⁷ *Hawford v Andros* (1599) BL Add MS 25203 f98, f98.

³¹⁸ *Lamb's Case* (1599) 5 Co Rep 23b, 23b.

Other lawyers of the time took a third approach to the *contra proferentem* rule. They accepted that it did apply to indentures, but maintained that its function was not to identify the reasonable intentions of the parties. Bacon, for example, explained that the rule made

an end of many questions and doubts about construction of words: for if the labour were only to pick out the intention of the parties, every judge would have a several sense, whereas this rule doth give them a sway to take the law more certainly one way.³¹⁹

For Bacon, then, the rule functioned as a tiebreaker. When it was impossible to identify the parties' intentions, the maxim enabled the judges to bypass fruitless speculation and guided them to the best construction of the deed. Choosing to construe against, rather than in favour of, the *proferens* was a policy choice. Firstly, it would make 'men watchful in their own business,' and, secondly, it would produce 'quiet and certainty' by favouring the possession of the grantee.³²⁰ In *Moyes v Grigg* (1600), Sjt Hele connected the *contra proferentem* rule to the principle that 'odious' conditions would be taken strictly. He successfully argued that a condition in a lease was 'to be taken strictly for the lessor and most favourably for the advantage of the lessee' because it was 'penal,' and threatened to defeat the lessee's estate.³²¹ As we have seen, the rule about destructive conditions was explicitly a rule of policy, based on the law's reluctance to destroy estates.³²²

In *Davenport's Case* (1610), the rule was reframed as a means of preventing a grantor from exploiting the grantee. The Earl of Huntingdon had granted Robert Bradshaw the next avoidance of a rectory, if it occurred during the Earl's 15 year term. The rectory fell vacant within the 15 years, but not until after the Earl had died and the rectory had passed to the reversioner. It was held that Bradshaw would have the avoidance, even though the Earl's term was over. Otherwise, the court explained, 'the grantor himself would derogate from his own grant, and would make it void at his pleasure.' This would be 'against the rule of law... that the grant of every one shall be taken most strongly against himself.'³²³ If the grant was not construed *contra proferentem*, a grantor would be able to exploit an ambiguous deed for his own advantage, leaving the grantee with nothing.

³¹⁹ Spedding, Ellis and Heath (n 131) 333.

³²⁰ *ibid.*

³²¹ *Moyes v Grigge* (1600) BL Add MS 25203 f200v, f200v.

³²² See 3.2.3. above.

³²³ *Davenport's Case* (1610) 8 Co Rep 144b, 145a.

The *contra proferentem* rule, then, presented something of a puzzle for sixteenth-century lawyers. It had been bequeathed to them by the medieval law, and therefore came with the weight of many precedents, as well as the intellectual authority of the civil law. However, they found it difficult to explain. It did not fit comfortably into their general approach to interpretation, which was based on the intentions of both parties and on reason. Some lawyers tried to establish it as a guide to the reasonable intentions of the parties, like *ut res magis valeat*. However, in reality, it was more or less arbitrary whether the maxim pointed to the same result as the parties' reasonable intentions or not. If it did, it was effectively superfluous. If it did not, it was overruled. Others thought that it could not intelligibly be applied to indentures at all, or that it was simply an anomalous rule of policy. No lawyer in our period managed to provide a convincing explanation for the rule, which was better-suited to a system with a more formalistic approach to contracting.

Lawyers were clear, however, that the rule did not apply to wills. It has already been mentioned that this was seen as a key contrast between the interpretation of deeds and wills, although its rationale was rarely explicitly discussed.³²⁴ Bacon wrote that the rule had 'no place at all... in devises and wills upon several reasons,' but did not clarify what those reasons were.³²⁵ The clearest explanation was given by Sjt Lovelace in the serjeants' case of 1567. He observed that 'in deeds the intent will be taken most strongly against the feoffor, because it is made on consideration and deliberation,' while a will was made 'by the necessity of death.'³²⁶ This links back to the medieval view of the maxim. A deed was made at the party's own peril, and so he ought to be careful about his words, while a testator was *in extremis*, and deserved favourable treatment by the court.³²⁷

³²⁴ See, for example, (1442) YB Mich 21 Hen VI pl 16, f6a-7b, f7a.

³²⁵ Spedding, Ellis and Heath (n 131) 341. See also *Ewer v Heydon*, where the court drew a contrast between interpretation *contra proferentem* and interpretation 'according to the intent of the devisor': *Ewer v Heydon* (n 290) 124.

³²⁶ *Le Serjaunts Case* (n 219) f3.

³²⁷ Fulbecke thought that a devise ought to be taken 'by mediocrity': thus, a devise of two cups would relate, not to gold cups or to pewter cups, but to 'silver as a metal betwixt both.' He was presumably referring to the canon law here. See William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 30v.

6.6. Conclusions

We have seen, then, that reason played a significant role in the interpretation of documents throughout our period. Reason was not only a means of identifying the parties' intentions. Identifying a reasonable construction was also a desideratum in and of itself, especially in relation to deeds. We have also seen how the use of reason changed. In the mid-sixteenth century, lawyers were likely to appeal to a broad concept of reason, which everyone could access through their own reasoning processes. However, by the end of the century, lawyers' arguments were more likely to be based on authorities that demonstrated the reason of the common law. Reason was also more likely to be distilled into specific maxims of interpretation, which provided useful guidance for lawyers in future cases.

We have also examined two influential maxims of interpretation, *ut res magis valeat quam pereat* and the *contra proferentem* rule. Both were originally derived from the *ius commune*, and had been part of the common law since the medieval period. For lawyers of the sixteenth century, they presented different challenges. It was easy to argue that the basis of *ut res magis valeat* was the intentions of the parties, and that the maxim aligned with a reasonable construction of the document. For this reason, it was rarely rejected in cases involving deeds. However, its application to wills was a little more uncertain. Lawyers were not only reluctant to make presumptions about a testator's intention that extended beyond his words, but also to place much weight on his words as evidence of his intention. To compensate for this uncertainty, they often multiplied authorities to establish the relevance of the rule.

The *contra proferentem* rule was much more difficult to explain. As many lawyers pointed out, it did not necessarily help to identify either the parties' intentions or a reasonable construction. It clearly did not apply to wills. Although frequently cited, it did not play much substantive role in the construction of deeds either. It did not fit well with lawyers' conception of contracting, which was based on the agreement of both of the parties. When it was not overruled by conflicting principles of interpretation, it was simply used to support them, and contributed little to the argument. Yet it carried sufficient authority that lawyers continued to cite it regardless.

Coke's work both exemplified and influenced the developments in this period. Coke was not the only contemporary lawyer who emphasised the use of authority and maxims when interpreting documents. However, the shift in approach we have identified can be seen most clearly in Coke's writings. He consistently presented the law of interpretation in a new way. He also provided intellectual support for this new approach by openly discussing his

conception of the law's reason. In the next chapter, we will explore the context in which interpretation was changing, and identify some developments that may have been influencing lawyers' new attitudes to legal documents.

7. PERCEPTIONS OF INTERPRETATION

7.1. Introduction

In the preceding chapters, we have seen how lawyers' attitudes to the interpretation of deeds and wills changed throughout our period. They were increasingly likely to prioritise the proper signification of the words of the document over the writer's intentions. They were also more inclined to frame their identification of the document's meaning as the product of 'artificial', rather than 'natural', reason, based on the authority of cases and the systematic application of specific rules and maxims. In this chapter, we will examine some of the background to these changes.

Firstly, lawyers' understanding of interpretation itself was evolving. In the mid-sixteenth century, the identification of the writer's intention had been presented as the sum total of interpretation. The court's role was to identify the extant meaning of the document, not to construct or contribute to it. By the early seventeenth century, however, it was recognised that the law was also injecting its own values into the interpretive process. Lawyers became more aware of the ways in which they could mould meaning through their interpretive choices, and debated the advantages and disadvantages of different approaches. They were also increasingly concerned that a document might be misinterpreted by its, potentially inexperienced, reader.

Secondly, we will see that these changes took place in a broader context of anxiety about the law, legal documents, and litigation. Interpretation could go wrong if either the writer or the reader made a mistake. Lawyers lamented that drafters were either so incompetent that they drew up nonsensical documents, or so cunning that they would subvert established rules with novel forms of conveyance. Laymen, suspicious of legal jargon, feared that they were being taken for a ride. Both criticised the greedy lawyers who sought to undermine conveyances with quibbles or invented meanings. The result, they feared, would be uncertainty, as the estates that depended on those documents were threatened.

As usual, we will find Coke at the forefront of these developments, complaining loudly about societal ills and proposing his own solutions. Like other lawyers of the time, he maintained that these problems were not caused by the law itself, but by those who had failed to properly understand it. In interpretation cases, as in the law generally, his proposed remedy was a renewed focus on the law's reason, and on the cases and maxims from which it could be extracted.

7.2. Interpretation and legal values

In the previous chapter, we saw that there were competing conceptions of interpretation in our period. For Plowden, reason and the writer's intention were closely bound together. If a deed was to be interpreted reasonably, or *contra proferentem*, or so as to save its effect, it was because this is what the parties would have intended. For Coke, however, principles of interpretation were established by the law. They did not necessarily reflect the writer's intention, but were emanations of the common law's reason. When discussing the maxim *ut res magis valeat quam pereat*, for example, Plowden explained that 'the reasonable construction of the law... inclines the words to the intention of the parties.'¹ The courts would make the deed effective because reason told them that this was what the parties had intended by their words. In contrast, Coke's explanation for the principle was based on the reason of the law. He explained that 'the law shall make such a construction as the gift by possibility may take effect.'² It was reasonable to interpret deeds in such a way as to make them effective, and therefore this was the construction that the law had determined to make.³ The parties' intentions faded into the background. Instead, Coke emphasised that there were good policy reasons for the rule, since it ensured that settled estates would not be disrupted.⁴

For Plowden, to construe a document was simply to declare its meaning according to the intentions of its writers. In *Partridge v Strange* (1553), for example, the judges agreed that it was not permissible to extend the ambit of penal statutes by equity.⁵ However, 'the words of them may be construed beneficially according to the intent of the makers thereof.'⁶ To construe the words according to the legislator's intention was not to add anything to their meaning, but simply to expound it. As we have seen, for Plowden, the parties' meaning was immanent in the words they had used.⁷ The words were the 'shell,' and the 'sense' of the words was 'the fruit and profit' that lay within.⁸ When construing a document, the courts were only drawing out a meaning that was there all along.

¹ *Browning v Beston* (1555) Plow 131v, 140. This is my own translation: see n 10 in chapter six.

² Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (The Societie of Stationers 1628) 183v.

³ *ibid.*

⁴ *The Reports of Sir Edward Coke*, vol V (Joseph Butterworth and Son 1826) 10 Co Rep xix.

⁵ *Partridge v Strange & Croker* (1553) Plow 77, 86; see Samuel Thorne (ed), *A Discourse upon the Exposition & Understandinge of Statutes* (Huntington Library 1942) 51.

⁶ *Partridge v Strange & Croker* (n 5) 86.

⁷ See 3.2.1. above.

⁸ *Eyston v Studd* (1574) Plow 459, 465.

For Coke, however, there was a distinction between the intended meaning of a document and the construction that would be given to it by the common law. In *Nokes's Case* (1599), for example, he explained that 'the best construction of deeds' was one that was '*quoad fieri possit* [as far as possible] according to the true intent and meaning of the parties.'⁹ It was therefore evidently possible to construe a deed in a way that did not reflect the parties' 'true intent and meaning.' Similarly, in *Knight's Case* (1588), Coke advised that 'the true intent of the parties' was to be observed, but only when it agreed with 'the rule and reason of the law.'¹⁰ The judges' role was not only to identify the intended meaning of the deed, but also to ensure that their construction accorded with the reason of the law. Later in the same case, the court noted that grants of the King were to be interpreted 'so that no prejudice shall accrue to him by construction or implication on his grant more than he truly intended by it.' It was possible, however, to construe the grant of a subject in a way that its writer had not intended.¹¹ For Coke, to construe a document was to give it a meaning that had not necessarily been given to it by its writer.

Egerton does not seem to have had a consistent view on the relationship between the document's intended meaning and its legal construction. In *Saunders v Stanfourde*, for example, he identified 'the meaning of the parties' with the 'exposition' of the deed, both of which could be opposed to 'the literal sense' of the words.¹² A 'reasonable construction and meaning,' he argued, was 'not repugnant to the words, but may aptly and properly stand with the proper nature and right signification of them.'¹³ Here, Egerton seemed to treat 'meaning' and 'construction' as synonymous. Later in the same case, however, he discussed the interpretation of the Statute of Fines, dividing his analysis into four sections: 'letter,' 'mischief,' 'meaning' and 'construction.'¹⁴ Having considered the words of the statute and the reason for which it was made, he concluded that the two together determined its intended meaning: if the present case was within both the letter and the mischief of the statute, 'how can it be imagined otherwise than that the meaning of the Parliament was to reach it also?'¹⁵ However, establishing this meaning was insufficient: he then listed eleven 'reasons to maintain this

⁹ *Nokes's Case* (1599) 4 Co Rep 80b, 81a.

¹⁰ *Knight's Case* (1588) 5 Co Rep 54b, 55a.

¹¹ *ibid* 56a.

¹² *Saunders & Starkey v Stanfourde* (undated) Hunt MS El 482 f70, f76v.

¹³ *ibid* f74v.

¹⁴ *ibid* f77v.

¹⁵ *ibid* f78.

construction,' noting cases previously decided on relevant points.¹⁶ Like Coke, he was concerned to demonstrate that his 'construction' did not only reflect the document's intended meaning, but also accorded with the rules of law.¹⁷

Lawyers were beginning to accept that the law of interpretation was not simply a channel for the transmission of the writer's intention, but also involved active choices on the part of the reader. However, this raised an unsettling possibility: that the interpretive process might go wrong. Plowden had presented interpretation as a seamless process of communication between writer and reader. There was little doubt that the meaning identified by the court from the written document was the meaning that its writer had intended to convey. For example, when discussing the interpretation of statutes, Plowden assumed that the reader could 'easily find out' what the legislator would have intended, simply by 'imagining' what he would have responded if asked.¹⁸

Coke, in contrast, worried that speculating about Parliament's intentions could lead to an incorrect interpretation. In *Edrich's Case* (1603), he recorded the court's warning that

they ought not to make any construction against the express letter of the statute; for nothing can so express the meaning of the makers of the Act, as their own direct words, for *index animi sermo* [speech is an indication of thought]. And it would be dangerous to give scope to make a construction in any case against the express words, when the meaning of the makers doth not appear to the contrary.¹⁹

For Coke, it was 'dangerous' to look for the writer's intentions if they had not been clearly expressed. In *Butt's Case* (1600), he also warned that '*quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa fienda est*' [where there is no ambiguity in the words, then no exposition contrary to the express words is to be made].²⁰ Here, Coke seemed to be nodding to a civilian maxim, '*cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*' [where

¹⁶ *ibid* f78v.

¹⁷ In another case, Egerton distinguished between the words of the statute, the intent of the statute, and the way in which its 'meaning will be construed': *Lepur v Woolf* (undated) Hunt MS El 482 f157, f158v–f160.

¹⁸ *Eyston v Studd* (n 8) 467.

¹⁹ *Edrich's Case* (1603) 5 Co Rep 118a, 118b.

²⁰ *Butt's Case* (1600) 7 Co Rep 23a, 24a. See also *Leonard Lovies's Case* (1613) 10 Co Rep 78a, 87a.

there is no ambiguity in the words, no question as to the intention should be admitted].²¹ Coke's focus here, however, was not on the contrast between words and intention. He had previously explained that 'the law will not make an exposition against the express words and intent of the parties, when it may stand with the rule of law.'²² His concern now was that the legal construction of the document must not diverge too far from its intended meaning, unless the rules of the law demanded it. He warned that departing from the document's words and intention could be a dangerous course, fearing that 'the law, by construction against the words and intention of the parties, would do an injury.'²³

Coke was painfully aware of the possibility that a legal document might be misinterpreted. In the prefaces to his reports, he fretted that those unfamiliar with the common law might misunderstand legal texts.²⁴ 'The fair outsides of enamelled words and sentences,' he warned, could 'bedazzle the eye of the reader's mind' so that they failed to 'pierce into the inside of the matter.'²⁵ If readers did not have a proper apprehension of the law's reason, they would be unable to correctly interpret legal writing.

Richard Ross has shown that fears about the misinterpretation of legal texts were commonplace in the late sixteenth century. Thanks to the printing of more, and more accessible, works of law, legal knowledge was newly available to laymen.²⁶ Some lawyers were alarmed that laymen would now be able to read law books without a proper understanding of the law's interpretive conventions.²⁷ In the early sixteenth century, the audience for law books was largely limited to the small world of the legal profession.²⁸ Texts were written in Law French and terms of art abounded, making legal works difficult to understand for those without legal training.²⁹ Books were regarded only as a means of preserving knowledge held primarily in the profession's collective memory.³⁰

²¹ D.32.25.1.

²² *Butt's Case* (n 20) 24a.

²³ *ibid.*

²⁴ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xxx.

²⁵ *The Reports of Sir Edward Coke*, vol II (Joseph Butterworth and Son 1826) 3 Co Rep xlii.

²⁶ Richard J Ross, 'The Commoning of the Common Law: The Renaissance Debate over Printing English Law, 1520-1640' (1998) 146 *University of Pennsylvania Law Review* 323, 391-402.

²⁷ *ibid* 326.

²⁸ *ibid* 391.

²⁹ *ibid* 392.

³⁰ Richard J Ross, 'The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640' (1998) 10 *Yale Journal of Law and the Humanities* 229, 276-9.

By the end of the century, however, legal writing had become available to a much wider audience, comprising not only the expanded lower branch of the profession, but also those with no legal training at all.³¹ Writers no longer assumed that their readers would understand the profession's language, but provided explanations of legal institutions, practices and terminology.³² Fulbecke imagined his works being read by a 'poor country yeoman' who wanted to keep up with his neighbours.³³ These neighbours were 'so full of law points,' he lamented, 'that when they sweat, it is nothing but law; when they breathe, it is nothing but law.'³⁴ Littleton's *Tenures* was their 'breakfast,' 'dinner' and 'supper,' and 'every plough-swain' carried 'the book of the grounds of the law' with him.³⁵ Aiming to attract a wider audience, many writers also began to publish in English. Coke explained that his *Commentary upon Littleton* was written in English so that 'any of the nobility, or gentry of this realm, or of any other estate, or profession whatsoever' would be able to understand it.³⁶ Fulbecke's yeoman added that he had bought the book 'because it was in English,' admitting that he had been disconcerted to find 'a vengeance deal of Latin in it' and had been obliged to invest in a dictionary.³⁷

Lawyers feared that these new, inexpert readers would misunderstand the law, since they lacked a broader understanding of the legal profession's interpretive conventions. Coke, for example, explained that law books were often written in French 'lest the unlearned by bare reading without right understanding might suck out errors, and, trusting to their conceit, might endamage themselves.'³⁸ Lawyers drew analogies to the misinterpretations of scripture which, they claimed, had resulted from the printing and translation of the Bible.³⁹ Ross observes that the same intellectual atmosphere pervaded debates over religion and law, and, although lawyers of the time rarely commented on the similarities between the two,⁴⁰ rhetoric

³¹ Ross (n 26) 416.

³² *ibid* 392–3.

³³ William Fulbecke, *The Second Part of the Parallele, or Conference of the Civill Law, the Canon Law, and the Common Law of This Realme of England* (Thomas Wight 1602) B2.

³⁴ *ibid*.

³⁵ *ibid*.

³⁶ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) preface (unpaginated).

³⁷ Fulbecke (n 33) B3.

³⁸ *The Reports of Sir Edward Coke* (n 25) 3 Co Rep xl.

³⁹ Ross (n 26) 405.

⁴⁰ *ibid* 385.

often ‘migrated from religious to legal polemic.’⁴¹ In particular, there were clear parallels between fears about Biblical hermeneutics and legal interpretation. Richard Bancroft, the Archbishop of Canterbury, complained that ‘nowadays every man, though he have not read more than the first leaf of Littleton, is able to teach the best doctor of divinity,’ just as ‘every ignorant ass interprets scriptures according to his hot humours.’⁴² The theologian Richard Hooker cited a Digest passage to decry those who resiled from a ‘literal interpretation’ of the Bible that had ‘the general consent of antiquity.’⁴³ As well as writing on the perils of legal interpretation, Coke also warned his readers against imported Catholic books. They were, he explained, ‘like to apothecaries’ boxes... whose titles promise remedies, but the boxes themselves contain poison.’⁴⁴

The difficulties of interpretation, then, were well-recognised in late-sixteenth-century England. Lawyers were aware that readers could misinterpret legal texts if they came to them without a deep understanding of the law’s reason. It seems likely that this awareness influenced debates about the interpretation of other kinds of legal document. As we have seen, they now recognised that construing an instrument was not just a passive exercise in receiving the writer’s meaning. It also involved active choices to impose certain values on the text, ensuring that it conformed with the reason and rules of the common law. This, in turn, raised the spectre of an incorrect construction. Interpretation could go wrong when reader and writer were not both sufficiently attuned to the law’s reason, and were not working within the same interpretive conventions. Lawyers could no longer rest secure in the knowledge that the writer’s intended meaning was the one that his reader would apprehend.

7.3. Lawyers, litigation and legal change

Lawyers, then, were growing anxious about the possibility of misinterpreting a legal document. They were also concerned that the law of interpretation was being hijacked by incompetents and scoundrels. For Coke, it was not only the inexpert reader who was to blame for the difficulties of legal interpretation. It was also the writer who had disguised his meaning with ‘affected words’ and ‘the strong scent of great swelling phrases.’⁴⁵ After all, if the words of

⁴¹ *ibid* 343.

⁴² Cited in *ibid* 404.

⁴³ Richard Hooker, *Of the Lawes of Ecclesiasticall Politie* (John Windet 1593) 130. The same passage was cited by Coke to make a similar point in the context of law: Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 229v.

⁴⁴ *The Reports of Sir Edward Coke*, vol IV (Joseph Butterworth and Son 1826) 7 Co Rep vi.

⁴⁵ *The Reports of Sir Edward Coke* (n 25) 3 Co Rep xlii.

the document were clear, its meaning would be successfully conveyed and there would be no need to venture into the dangerous mire of construction.

West, too, blamed drafters for problems with the interpretation of wills. He warned that it was ‘much better’ when wills were ‘perspicuous of themselves,’ rather than ‘enlightened by the exposition and allowance of others.’⁴⁶ A badly-drafted will could ‘deceiv[e]... even men of good judgement, insomuch that of one self question they pronounce different opinions.’⁴⁷ Where a will suffered from ‘obscurity, ambiguity, and uncertainty,’ it would be ‘doubtful in what sense the testator would have his words taken,’ and his intentions must ‘rather by probable argument be guessed than rightly gathered.’⁴⁸ West was clearly prepared for trouble. His sample wills were headed with recommendations like ‘a good precedent for a testament’⁴⁹ or ‘a very perfect form of a will,’⁵⁰ descriptions he did not find it necessary to include for other kinds of document. He even provided a sample ‘clause of a will’ which contained directions on interpretation. If ‘any ambiguity, doubt or question’ arose about the words of the will or the testator’s ‘true intent and meaning,’ the executors were to ‘expound, explain and interpret’ it ‘according to their wisdoms and good discretions.’⁵¹ This suggests that testators were well aware of the difficulties that could arise in the interpretation of their wills.

Concerns about bad drafting were not new, but they were on the rise. Prior to 1536, around a third of the land in England was held by monasteries,⁵² which were accordingly responsible for the drafting of many conveyances.⁵³ Some had developed their own house styles for drafting and included idiosyncratic standard terms in their leases.⁵⁴ Lawyers in our period tended to grumble about this. Broke CJ, for example, complained that

the cloisterers, in making their leases and deeds, had commonly a peculiar form thereof, which they would stick to so precisely, that rather than deviate from their custom, they would mar the whole, and therefore because they would not

⁴⁶ William West, *The First Part of Symboleography* (Thomas Wight and Bonham Norton 1598) s 632.

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ *ibid* s 645.

⁵⁰ *ibid* s 642.

⁵¹ *ibid* s 646.

⁵² CW Brooks, *Pettyfoggers and Vipers of the Commonwealth: The ‘Lower Branch’ of the Legal Profession in Early Modern England* (Cambridge University Press 1986) 98.

⁵³ JM Kaye, *Medieval English Conveyances* (Cambridge University Press 2009) 255.

⁵⁴ *ibid* 256.

direct their form according to the rule of law, but would have the law bend to their usage, they have destroyed the force of many deeds.⁵⁵

Similarly, Bacon criticised terms that had been added to deeds ‘upon ignorance of the law and *ex consuetudine clericorum* [from the custom of priests] upon observing of a common form, and not upon purpose or meaning.’⁵⁶

The courts would sometimes treat the drafter of an instrument with deference. In one 1431 case, for example, Babington CJ refused to hold part of a patent void, since ‘the most learned in the law have made patents in such form before this time, and they were held to be good.’⁵⁷ Similarly, in a 1568 case on the validity of a certain condition, Dyer CJ noted that a similar condition had been held good in a previous case, and that ‘it was commonly put into leases from the Abbot of Westminster.’⁵⁸ We saw in chapter three, however, that the courts were increasingly unwilling to tolerate poor drafting.⁵⁹ In *Morris v Smith* (1585), one landowner faced doubts about the validity of his deed, despite the fact that prominent lawyers had helped to write it. Francis Ascough had bargained and sold ‘his manor of North-Kelsey’ to Ralph Bard. Peryam J objected that there was no such manor of North-Kelsey; Ascough had only the manor of Castor, part of which was in the town of North-Kelsey.⁶⁰ Anderson CJ was prepared to accept that the conveyance was effective, although ‘the form of it might have been better and more consonant to the law.’⁶¹ Bard grumbled that ‘his conveyance was made by Wray and Manwood, and that their opinion, and the opinion of Carell of the Inner-Temple, was clear that the grant was good to convey a manor in North-Kelsey.’⁶² In other cases, the parties met with less success. On one occasion, Anderson CJ observed that ‘it is no reason to expound a lease which is void to be good because there are many of them made.’⁶³ He also warned of

⁵⁵ *Throckmerton v Tracy* (1555) Plow 145, 163.

⁵⁶ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 377.

⁵⁷ (1431) YB Trin 9 Hen VI pl 30, f27a-28b, f28b.

⁵⁸ *Anon* (1568) Dyer’s Notebooks (109 SS) 158, 158.

⁵⁹ See 3.2.2. above.

⁶⁰ *Morris v Smith and Paget* (1585) Cro Eliz 38, 38.

⁶¹ *ibid* 39.

⁶² *ibid*. It was not uncommon to consult a barrister on the drafting of a complex instrument: CW Brooks, RH Helmholz and P Stein, *Notaries Public in England since the Reformation* (Society of Public Notaries 1991) 94.

⁶³ *Mariot v Mascal* (1587) 1 And 202, 219.

the ‘mischiefs’ that would follow if ‘knavish and foolish’ terms were upheld.⁶⁴ In *The Earl of Pembroke v Sir Henry Berkeley* (1596), the justices of the Exchequer Chamber held that ‘the ignorance of scriveners’ must ‘be corrected by the law,’⁶⁵ despite objections that this would be ‘perilous to the estates of men.’⁶⁶

The incompetence of scriveners and their ilk was a favourite theme of lawyers in our period. Scriveners were professional writers who drew up contracts and conveyances. Only a few had legal training,⁶⁷ and many were also involved in money-lending and investing.⁶⁸ As conveyancing became more complex towards the end of the sixteenth century, attorneys, members of the lower branch of the legal profession,⁶⁹ also became more closely involved in drafting.⁷⁰ Coke, in particular, was scathing about their efforts. ‘Conveyances and instruments,’ he complained, were being ‘made by men unlearned,’ and wills ‘by parsons, scriveners and such other *imperites* [unskilled people].’⁷¹ Elsewhere, he griped that ‘conveyances and wills’ were ‘drawn and devised by’ those who had ‘*scientiam sciorum quae est mixta ignorantia*’ [the knowledge of the inexperienced, which is mixed with ignorance].⁷² The result was instruments full of ‘insensible and disagreeing words, sentences, and provisos,’⁷³ and ‘wills intricately, absurdly and repugnant set down.’⁷⁴ Coke recommended that lawyers ‘speak effectually, plainly, and shortly’ to avoid such confusion.⁷⁵

Wills were even more likely than other documents to be badly drafted, simply because they were generally made in haste on a testator’s deathbed. Treatise-writers clearly recognised this problem. West, for example, emphasised that ‘many times’ wills were difficult to understand,

⁶⁴ *The Heirs of Sir Roger Lewknor and Ford’s Case* (1586) Godbolt 114, 118.

⁶⁵ *Henry Earl of Pembroke v Sir Henry Barkley* (1596) Popham 116, 119.

⁶⁶ *ibid* 117.

⁶⁷ JH Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (Oxford University Press 2003) 442.

⁶⁸ See generally DC Coleman, ‘London Scriveners and the Estate Market in the Later Seventeenth Century’ (1951) 4 *Economic History Review* 221.

⁶⁹ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 67) 437.

⁷⁰ Brooks, Helmholz and Stein (n 62) 82.

⁷¹ *The Reports of Sir Edward Coke*, vol I (Joseph Butterworth and Son 1826) 2 Co Rep ix.

⁷² *The Reports of Sir Edward Coke* (n 25) 4 Co Rep xviii.

⁷³ *The Reports of Sir Edward Coke* (n 71) 2 Co Rep x.

⁷⁴ *ibid* 2 Co Rep ix.

⁷⁵ *The Reports of Sir Edward Coke* (n 25) 3 Co Rep xlii. See also Thomas Wilson, *The Art of Rhetoric* (1560) (Peter E. Medine ed, Pennsylvania State University Press 1994) 195.

and that they were ‘oftentimes’ misconstrued.⁷⁶ He did not express similar concerns about deeds. Coke observed that the ‘obscure and insensible words, and repugnant sentences’ in wills were often due to their ‘being made in haste.’⁷⁷ Since poor drafting was more likely when the will was not made ‘in full health and memory,’ Coke advised his readers to make their wills ‘by good advice, in your perfect memory,’ and thereby ‘prevent questions and controversies’ from arising later.⁷⁸ Elsewhere, he cautioned that ‘few men pinched with the messengers of death have a disposing memory,’ and that it would be ‘some blemish or touch to a man well esteemed for his wisdom and discretion all his life, to leave a troubled estate behind him... after his death.’⁷⁹

Brooks has warned that some of this hostility to attorneys and scribes was simply the product of snobbery. The upper branch of the legal profession was largely composed of well-educated and socially elite men, who liked to see themselves as the heirs of the jurists of ancient Rome.⁸⁰ They duly disdained the lower branch, who carried out ‘mechanical’ work and were trained by apprenticeship.⁸¹ Even members of the lower branch, however, were aware that there was a problem. Phayer, who worked as solicitor to the Council of Wales and the Marches,⁸² bemoaned the ‘great incommodities and danger’ of badly-drafted legal documents.⁸³ ‘Difficult, double and obscure’ documents, he warned, containing ‘as many doubts as sentences (a very great occasion of wrangling and strife)’ were being drawn up ‘by the negligence or rather ignorance’ of writers ‘presuming upon their own wits’⁸⁴ and ‘not exactly learned in the laws.’⁸⁵ Meanwhile, West, an attorney,⁸⁶ blamed ‘notaries, and such as write wills,’ for the ‘ambiguities and uncertainty’ of their instruments, and ‘the obscurity in the words or sentences thereof.’⁸⁷ Admittedly, both men were hawking their books of precedents,

⁷⁶ West (n 46) s 632.

⁷⁷ *Butler and Baker’s Case* (1591) 3 Co Rep 25a, 36a.

⁷⁸ *ibid.*

⁷⁹ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xiv.

⁸⁰ Brooks (n 52) 179, 268.

⁸¹ *ibid* 178, 268.

⁸² Philip Schwyzer, ‘Phaer [Phayer], Thomas’ [2009] Oxford Dictionary of National Biography <<https://doi.org/10.1093/ref:odnb/22085>> accessed 22 March 2019.

⁸³ Thomas Phayer, *A New Boke of Presidentes* (Edward Whytchurche 1543) Ai v. Phayer was a ‘lawyer, medical doctor and translator of Virgil’s *Aeneid*’: Brooks, Helmholz and Stein (n 62) 86.

⁸⁴ Phayer (n 83) Ai v.

⁸⁵ *ibid* Aii.

⁸⁶ Brooks (n 52) 44.

⁸⁷ West (n 46) s 632.

and so they had a vested interest in painting their colleagues as incompetent bunglers. However, the success of *Symbolography* and other formularies showed that there was a ready market for such books.⁸⁸ Legal business was booming, and new entrants to the profession were in need of guidance on drafting increasingly complicated conveyances.⁸⁹ Indeed, Coke also criticised those who relied too heavily on precedents without understanding how to adapt them to the facts of each case.⁹⁰

This was, after all, a period of significant upheaval in land law. New forms of conveyance were rapidly developing through a back-and-forth between drafters and the courts.⁹¹ As we saw in chapter three, the Chancery had allowed certain devices that were impermissible at common law to be created by use.⁹² After 1536, it was established that the common law rules would not apply even to uses executed by the Statute of Uses. Settlers swiftly exploited this concession to create devices that technically broke common law rules, such as shifting and springing uses.⁹³ It was also generally thought that perpetuity clauses, abhorred by the common law, could be effective in the limitation of a use, and they were included in a great number of sixteenth-century settlements.⁹⁴ Their incidence even increased after 1560, at least in settlements made by the peerage.⁹⁵ Only in a series of cases at the turn of the century were all forms of perpetuity clause held to be invalid.⁹⁶

Given the unsettled state of the law, drafters were forced to experiment. In his argument in *Chudleigh's Case* (1595), Bacon observed that it was 'likely that counsellors of the law have advised men in such cases that when the cases come to be scanned it is hard to argue how the law will be taken.' However, for a hopeful settlor, there was little downside to testing a new form of drafting: 'if they prove void... it is but a conveyance adventured, inconvenience there

⁸⁸ Brooks, Helmholz and Stein (n 62) 87.

⁸⁹ *ibid* 81.

⁹⁰ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 212, 317v.

⁹¹ Brooks, Helmholz and Stein (n 62) 94.

⁹² See 3.2.5. above.

⁹³ AWB Simpson, *A History of the Land Law* (2nd edn, Clarendon Press 1986) 196.

⁹⁴ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 67) 701.

⁹⁵ Lloyd Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement* (Cambridge University Press 1983) 14.

⁹⁶ Simpson (n 93) 211. See *Corbet's Case* (1600) 1 Co Rep 83b; *Sir Anthony Mildmay's Case* (1605) 6 Co Rep 40a; and *Mary Portington's Case* (1613) 10 Co Rep 35b.

is none.⁹⁷ As a result, new, and increasingly daring, forms of drafting continued to develop as conveyancers sought to evade the courts' crackdown on perpetuities.⁹⁸ Judges were constantly playing catch-up with drafters.

The uncertainty caused by these novel conveyances made a deep impression on common lawyers. Some pointed to the deleterious social effects of perpetuity clauses: Popham CJ, for example, argued that they tended 'to the subversion of noble and great families,' because they 'would stir up the son... to put his father out of the land.'⁹⁹ Coke employed a colourful range of invective against perpetuity clauses, which he described as 'a monstrous brood carved out of mere invention, and never known to the ancient sages of the law.'¹⁰⁰ Interestingly, however, he focused his most withering criticisms on the form of perpetuity clauses, rather than their substance. He described them as 'upstart and wild provisos and limitations, such as the common law never knew,' which 'breed and multiply infinite troubles, questions, suits and difficulties.'¹⁰¹

Coke had three main problems with the drafting of these clauses. Firstly, they were so widely drafted as to be unclear. In *Sir Anthony Mildmay's Case* (1605), for example, the court objected to the form of a perpetuity clause that barred the tenant in tail from 'attempting, going about or entering into communication' to alienate the land. These words, the judges held, were

uncertain, and void in law, and God forbid that the inheritances and estates of men should depend upon such uncertainty; for it is true, *Quod misera est servitus, ubi jus est vagum, et quod non definitur in jure quid sit conatus, ne quid est* [that it is a miserable slavery when the law is uncertain, and that it is not defined in law what might be an attempt, or what is] going about, etc. or communication.¹⁰²

Because the clause was so widely drawn, the tenant would have no way of knowing if he were in breach of it or not. Coke raised a similar objection in *Fitzwilliam's Case* (1604), criticising provisions in limitations of uses that were 'so extravagant that none shall know any rule to

⁹⁷ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 7 (Cambridge University Press 2011) 623; see *Chudleigh's Case* (1595) 1 Co Rep 120a.

⁹⁸ *Bonfield* (n 95) 26, 39.

⁹⁹ *Chudleigh's Case* (n 97) 138b. See also *Dillon v Fraine* (undated) Popham 70, 83.

¹⁰⁰ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep x.

¹⁰¹ *The Reports of Sir Edward Coke* (n 25) 4 Co Rep vii.

¹⁰² *Sir Anthony Mildmay's Case* (n 96) 42a.

decide the questions which arise upon them, which will produce uncertainty, the cause of infinite troubles, controversies and suits.¹⁰³

Secondly, Coke criticised the length of these clauses. In *Mildmay's Case*, he observed that

in the said proviso found at large by the special verdict, there are more than a thousand words; whereas in our books, when tenant in tail was restrained from alienation, there were not twelve words, *haec fuit candida illius aetatis fides et simplicitas, quae pauculis lineis omnia fidei firmamenta posuerunt* [this was the pure view of that faithful and simple age, that a few lines were sufficient to ordain everything].¹⁰⁴

In his *Commentary upon Littleton*, he described contemporary deeds as '*elephantinae chartae*' [elephantine charters], comparing them unfavourably to Magna Carta.¹⁰⁵

Finally, Coke objected to the novelty of their drafting. They were 'late inventions and devises... such as the common law never knew,'¹⁰⁶ which had been conjured up by 'these new inventors of uses, without any approved ground of law or reason.'¹⁰⁷ The fact that nobody had used such clauses before suggested that they had always been known to be ineffective.¹⁰⁸ Coke admonished his reader 'to follow approved precedents; for *Nihil simul inventum est, & perfectum*' [nothing is simultaneously invented and perfected]¹⁰⁹ and boasted, '*Periculosum existimo quod bonorum virorum non comprobatur exemplo*' [I hold it dangerous which is not approved by the example of good men].¹¹⁰ After all, when 'the rule of the old common law' was applied to 'novelties' like perpetuity clauses, it might 'utterly crush them and bring them to nothing.'¹¹¹

¹⁰³ *Fitzwilliam's Case* (1604) 6 Co Rep 32a, 34a.

¹⁰⁴ *Sir Anthony Mildmay's Case* (n 96) 43a.

¹⁰⁵ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 81.

Fleetwood, writing on Magna Carta, made a similar point: JH Baker, *The Reinvention of Magna Carta 1216-1616* (Cambridge University Press 2017) 243.

¹⁰⁶ *The Reports of Sir Edward Coke* (n 25) 4 Co Rep vii.

¹⁰⁷ *Sir Anthony Mildmay's Case* (n 96) 43a.

¹⁰⁸ *Corbet's Case* (n 96) 87b; *Sir Anthony Mildmay's Case* (n 96) 42b. Arguments from an absence of examples were also used by other lawyers at the time: see, for example, David Ibbetson, 'The Arguments in Calvin's Case (1608)' in Troy L Harris (ed), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Robbins Collection Publications 2015) 219.

¹⁰⁹ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 230.

¹¹⁰ *The Reports of Sir Edward Coke* (n 44) 7 Co Rep x.

¹¹¹ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 379v.

Elsewhere, Coke cited a civilian maxim to support his view that ‘that which is most commonly used in conveyances is the surest way. *A communi observantia non est recedendum, & minime mutanda sunt quae certam habuerunt interpretationem*’ [There should be no departure from common usage, and those things which have had a certain interpretation should be changed least].¹¹²

For Coke, then, problematic interpretation cases could be avoided if legal instruments were properly written. Writers should express their meaning clearly, using established forms of words, instead of dabbling in new forms of drafting. If they did so, there would be no need for interpretation cases at all. Uncertainty in the law was ‘*hominis vitium non professionis*’ [the fault of men and not the law], because ‘the greatest questions’ arose, ‘not upon any of the rules of the common law,’ but because of badly-drafted conveyances, wills and statutes.¹¹³ ‘If men,’ he assured his reader,

would take sound advice and counsel in making of their conveyances, assurances, instruments, and wills... then should very few questions in law arise, and the learned should not so often and so much perplex their heads, to make atonement and peace by construction of law between insensible and disagreeing words, sentences, and provisos, as they now do.¹¹⁴

Returning to the same theme in a later volume of his reports, he explained that ‘doubts and questions of law’ arose on ‘long and ill-penned statutes lately made,’¹¹⁵ on ‘late and new devices and inventions in assurances,’ and on ‘conveyances and wills drawn and devised’ by the ignorant.¹¹⁶ For Coke, cases on the interpretation of documents were a clear symptom of incompetent drafting.

However, lawyers’ ire was not reserved for the drafters who had drawn up these instruments. They were also critical of the parties who sought to challenge them in court. Elyot, who had studied at Middle Temple and served as clerk to the justices of assize,¹¹⁷ attached blame to both drafters and parties, lamenting that

¹¹² *ibid* 229v. See D.1.3.23.

¹¹³ *The Reports of Sir Edward Coke* (n 71) 2 Co Rep ix.

¹¹⁴ *ibid*.

¹¹⁵ *The Reports of Sir Edward Coke* (n 25) 4 Co Rep xvii.

¹¹⁶ *ibid* 4 Co Rep xviii.

¹¹⁷ Donald W Rude (ed), *A Critical Edition of Sir Thomas Elyot's The Booke Named The Governour* (Garland Publishing 1992) xiv, xvii.

all the learned men in the laws of this realm, which be also men of great wisdom, cannot with all their study devise so sufficient an instrument, to bind a man to his promise or covenant, but that there shall be something therein espied to bring it in argument.¹¹⁸

Similarly, Coke bemoaned ‘this eagle-eyed world’ in which badly-drafted wills were ‘subject to so many questions.’¹¹⁹ He seems to have suspected many parties to interpretation cases of acting in bad faith, deliberately misconstruing documents for their own advantage. He advised his readers about the ‘pretences’ that might be used to invalidate a will.¹²⁰ West, likewise, warned that ‘things well meant by the testators’ could be ‘evil and diversely understood by their posterity and survivors.’¹²¹ Fulbecke, speaking in the voice of his imagined yeoman, described his neighbours as ‘full of sension and tension, and so cunning, that they will make you believe, that all is gold, which glistereth.’¹²² Elsewhere, he criticised lawyers who engaged in ‘fraud and cavilling.’¹²³

Coke was particularly preoccupied by the idea that ‘fraud and deceit abound in these days more than in former times.’¹²⁴ He regarded deliberate misinterpretations of documents as one such species of fraud, arguing, for example, that the construction of a patent ‘*contra intentionem Regis* [against the intention of the King]... sounds in deceit of the King.’¹²⁵ One who ‘wresteth or misapplieth any text, book, or authority of the law against his proper and genuine sense’ infringed the principles of justice.¹²⁶ Elyot was even more emphatic, writing that

in every covenant, bargain, or promise ought to be simplicity, that is to say one plain understanding or meaning between the parties... And where any man of a covetous or malicious mind will digress purposely from that simplicity, taking advantage of a sentence or word, which might be ambiguous or doubtful, or in some thing either superfluous or lacking in the bargain or promise, where he

¹¹⁸ *ibid* 199.

¹¹⁹ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xiv.

¹²⁰ *Butler and Baker’s Case* (n 77) 36a.

¹²¹ West (n 46) s 632.

¹²² Fulbecke (n 33) B2.

¹²³ William Fulbecke, *A Direction or Preparative to the Study of the Lawe* (Thomas Wight 1600) 4v.

¹²⁴ *Twyne’s Case* (1601) 3 Co Rep 80b, 82a; see also *Fermor’s Case* (1602) 3 Co Rep 77a, 80a.

¹²⁵ *Roger Earl of Rutland’s Case* (1608) 8 Co Rep 55a, 56b.

¹²⁶ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xxiii.

certainly knoweth the truth to be otherwise: this in mine opinion is damnable fraud, being as plain against justice as if it were enforced by violence.¹²⁷

Again, such worries may have been linked to contemporary concerns about the deliberate misinterpretation of the law more generally. Exploiting the newfound accessibility of the law, lay pamphleteers were circulating creative misrepresentations of statutes.¹²⁸ In 1661, the lawyer Fabian Phillipps drew a link between these and misconstruals of the Bible. ‘They that could then misinterpret scripture,’ he complained, ‘abuse the plain and genuine sense and meaning of all our laws.’¹²⁹

Others in the legal profession criticised the lawyers who exploited drafting errors on behalf of their clients. Thomas Wilson, for example, castigated lawyers in his *Art of Rhetoric*, griping that,

rather than fail, they will make doubts oftentimes where no doubt should be at all. ‘Is his lease long enough,’ quod one? ‘Yea sir, it is very long,’ said a poor husbandman. ‘Then,’ quod he, ‘let me alone with it; I will find a hole in it, I warrant thee.’¹³⁰

Wilson was a doctor of the civil law, but seems to have been writing for an audience of common lawyers.¹³¹ Another civilian, Swinburne, warned that no matter

how favourable soever the law be toward dead men’s wills, the lawyers are not so favourable to their clients, and therefore if it were but to avoid long and costly suits, it is meet that the testator utter his mind, as plainly and certainly as he can.¹³²

No matter who was at fault, however, it was agreed to be highly undesirable that such cases were coming to court. It was a commonplace of early modern England that the law had been instituted to order society and settle disputes. As Sjt Pollard put it, ‘certainty is the mother of repose, and uncertainty the mother of contention, which our wise and provident law has ever

¹²⁷ Rude (n 117) 187.

¹²⁸ Ross (n 26) 361.

¹²⁹ Fabian Phillipps, *Ligeancia Lugens, or, Loyaltie Lamenting* (Andrew Crook 1661) 25.

¹³⁰ Wilson (n 75) 130.

¹³¹ Richard J Schoeck, ‘Rhetoric and Law in Sixteenth-Century England’ (1953) 50 *Studies in Philology* 110, 120.

¹³² Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* (John Windet 1590) 193.

guarded against.¹³³ Coke wrote that ‘the end of law is to settle repose, and make peace between man and man.’¹³⁴ For early modern common lawyers, ideas of the ‘commonweal’ revolved around the importance of, firstly, resolving disputes with certainty and, secondly, ensuring that disputes did not arise in the first place.¹³⁵ As a result, lawsuits were a worrying indication that the law was failing to fulfil its proper function.¹³⁶ Laymen were not being properly guided on the ordering of their lives, but instead were quarrelling with their neighbours. Lawyers, instead of working to reconcile the parties, were fomenting these disputes in pursuit of fees.¹³⁷

Unfortunately, the lawyers who held these views were living through what was perhaps the most litigious time in English history.¹³⁸ Between the beginning of our period and its end, there was an unprecedented increase in the number of lawsuits being heard at common law. Brooks has shown that the number of cases in advanced stages in the King’s Bench and Common Pleas rocketed from around 5,000 in 1560 to over 13,000 in 1580 and 23,000 in 1606.¹³⁹ Brooks attributes much of this rise to the fact that ‘the sixteenth and early seventeenth centuries were a period of unprecedented prosperity’ for many.¹⁴⁰ As the economy developed, more disputes were inevitable,¹⁴¹ and litigation became affordable for more of the population.¹⁴²

Contemporary lawyers were well aware that the courts were attracting more business than ever before.¹⁴³ Coke, for example, speculated on the causes of this ‘multiplication of suits in law.’¹⁴⁴ Several of his suggestions were linked to the proliferation of written documents. For example, it was a time of ‘plenty, the nurse of suits,’ as more individuals engaged in financial

¹³³ *Colthirst v Bejushin* (1550) Plow 21, 25.

¹³⁴ *The Lord Cromwel’s Case* (1601) 2 Co Rep 69b, 75a.

¹³⁵ Ian Williams, ‘English Legal Reasoning and Legal Culture, c.1528-c.1642’ (PhD thesis, University of Cambridge 2008) 140.

¹³⁶ Brooks (n 52) 133.

¹³⁷ *ibid.*

¹³⁸ *ibid* 79.

¹³⁹ *ibid* 51.

¹⁴⁰ *ibid* 94.

¹⁴¹ *ibid* 95.

¹⁴² *ibid* 101–7.

¹⁴³ *ibid* 53.

¹⁴⁴ Sir Edward Coke, *The Fourth Part of the Institutes* (M Flesher, for W Lee, and D Pakeman 1648) 76.

transactions.¹⁴⁵ Similarly, ‘many questions and doubts’ had arisen on the dispersal of lands that had previously belonged to monasteries.¹⁴⁶ More individuals had become landowners, and were more likely to take disputes with their neighbours to the Westminster courts.¹⁴⁷ Both kinds of case were likely to involve the interpretation of written instruments.

Coke seems to have been correct in his intuition that legal documents were contributing to the spike in litigation. Brooks observes that the frequency of debt actions was increasing even in relative terms: in 1512, debt accounted for 58% of all Common Pleas business, a figure that had risen to 88% by 1640.¹⁴⁸ Nine out of ten debt actions were brought on bonds.¹⁴⁹ As a result, ‘actions of debt, and the ubiquity of written obligations in particular,’ were a major factor in the increase of litigation.¹⁵⁰ The Statutes of Uses and Wills had also expanded the common law’s jurisdiction over other kinds of written instrument, and, as we have seen, created confusion that took decades of litigation to resolve.¹⁵¹

Cases on interpretation, then, could have deleterious legal and social consequences. Coke warned that it would be ‘dangerous’ to depart from ‘*praxis jurisperitorum*’ [the practice of those skilled in the law] when dealing with conveyances, ‘for thereupon would rise infinite contentions, quarrels, and suits, which would be inconvenient.’¹⁵² This concern to end litigation was cited as a motivating influence behind many results in interpretation cases. For example, in *Clayton’s Case* (1585), it was held that a lease expressed to last ‘for three years from henceforth’ would terminate three years after the date of delivery, but that the time of delivery was irrelevant. If the parties had to calculate ‘fractions and divisions of a day,’ it would lead to ‘uncertainty, which is always the mother of confusion and contention.’¹⁵³ Similarly, in *Baspole’s Case* (1610), John Baspole was obliged to abide by the award of an arbitrator on ‘all matters’ between him and William Freeman.¹⁵⁴ Baspole objected that the arbitrator had not

¹⁴⁵ *ibid*; see Brooks (n 52) 95. Bacon also wrote that, in times of peace, ‘abundance of wealth and fineness of cunning’ led to a ‘multitude of suits and controversies’: Spedding, Ellis and Heath (n 97) 314–5.

¹⁴⁶ Coke, *The Fourth Part of the Institutes* (n 144) 76.

¹⁴⁷ Brooks (n 52) 98.

¹⁴⁸ *ibid* 70.

¹⁴⁹ *ibid* 67.

¹⁵⁰ *ibid* 74.

¹⁵¹ *ibid* 89.

¹⁵² *The Lord Cromwel’s Case* (n 134) 72b.

¹⁵³ *Clayton’s Case* (1585) 5 Co Rep 1a, 1b.

¹⁵⁴ *Baspole’s Case* (1610) 8 Co Rep 97b, 97b.

considered all matters at stake between them, and that he was therefore under no obligation to abide by the award.¹⁵⁵ The court held that the arbitrator's duty was only to consider all the matters referred to him by the parties.¹⁵⁶ 'If other construction should be made,' the judges explained, 'many arbitrations might be avoided' by concealing a secret cause of action, '*et expedit reipublicae ut sit finis litium*' [and it is for the public good that litigation come to an end].¹⁵⁷

7.4. Lay perceptions of legal interpretation

It was not just lawyers who were concerned about the state of legal interpretation. Attacks on the legal profession by both moralists and satirists had become increasingly vehement since the Reformation.¹⁵⁸ We have seen that, in our period, laymen were more involved with legal documents than ever before, living 'in a matrix of parchment and paper.'¹⁵⁹ We have also seen that many more people were learning to use legal texts, and more were becoming involved in legal disputes concerning written documents. It is therefore unsurprising that many of these attacks focused on problems with legal instruments and their construction. Two popular complaints about the law echoed lawyers' concerns about interpretation: firstly, legal documents were too difficult to understand, and, secondly, lawyers were exploiting the process of interpretation for their own advantage.

E. W. Ives argues that many complaints about lawyers arose from the fact that they were 'unintelligible to laymen.'¹⁶⁰ Many people in England were illiterate, and therefore incapable of deciphering the documents that regulated their lives.¹⁶¹ Even those who could read, however, found that legal instruments were full of incomprehensible jargon, the effects of which could only be guessed at. The language of common lawyers was a popular target of satire.¹⁶² In plays, the stock character of a lawyer often spoke in impenetrable legalese, which

¹⁵⁵ *ibid* 98a.

¹⁵⁶ *ibid*.

¹⁵⁷ *ibid* 98b.

¹⁵⁸ Wilfrid R Prest, *The Rise of the Barristers: A Social History of the English Bar 1590-1640* (Clarendon Press 1991) 286.

¹⁵⁹ Brooks, Helmholz and Stein (n 62) 84. See 1.1. above.

¹⁶⁰ EW Ives, 'The Reputation of the Common Lawyers in English Society, 1450-1550' (1960) 7 *University of Birmingham Historical Journal* 130, 133.

¹⁶¹ David Cressy, *Literacy and the Social Order: Reading and Writing in Tudor and Stuart England* (Cambridge University Press 1980) 72. See 1.4. above.

¹⁶² Edward Tucker, *Intruder into Eden: Representations of the Common Lawyer in English Literature 1350-1750* (Camden House 1984) 14.

was humorously misunderstood by the other characters.¹⁶³ In George Ruggle's 1615 play *Ignoramus*, for example, the eponymous lawyer uses absurd Latin constructions, offering his beloved Rosabella 'garteros, spanica ruffos' and 'cambrica smockos.'¹⁶⁴ He then makes her a lengthy offer of jointure, enumerating so many appurtenances to the land ('forests and woods, gorses, heaths, moors, salt marshes, fresh marshes, land, turfing land, elm-bearing land, mossy land, pasturage on common land' and so on) that he runs out of breath. A concerned bystander asks if he is 'well in his wits' and compares him to a parrot.¹⁶⁵ Later in the play, his legal jargon is mistaken for a magic spell¹⁶⁶ and the other characters attempt to carry out an exorcism.¹⁶⁷ Edward Tucker notes that lawyers in this period were commonly associated with the Devil,¹⁶⁸ who was himself reputed to speak in an unknown language.¹⁶⁹

Unable even to understand legal documents, laymen began to fear that they could easily be exploited by their lawyers.¹⁷⁰ The stock character of a lawyer was greedy, amoral and duplicitous, prepared to argue anything for the right fee.¹⁷¹ Ignoramus's first name is Ambidexter,¹⁷² and he makes 'truth, no truth, and no truth, truth.'¹⁷³ Many complaints about lawyers' tactics focused on abuses of court procedure, arcane rules of pleading, and the use of writs of error to overturn judgments.¹⁷⁴ However, the law of interpretation was another easy target. A layman would naturally expect his deed to have a clear meaning. If it turned out not to have its intended effect, he would either blame the inadequacies of the drafter or the cunning of his opponent's counsel. In plays, lawyers 'played cheap tricks with legal technicalities in hopes of a quick and easy profit.'¹⁷⁵ Ignoramus's clerk, Dulman, congratulates him because he has 'tickled the point of the law' by raising suspicions about the validity of a

¹⁶³ Edward Tucker, 'Ignoramus and Seventeenth-Century Satire of the Law' (1971) 19 *Harvard Library Bulletin* 314, 319.

¹⁶⁴ George Ruggle, *Ignoramus: A Comedy* (Robert Codrington tr, W Gilbertson 1662) E2. I.V.423-424.

¹⁶⁵ *ibid.* I.V.449-450.

¹⁶⁶ *ibid.* L2v. III.VIII.1789.

¹⁶⁷ *ibid.* (unpaginated). IV.X.2659-2726.

¹⁶⁸ See generally Tucker (n 163).

¹⁶⁹ *ibid.* 320.

¹⁷⁰ Ives (n 160) 154.

¹⁷¹ *ibid.* 133.

¹⁷² Ruggle (n 164) E2. I.V.436.

¹⁷³ *ibid.* Hv. II.VI.1071.

¹⁷⁴ Barbara Shapiro, 'Law Reform in Seventeenth Century England' (1975) 19 *American Journal of Legal History* 280, 282.

¹⁷⁵ Brooks (n 52) 111.

deed.¹⁷⁶ Ignoramus then warns Dulman not to get a single letter wrong in an indenture he is drawing up, ‘for in law but one comma misplaced, overthrows a whole plea.’¹⁷⁷ In Samuel Daniel’s 1605 play *The Queen’s Arcadia*, an aspiring lawyer boasts that he can

make the gloss to overthrow the text;
I can allege, and vouch authority,
T’embroil th’intent, and sense of equity:
Besides by having been a notary,
And us’d to frame litigious instruments
And leave advantages for subtlety,
And strife to work on, I can so devise
That there shall be no writing made so sure
But it shall yield occasion to contest
At any time when men shall think it best.¹⁷⁸

Here, lawyers and notaries are presented as colluding to ensure that legal documents are unreliable. The notary deliberately leaves the instrument open to ‘subtlety and strife.’ Meanwhile, the lawyer is able to ‘vouch authority’ so that the original intention behind the document is disregarded by the courts.

The interpretation of private instruments was most likely to cause complaint amongst laymen. After all, these were the legal documents with which they would have been most frequently in contact. However, the interpretation of laws was also a matter of great political concern, feeding into a general culture of suspicion towards legal interpretation. Some accused lawyers of manipulating legal interpretation to serve the interests of the Crown. The 1559 *Mirror for Magistrates*, for example, opened with a poetic diatribe against Tresilian CJ ‘for misconstruing the laws, and expounding them to serve the Prince’s affections.’ In this telling, corrupt judges admitted that

the laws we interpreted and statutes of the land,
Not truly by the text, but newly by a gloss:
And words that were most plain when they by us were scanned
We turned by construction like a Welshman’s hose,
Whereby many one both life and land did lose.¹⁷⁹

¹⁷⁶ Ruggle (n 164) D2v. I.III.241.

¹⁷⁷ *ibid* D3. I.III.269-270.

¹⁷⁸ Samuel Daniel, *The Queenes Arcadia* (G Eld 1606) L. Egerton was Daniel’s patron.

Later in our period, however, lawyers were more likely to be accused of making constructions that were hostile to the Crown. James I echoed the words of *Mirror for Magistrates*, complaining to Coke that ‘if the judges interpret the laws themselves and suffer none else to interpret, then they may easily make of the laws shipmen’s hose.’¹⁸⁰ This is another image that also circulated in contemporary religious debate. In 1567, John Jewel, the Bishop of Salisbury, criticised Catholics who treated scripture like ‘a shipman’s hose,’ ensuring that ‘they may be fashioned, and plied all manner of ways, and serve all men’s turns.’¹⁸¹ The King himself made the link between Biblical hermeneutics and legal interpretation, complaining that ‘the judges are like the papists. They allege scriptures and will interpret the same.’¹⁸²

James’s hostility ensured that criticisms of legal interpretation had an influential audience. *Ignoramus* was premiered for the King, who enjoyed it so much that he insisted on watching it twice, despite its ‘extreme length.’¹⁸³ It is recorded that this ‘nettled the lawyers.’¹⁸⁴ In particular, the play took aim at Coke, and his approach to legal language.¹⁸⁵ On one account, the performers ‘dressed Sir Ignoramus like Chief Justice Coke and cut his beard like him and feigned his voice.’¹⁸⁶ James was well aware that Coke was being mocked by the production. Another account tells that, when the actors manufactured a disruption to the play, he cried that it was ‘a plot of Coke’s’ to prevent them from continuing.¹⁸⁷ Coke’s approach to interpretation was therefore under scrutiny in the highest quarters. After Coke’s downfall, the King advised the courts to make their

¹⁷⁹ *A Myrroure for Magistrates* (Thomas Marshe 1559) ii.

¹⁸⁰ David Chan Smith, *Sir Edward Coke and the Reformation of the Laws: Religion, Politics and Jurisprudence, 1578-1616* (Cambridge University Press 2014) 176.

¹⁸¹ Alexander Dyce (ed), *The Poetical Works of John Skelton*, vol 2 (Thomas Rodd 1843) 289. Welshmen and shipmen appear to be interchangeable in this context: Dyce explains that their hose ‘became proverbial from their pliability, power of being stretched, &c.’

¹⁸² Smith (n 180) 178.

¹⁸³ EK Chambers, *The Elizabethan Stage*, vol 3 (Clarendon Press 1965) 476. *The Queen’s Arcadia* was also performed before royalty: *ibid* 276.

¹⁸⁴ Chambers (n 183) 476.

¹⁸⁵ Although *Ignoramus* was written before Coke’s *Institutes*, Ignoramus’s long list of appurtenances bears a striking resemblance to Coke’s list of terms for different kinds of land: Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 4v.

¹⁸⁶ Anthony Powell, *John Aubrey and His Friends* (Eyre & Spottiswoode 1948) 86.

¹⁸⁷ Peter Peckard, *Memoirs of the Life of Mr Nicholas Ferrar* (J Archdeacon 1790) 25.

interpretations... always subject to common sense and reason. For I will never trust any interpretation, that agreeth not with my common sense and reason, and true logic. It must not be sophistry or strains of wit that must interpret, but either clear law, or solid reason.¹⁸⁸

Judges who based their decisions on ‘niceties,’ he warned, had introduced a ‘corruption’ to the common law which must be ‘purged.’¹⁸⁹ While James was concerned with the interpretation of the law itself, his criticism must have contributed to a climate in which any kind of legal interpretation was not only disreputable, but also politically perilous.

Ross observes that, in the Elizabethan and early Stuart periods, ‘streams of criticism of common law and lawyers’ were flowing from the press. Lawyers were accused of ‘corrupt[ing] the equity of law with false glosses, twisting words in search of payment’ and manipulating ‘technicality in favour of local notables and the rich.’¹⁹⁰ The inadequacies of the law, and of legal interpretation, were repeatedly pointed out by ‘poets, dramatists, historians, landed gentry, ministers, scholars, satirists, and merchants,’ not to mention the King himself.¹⁹¹ Common lawyers’ changing attitudes to interpretation must therefore be seen in this context of overwhelming hostility.

7.5. Interpretation and uncertainty

Legal interpretation, then, was a cause of general concern. Lawyers and laymen alike thought that cases requiring the construction of documents were only coming to court because of unskilled or reckless drafters; contentious, if not actively deceitful, parties; and greedy, manipulative lawyers. The result, it was generally agreed, was likely to be uncertainty in the law. Judges, forced to guess at a writer’s meaning, would come to different conclusions about the meaning of a document, and there was no way of knowing whose interpretation was correct.

¹⁸⁸ King James VI and I, *Political Writings* (Johann P Sommerville ed, Cambridge University Press 1995) 212.

¹⁸⁹ *ibid* 211.

¹⁹⁰ Ross (n 26) 364.

¹⁹¹ *ibid* 368.

The uncertainty of the common law was a frequent cause of complaint in our period.¹⁹² David Chan Smith argues that the common law was becoming a victim of its own success. Its ‘sixteenth-century florescence’ had brought about intellectual transformation,¹⁹³ but also led to fears that the law was becoming confused and uncertain.¹⁹⁴ Thomas Starkey, an enthusiast for the civil law,¹⁹⁵ described the common law as ‘without order or end,’ so that there was ‘no stable ground therein nor sure stay, but everyone that can colour reason maketh a stop to the best law that is before time devised.’¹⁹⁶ The abundance of new information and texts about the law made it difficult for anyone to get a handle on the material.¹⁹⁷ Complaints grew more vociferous as the century wore on. Bacon described ‘the uncertainty of the law’ as ‘the principal and most just challenge that is made to the laws of our nation at this time,’¹⁹⁸ while the King lambasted the ‘uncertainty’ that was found in the common law.¹⁹⁹

The result of this uncertainty, it was feared, would be an unsettling of estates in land. We have seen that the courts were increasingly suspicious of drafters. However, counterbalancing this was their concern that judicially-sanctioned conveyancing practices ought to be maintained, so as not to undermine estates. After all, many conveyances were not challenged in court until generations after they had been drawn up.²⁰⁰ Departing from the common practice in such cases therefore risked destabilising many similar settlements. In *Dowman’s Case* (1586), for example, the question was whether a declaration in an indenture could direct the uses in a previous common recovery.²⁰¹ The court held that it could. ‘Great inconvenience,’ they warned, ‘would ensue’ if not, ‘for the inheritances of many subjects in England depend upon such declarations subsequent.’²⁰² Furthermore, their conclusion agreed ‘with the common opinion of men learned in the law, and common experience; and the alteration of such

¹⁹² CW Brooks, ‘The Place of Magna Carta and the “Ancient Constitution” in Sixteenth-Century English Legal Thought’ in CW Brooks, *Lawyers, Litigation and English Society Since 1450* (The Hambledon Press 1998) 224.

¹⁹³ Smith (n 180) 1.

¹⁹⁴ *ibid* 14.

¹⁹⁵ Baker, *The Oxford History of the Laws of England, Vol VI: 1483-1558* (n 67) 5.

¹⁹⁶ Thomas Starkey, ‘A Dialogue between Pole and Lupset’ (1989) 37 *Camden Fourth Series* 1, 128.

The Dialogue was composed c. 1529x32: *ibid* x.

¹⁹⁷ Smith (n 180) 144.

¹⁹⁸ Spedding, Ellis and Heath (n 97) 322.

¹⁹⁹ King James VI and I (n 188) 211.

²⁰⁰ JH Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2007) 288.

²⁰¹ *Dowman’s Case* (1586) 9 Co Rep 7b, 8b.

²⁰² *ibid* 11b.

opinions which concern assurances of inheritances would be too dangerous.²⁰³ Similarly, Moore argued that it would be ‘mischievous’ to construe a proviso in a feoffment to use so as to suspend the settlor’s power of revocation.²⁰⁴ His explanation was that ‘all great lords and gentlemen have made many small leases of part of their possessions.’ It would therefore be ‘utterly contrary to reason and equity’ to prevent them from altering the uses to provide jointures or income for their younger children.²⁰⁵ For ‘proof that the law allows this construction,’ he offered the fact that it was ‘the common case’ to include such a proviso in the limitation of a use.²⁰⁶

Coke’s concerns about novel drafting and excessive litigation were also linked to his desire for certainty in the law. ‘The ancient judges and sages of the law,’ he explained, had always ‘suppressed innovations and novelties... lest the quiet of the common law might be disturbed.’²⁰⁷ It was important not to let doubt be cast on conveyances because of their importance to estates. Fines and recoveries, for example, were ‘like to the pole Arctic and Antarctic, for upon those assurances of lives depend.’²⁰⁸ Similarly, judges in interpretation cases ought to prioritise the certainty of estates: Coke lauded cases in which documents were ‘well expounded for the quieting of the possessions of many.’²⁰⁹

Some lawyers remarked on the irony that written documents, which ought to have been used to settle estates, were in fact being used to foment uncertainty. As we saw in chapter one, Phayer had praised written documents as a means of ensuring that ‘matters of doubt are put out of question,’ ‘contention avoided, unity and concord induced, virtuous and politic order observed,’ and lives lived ‘in quiet.’²¹⁰ ‘As a trusty anchor,’ he explained, they held ‘the right of every man’s possessions safely and surely against all troublous and stormy tempests of injuries.’²¹¹ However, when the instruments were badly drafted, certainty and peace would be actively subverted. Written documents would lead to ‘great incommodities and danger...

²⁰³ *ibid.*

²⁰⁴ *Uses & Revocations de Uses* (undated) Moore 608, 613.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.* 611. See also *Leonard Lovies’s Case* (n 20) 86b; *Le Countee de Bedfords Case* (undated) Moore 718, 720.

²⁰⁷ Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary upon Littleton* (n 2) 379v.

²⁰⁸ *Ann Hungate’s Case* (1613) 12 Co Rep 122, 123. See also *The Marquis of Winchester’s Case* (1583) 3 Co Rep 1a, 3b.

²⁰⁹ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xi.

²¹⁰ Phayer (n 83) Ai v. See 1.4. above.

²¹¹ *ibid.* Aii v.

between man and man,' and be 'a very great occasion of wrangling and strife.'²¹² For Coke, too, problems with written documents were a major cause of uncertainty in the common law. As we saw above, he argued that 'the greatest questions' in law arose, 'not upon any of the rules of the common law,' but upon badly-drafted conveyances, wills and statutes.²¹³ Again, these led to uncertain, and potentially ruinous, ventures into interpretation. It was, Coke observed, 'full of great inconvenience' when nobody knew 'what construction to make, or advice to give' about the meaning of a will.²¹⁴ He lamented that 'intricate and subtle questions in law daily arose upon the validity and construction of wills of lands... to the ruin of many and hindrance of multitudes.'²¹⁵

How, then, did lawyers respond to the problem of uncertainty in the law? Many advocated improvements in the common law method. It was not the law itself, they explained, that was at fault, but those who had failed to understand it properly. Coke, for example, criticised civilians who had condemned the common law as 'dark and obscure' on the basis of a 'sole and superficial reading.'²¹⁶ Lawyers began to publish pedagogic texts, offering clear and rational explanations of the common law's rules.²¹⁷ Fulbecke admitted that the 'weakness of man's memory cannot tolerate the multitude of particular laws.'²¹⁸ As a result, some thought that the law was 'an art obscured with difficult cases, shadowed with conceited terms, and, as it were, covered with clouds and wrapped in darkness.'²¹⁹ However, the law was actually 'bounded by certain rules and limits,' and could be 'comprehended and delivered in certain general precepts.'²²⁰ If a student properly understood the law's general principles, he would be able to apply them to any particular case that might arise, and need not be troubled that 'the law books are so huge, and large, and that there is such an ocean of reports.'²²¹ The law was 'definite in itself,' and the 'science itself is short and easy to one that is diligent.'²²²

²¹² *ibid* Ai v.

²¹³ *The Reports of Sir Edward Coke* (n 71) 2 Co Rep ix.

²¹⁴ *The Lord Cheyney's Case* (1591) 5 Co Rep 68a, 68b.

²¹⁵ *The Reports of Sir Edward Coke* (n 25) 4 Co Rep vi.

²¹⁶ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xxx.

²¹⁷ Smith (n 180) 158; Williams (n 135) 27.

²¹⁸ Fulbecke (n 123) 4v.

²¹⁹ *ibid* 4.

²²⁰ *ibid* 4v.

²²¹ *ibid* 5.

²²² *ibid*.

As we saw in chapter six, many of these books gave a leading place to legal maxims.²²³ Bacon, for example, compiled his collection of maxims in order to ‘establish and settle a certain sense of law which doth now too much waver in uncertainty.’²²⁴ He argued that it was vital to reduce the laws ‘to more brevity and certainty’ in order that, *inter alia*, ‘the great hollowness and unsafety in assurances of lands and goods may be strengthened;’ ‘the counsellor better warranted in his counsel;’ and ‘the contentious suitor that seeketh but vexation disarmed.’²²⁵ Many of Bacon’s maxims related to the interpretation of documents: for example, ‘*verba fortius accipiuntur contra proferentem*’ [words should be taken more strongly against the one who put them forward];²²⁶ ‘*verba generalia restringuntur ad habilitatem rei vel personae*’ [general words should be confined to the character of the thing or person];²²⁷ and ‘*non accipi debent verba in demonstrationem falsam, quae competunt in limitationem veram*’ [words should not be taken according to a false demonstration if they make sense according to a true limitation].²²⁸

Bacon seems to have regarded problems with interpretation as more or less inevitable. He was troubled by the difficulty of conveying meaning through language:²²⁹ in his extra-legal writings, he observed that words could inhibit understanding if they represented things in an inaccurate or confusing way.²³⁰ When discussing the law, he acknowledged the ‘many questions and doubts about construction of words’ that arose when ‘every judge’ had ‘a several sense’ of the parties’ intentions.²³¹ As a result, he explained, the law needed tiebreaker rules, such as the *contra proferentem* maxim, which would give judges ‘a sway to take the law more certainly one way.’²³² He thought that a clear and rational system of rules would help to moderate the inevitable uncertainties of interpretation. If necessary, the search for the writers’ intentions would simply have to be abandoned in the name of certainty and the speedy resolution of disputes.

²²³ See 6.4. above.

²²⁴ Spedding, Ellis and Heath (n 97) 316.

²²⁵ *ibid.*

²²⁶ *ibid* 333.

²²⁷ *ibid* 356.

²²⁸ *ibid* 361.

²²⁹ Richard Waswo, *Language and Meaning in the Renaissance* (Princeton University Press 1987) 51.

²³⁰ James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds), *The Works of Francis Bacon*, vol 4 (Cambridge University Press 2011) 61.

²³¹ Spedding, Ellis and Heath (n 56) 333.

²³² *ibid.*

Coke seems to have been less pessimistic about the possibility of conveying meaning through writing. Although a written document was only a ‘dead letter,’ he believed that it might still convey ‘the effect of all that was spoken.’²³³ However, he was aware of the risk that ‘multiple meanings often lie under the very same words.’²³⁴ He thought that the only sure way of transmitting the writers’ intentions was to ensure that all parties adhered closely to the common law’s method. As Smith puts it,

Coke believed that it was the obligation of both writer and reader to follow a method, to write and read in a particular way that made plain the memory of the law in the text and so exposed the ‘right reason and rule of the law.’²³⁵

As we have seen, Coke largely blamed two actors for problems with interpretation: writers who failed to explain their meaning, and readers who failed to understand it. The law, he explained, was ‘not uncertain *in abstracto*, but *in concreto*,’ and there were two causes of this uncertainty: ‘*praepostera lectio* and *praepropera praxis*, preposterous reading and over-soon practice.’²³⁶ Both reader and writer must be aware of the same interpretive conventions in order to correctly identify the meaning of the text.

Thus, like many of his contemporaries, Coke argued that the problem of uncertainty could be solved if the rules of the common law were properly understood by all. We saw in chapter six that Coke’s reports were intended as a means of instructing other lawyers in these rules.²³⁷ He hoped to present the common law as a clear and rational system of maxims and precedents, rather than a confusing mass of case law. He was publishing his reports, he declared, ‘for the common good... in quieting and establishing of the possessions of many in these general cases, wherein there hath been such variety of opinions.’²³⁸ Legal certainty required that there be clear rules for the interpretation of both the law in general and private instruments in particular. As we have seen, Coke emphasised the role of ‘artificial reason’ in interpretation, encouraging lawyers to ground their arguments on established principles, rather than broad appeals to their own ‘natural’ reason.²³⁹

²³³ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xxiii. See Smith (n 180) 150.

²³⁴ Sir Edward Coke, *La Sept Part Des Reports Sr. Edw. Coke Chivaler* (Societie of Stationers 1608) title page; see Smith (n 180) 152.

²³⁵ Smith (n 180) 152.

²³⁶ *The Reports of Sir Edward Coke* (n 4) 9 Co Rep xxxvii.

²³⁷ See 6.4. above.

²³⁸ *The Reports of Sir Edward Coke* (n 71) 1 Co Rep xxix.

²³⁹ See 6.3. above.

However, it would be a mistake to think of Coke's approach to interpretation as in any way formalistic. He was well aware that relying on strict rules of construction encouraged a quibbling approach to documents. Quibbling was not just associated with fraud, but also raised the spectre of uncertainty just as surely as a lack of rules did. In *Roger Earl of Rutland's Case* (1608), for example, the King had granted the herbage and pannage of Clipson Park to the Earl of Rutland, although it was then in the possession of Thomas Markham. The defendant argued that the patent was void for uncertainty, since the grant could not take effect during Markham's term, and there was no indication of when it was meant to begin.²⁴⁰ The court held that it was clearly intended to commence when Markham's term ended. Coke castigated the defendant, complaining that 'of late times such nice and strict construction hath been strained by some of letters patent, to subvert the force and effect of them.'²⁴¹ The result was that 'many good letters patent are drawn in question, which is to the King's dishonour, the disherison of the subject and against the true reason and ancient rule of the law.'²⁴² He concluded that 'such nice and captious pretence of certainty, confounds true and legal certainty, *et maledicta expositio est quae corrumpit et confundit textum*' [and it is a bad exposition that corrupts and confounds the text].²⁴³ '*Apices juris*,' he reminded his reader, '*non sunt jura*' [points of law are not laws].²⁴⁴ Charles Donahue has argued that, for continental humanist scholars, the '*apices juris*' were rules of strict law that must give way to equity.²⁴⁵ Similarly, Coke recognised that clear rules of interpretation must sometimes be compromised in order to achieve 'true and legal certainty.'

Coke also referred to this maxim in cases that concerned the misnomer of corporations.²⁴⁶ Here, too, he criticised parties who relied on legal technicalities, warning that 'too much niceness and curiosity' in the law would result in conveyances being, 'against all honesty and just dealing, impeached and overthrown.'²⁴⁷ Until 'this generation of late times,' he lamented, corporations had never sought to avoid their grants on the basis of a 'curious or nice'

²⁴⁰ *Roger Earl of Rutland's Case* (n 125) 55b.

²⁴¹ *ibid* 56b.

²⁴² *ibid*.

²⁴³ *ibid*.

²⁴⁴ *ibid*.

²⁴⁵ Charles Donahue, 'Equity in the Courts of Merchants' (2004) 72 *Tijdschrift voor Rechtsgeschiedenis* 1, 4.

²⁴⁶ *Sir Moyle Finch's Case* (1606) 6 Co Rep 63a, 65a; *The Case of the Mayor and Burgesses of Lynne Regis* (1612) 10 Co Rep 122b, 126a.

²⁴⁷ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xviii.

misnomer, and ‘what suits and troubles thence ensued, everybody knows.’²⁴⁸ The proper approach to misnomer, on the other hand, would ensure ‘the surety and quiet’ of both corporations and ‘their farmers and others claiming from them... for estates, covenants, and other things made unto them.’²⁴⁹

Again, we see Coke’s recognition that different approaches to interpretation were possible. In the medieval period, there was little discussion of the principles used to understand a document.²⁵⁰ By the mid-sixteenth century, we have seen that lawyers were beginning to analyse their own interpretive techniques. However, writers like Plowden presented only one correct way of construing a document. Coke, on the other hand, acknowledged that there were multiple possible approaches to construction, each of which had its own pros and cons. Too much emphasis on certainty subverted certainty by encouraging quibbling.²⁵¹ Too much emphasis on reason, meanwhile, subverted reason by encouraging ‘infinite contentions, quarrels, and suits.’²⁵² Only through a deep understanding of the common law’s reason could lawyers successfully chart a course between this Scylla and Charybdis.

Finally, it is worth noting that not all lawyers were distressed by the uncertainty that resulted from a proliferation of interpretive choices. As a senior judge and politician, Coke was naturally concerned with the direction of the common law, and keen to set it on what he saw as the right path. We have seen, however, that practising lawyers do not seem to have shared his qualms: indeed, they were notorious for exploiting this multiplicity of interpretive options for their clients’ best advantage. That this was not a baseless stereotype can be seen by examining Egerton’s draft arguments from the 1580s, before his judicial appointments and his association with the Chancery. These arguments were not written for publication; Egerton’s only concern was to advance the interests of his clients. As a result, he was not interested in presenting the law as a coherent and intellectually satisfying system, but in identifying and manipulating its ambiguities. It is clear that Egerton found considerable room for manoeuvre in arguments over the interpretation of documents. In some cases, he argued that the court must disregard ‘the natural property’ of words and instead apply them to ‘the meaning of the parties,’²⁵³ even when interpreting a condition.²⁵⁴ In other cases, however, he insisted that

²⁴⁸ *Sir Moyle Finch’s Case* (n 246) 65a; see also *The Case of the Mayor and Burgesses of Lynne Regis* (n 246) 126a.

²⁴⁹ *The Reports of Sir Edward Coke* (n 4) 10 Co Rep xix.

²⁵⁰ Thorne in Thorne (n 5) 9.

²⁵¹ *Roger Earl of Rutland’s Case* (n 125) 56b.

²⁵² *The Lord Cromwel’s Case* (n 134) 75a.

²⁵³ *Saunders & Starkey v Stanfourde* (n 12) f72.

²⁵⁴ *ibid* f73v.

conditions must be ‘taken strictly according to the words.’²⁵⁵ Sometimes, he would claim that the words of a will were only ‘dead elements’;²⁵⁶ at other times, he would emphasise their importance for establishing the intention of the testator.²⁵⁷ By tactically selecting cases from the Year Books and Plowden’s and Dyer’s reports, Egerton was always able to multiply citations in support of his favoured approach to construction.

Egerton’s papers demonstrate that practising lawyers were benefiting from the contemporary uncertainty about interpretation. Egerton clearly believed that all of his arguments had at least a chance of appealing to the court. It would be a rare case in which he could not muster some support for his client’s preferred construction of a document. It is perhaps notable that in none of his arguments did Egerton express any concern about the consequences of the uncertainty generated by the law of interpretation. When he did express doubts about the place of interpretation, they were based on philosophical or theological writings, rather than the state of the contemporary common law.²⁵⁸ Laymen and statesmen may have fretted over uncertainty in the law, but many practising lawyers were thriving.

7.6. Conclusions

In our period, issues surrounding the interpretation of private documents were a microcosm of issues in the common law more broadly. Thanks to the intellectual flourishing of the sixteenth century, lawyers were increasingly insecure about legal knowledge. They were also under pressure from societal changes, as legal instruments were put to new and rapidly evolving uses and litigation rates soared. The law of interpretation was caught up in these changes. By the beginning of the seventeenth century, it was a target for criticism by the profession, the public, and even the Crown.

In the mid-sixteenth century, writers like Plowden had taken for granted that the meaning of a document was immanent within it, waiting to be drawn out by the interpreter. By the end of the century, Coke and his contemporaries had admitted that the construction of a document was the product of choices made by the reader. They were deeply troubled by the possibility of misinterpretation and its potentially far-reaching consequences. If the documents upon which estates were based could be unsettled, the commonwealth itself would be destabilised.

²⁵⁵ *Scott v Scott* (undated) Hunt MS El 482 f116, f118v.

²⁵⁶ *Englande’s Case* (undated) Hunt MS El 482 f53, f55.

²⁵⁷ *Sanders v Byng* (undated) Hunt MS El 482 f182, f183.

²⁵⁸ See, for example, his reference to Augustine in *Holcrofte’s Case* (undated) Hunt MS El 482 f89, f97.

Grasping for certainty, lawyers sought to retrench. They began to place more emphasis on the words of a document, on previously-judged cases, and on specific interpretive maxims. These developments in the law of interpretation only mirrored trends in the law more generally.

To an extent, however, these attempts to correct the law's course created a feedback loop. Lawyers thought that focusing on clear rules and precedents would reduce uncertainty. However, their shifting approach to interpretation itself created new uncertainty about legitimate techniques for construing documents. As the law of interpretation remained in flux, lawyers like Egerton were able to exploit it for their own advantage, spinning potential meanings without clear limits. Coke himself seems to have been aware that it was futile to pin down rules for interpretation. Although he repeatedly lauded the importance of both reason and certainty, he admitted that both, taken to their extremes, would be self-defeating. Unlike Plowden, he saw interpretation as a dangerous endeavour, with potential disaster lurking at every turn.

8. CLOSING REMARKS

Wigmore dismissed the early modern law of interpretation as marred by the ‘stiff and superstitious formalism’ of ‘primitive minds.’¹ Hampered by their ‘scholastic technicality,’ lawyers viewed each word as a ‘fixed symbol’² and were unaware of the principles of ‘rational interpretation.’³ When dealing with wills, they did not engage in ‘a liberal and sympathetic search for testators’ meaning.’⁴ When construing deeds, they preferred to ‘treasure the shibboleths of conveyancing’ and their ‘store of esoteric learning’ rather than permitting ‘any liberality of interpretation.’⁵ Wigmore concluded sorrowfully that some contemporary ‘judicial utterances seem now obstinate enough in their blindness.’⁶

It has been the argument of this thesis that, *pace* Wigmore, early modern common lawyers took a thoughtful and sophisticated approach to the interpretation of private documents. Wigmore’s remarks were based on a reading of Broke CJ’s judgment in *Throckmerton v Tracy* (1555),⁷ which, as we have seen, was not necessarily representative of lawyers’ views in this period.⁸ To a great extent, judges did take a ‘liberal and sympathetic’ approach to interpretation, which prioritised the identification and implementation of the parties’ intentions. When they hewed more closely to the words of the document, it was as a result of genuine concerns about a lack of clarity in the law and the uncertainty that this could cause. In either case, the courts’ approach to interpretation was based on complex theories about the nature and purpose of law, language and legal instruments that were anything but ‘primitive.’

In chapter two, we saw that lawyers used the rules of grammar and legal precedents to establish the signification of words in a document. However, since they were aware that a word might bear multiple meanings, this was only the beginning of their enquiry. Chapter three investigated the relationship between the ‘proper signification’ of the words used by the writer and the meaning that he had intended to give them. It was established that this relationship varied depending on the kind of document at issue. The meaning of the words

¹ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence*, vol 9 (3rd edn, Little, Brown and Company 1940) 187.

² *ibid.*

³ *ibid* 188.

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ *Throckmerton v Tracy* (1555) Plow 145, 162–3.

⁸ See 3.2.1. above.

was more important when construing a deed than it was for construing a will or the limitation of a use. This was justified with reference to differences in the creation, context and purpose of each document. The balance struck by the courts also changed over time. As the sixteenth century wore on, lawyers became more reluctant to allow the writer's intentions to trump the signification of his words when interpreting any kind of document.

Chapter four examined the nature of the intentions that the courts were invoking. The intentions of a testator were understood differently to those of the parties to a deed. Only the testator's intention had to be taken into account when interpreting a will, but the intentions of both parties were relevant to the interpretation of a deed. In chapter five, we saw how this affected the means by which those intentions were identified. In both cases, lawyers looked at the words of the instrument and the circumstances in which it was made. However, they were also prepared to make presumptions about what reasonable parties to a deed would have intended. They were much more reluctant to make similar presumptions when interpreting a will. Chapter six explored the role of reason further. We saw that it changed throughout our period, as lawyers became less content to rely on *a priori* reason. Instead, they grew more reliant on the authority of previously-judged cases, their effects often distilled into specific interpretive rules and maxims.

The changes identified throughout this thesis formed part of the same general trend. In the mid-sixteenth century, interpretation was a broad and flexible process, in which lawyers relied on their own reasoning faculties to identify the intentions of a writer. By the end of the century, the process of interpretation was becoming more structured. Lawyers focused more closely on the words of the document, and relied on precedents and rules to guide them. In chapter seven, we investigated the background to this shift. We saw that, by the end of the sixteenth century, lawyers had grown insecure about legal interpretation. They were worried that its formlessness could lead to uncertainty, and threaten the stability of the whole common law. The changes in their approach to interpretation must therefore be seen in a broader context of anxiety about the law and legal documents. In this period, fears about the direction of the common law in general often coalesced around issues in the law of interpretation.

Some issues raised by this thesis remain to be fully explored. Firstly, it has not been possible, except in the briefest of terms, to discuss the interpretation of legal documents other than deeds and wills.⁹ An important next step is to expand this study to cover other legal instruments with which the courts frequently dealt: in particular, statutes and letters patent.

⁹ See 3.2.1., 5.4. and 6.2. above.

This would provide a comprehensive overview of interpretation at common law in this period. By comparing the courts' approach to these different kinds of document, it would be possible to identify ideas that applied to all kinds of interpretation, and those that were specific to particular instruments. This thesis has also focused on the practice of the common law courts. Future research could expand its scope by comparing interpretive methods at common law to those used by the contemporary courts of equity or ecclesiastical courts in England.

Secondly, more could be done to identify other sources of ideas about interpretation that influenced common lawyers. For example, at a number of points, we have observed that common lawyers drew on works of civil law, rhetoric or philosophy for their understanding of interpretation.¹⁰ However, within the scope of this thesis, it has not been possible to trace these influences in detail. This should be a fruitful avenue for future research. We have also noted that issues raised by legal interpretation were, in many ways, similar to issues surrounding other kinds of interpretation in early modern England, such as Biblical hermeneutics.¹¹ The research in this thesis could therefore feed into broader debates about Renaissance attitudes to writing and meaning. Finally, this thesis has focused on lawyers' understanding of language and legal instruments, but we have seen that laymen were often unhappy about the way in which their words were interpreted by the courts.¹² Future research could further explore the tensions between writers' and readers' understandings of their documents.

In William Shakespeare's *Henry VI, Part Two*, composed in the 1590s,¹³ Jack Cade decries the profound effects a legal instrument can have when it gets away from its writer. 'Is not this,' he asks,

a lamentable thing, that of the skin of an innocent lamb should be made parchment; that parchment, being scribbled o'er, should undo a man? Some say the bee stings, but I say 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since.¹⁴

It is clear that it is vital to understand the courts' approach to the interpretation of private documents in this period. As Shakespeare observed, it was an issue that concerned laymen of

¹⁰ See 3.2.1., 5.2.2. and 5.3.2. above.

¹¹ See 3.2.1. and 7.2. above.

¹² See 7.4. above.

¹³ William Shakespeare, *Henry VI, Part Two* (Roger Warren ed, Oxford University Press 2003) 1.

¹⁴ *ibid* 239. IV.II.72-77.

all stations in life, who were often dependent on such documents. It was also an issue that contemporary lawyers cared about fiercely. Whether writing paeans to equitable construction like Plowden, quibbling over grammar like Dyer, reflecting on continental theories like Fulbecke, fretting over the dangers of interpretation like Coke, or exploiting its ambiguities like Egerton, lawyers spent a significant amount of their time and energy on the subject. The questions raised by the interpretation of private documents touched on many disparate aspects of early modern life and law. As they expounded its principles for the first time, common lawyers were treating with a topic of the utmost significance.

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