Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence

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ASCERTAINING THE TESTATOR'S INTENT:
LIBERAL ADMISSION OF EXTRINSIC EVIDENCE

"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," asked Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

—Lewis Carroll, Through the Looking Glass.

It has long been the troublesome task of the courts to determine what meaning a testator assigned to the words which he used in his will.¹ Until recently, the California courts had placed the word in the position of master by applying strict, formalistic rules of interpretation which regulated the admission of extrinsic evidence offered to prove what the testator meant by the words he used. Under the doctrine known as the plain meaning rule, if the word chosen by the testator had a common, general and unambiguous meaning, evidence of a special meaning which the testator actually attached to such word was inadmissible.² Despite the fact that the testator misunderstood the legal effect of his statements,³ the choice of a particular word was determinative of the testator's intent which the courts could never vary. Nor could the courts admit evidence of extrinsic circumstances which would prove or imply that the testator intended to attach a different meaning to the word.⁴

A second restriction on the admission of extrinsic evidence to aid in construction of wills was based on a maxim drawn by Lord Bacon which differentiated between latent and patent ambiguities. According to this maxim, extrinsic evidence was only admissible to resolve la-

2. 4 PAGE ON THE LAW OF WILLS § 32.10 (Bowe-Parker ed. 1961). [hereinafter cited as PAGE].
3. "[T]he expressed intent will not be varied under the guise of correction because the testator misapprehended its legal effect . . . . [I]t will be presumed that he designed that result." In re Estate of Young, 123 Cal. 337, 343-44, 55 P. 1011, 1013 (1899).
tent ambiguities. In recent decisions, however, the California courts have shown a readiness to abandon these two formalistic rules and to allow extrinsic evidence to prove and give effect to the testator's intent, regardless of his choice of words. This development in California law, long overdue, has made more meaningful section 101 of the Probate Code which commands that "[a] will is to be construed according to the intentions of the testator." Thus, the testator is now allowed to assume his proper role of master over the word.

The Plain Meaning Rule

The plain meaning rule was a product of the stiff and superstitious formalism which characterized early English law. Then, words were considered to be magical symbols, each of which had a precise and invariable meaning. Those who used words handled them with great care, lest the courts, through their inflexible rules of construction and highly technical rules of evidence, distort the meaning which they were intended to convey. As a spirit of liberality emerged during the 1800's, words, to a certain extent, lost their supernatural quality. It became settled that if the testator's intent to use words in an uncommon sense appeared on the face of the will, such contrary intent would be given effect. But, absent such indication on the face of the will, no meaning deviating from the accepted definition would be recognized despite the conclusiveness of the evidence indicating that deviation.

The plain meaning rule was incorporated into section 1324 of the original California Civil Code, enacted in 1872. The statute provided:

The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

Because there was no textual command to restrict the search for "an-

5. PAGE § 32.7. See note 44 & accompanying text infra.
6. This rule has also been referred to as the "single plain meaning rule," PAGE § 32.10; and the rule against "disturbing a clear meaning," 9 J. WIGMORE, EVIDENCE § 2461 (3d ed. 1940) [hereinafter cited as WIGMORE].
7. WIGMORE § 2461, at 187.
8. The reduction of this concept to a rule of construction may be attributed primarily to Vice Chancellor Sir James Wigram who wrote in 1831: "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of a will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered." J. WIGRAM, EXTRINSIC EVIDENCE IN AID OF THE INTERPRETATION OF WILLS 18 (4th ed. 1858) (emphasis in original).
other sense” to the context of the will, it is at least arguable that the absence manifested a legislative intent to lessen the inflexibility of the plain meaning rule. In the early cases applying the statute, however, the courts did not look beyond the face of the will. In 1931, when the California Probate Code was enacted, the above Civil Code section was incorporated into Probate Code section 106. Under this section, the courts continued to apply the same restricted search, holding that the intent to use an uncommon meaning could only appear in the context of the instrument itself. If the terms of the will were ambiguous (i.e., had no “ordinary and grammatical sense”), an “uncertainty” arose on the face of the will and, under Probate Code section 105, extrinsic evidence was admissible to resolve the uncertainty. As stated in 

9. In the Code Commissioners’ annotation to section 1324, eight cases are cited to explain the intent and purpose of the section. Of these, one case allowed extrinsic evidence to show that the testator intended to use a word in other than its ordinary sense. Rathbone v. Dyckman, 3 Paige 9 (N.Y. Ch. 1831). The remaining cases restricted the determination of the contrary intent to the context of the will. Cal. Civ. Code § 1324 (1878), now Cal. Prob. Code § 106.

10. In In re Estate of Wilson, 171 Cal. 449, 153 P. 927 (1915), the court said: “[W]here . . . taking the words of the will alone, intent is clear, that intent must be followed, and proof that the testator desired other results or that the circumstances were such that such desire might be inferred is inadmissible.” Id. at 456, 153 P. at 930; accord, In re Estate of Watts, 186 Cal. 102, 105, 198 P. 1036, 1037 (1921); In re Estate of Fair, 132 Cal. 523, 530, 64 P. 1000, 1002 (1901); In re Estate of Tompkins, 132 Cal. 173, 176, 64 P. 268, 269 (1901); In re Estate of Young, 123 Cal. 337, 343-44, 55 P. 1011, 1013 (1899); In re Estate of Walkerly, 108 Cal. 627, 659, 41 P. 772, 780 (1895); In re Estate of Reinhardt, 74 Cal. 365, 368, 16 P. 13, 14 (1887).

11. Cal. Prob. Code § 106 provides: “The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. Technical words are not necessary to give effect to any species of disposition by a will; but technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense.”


13. A distinction, however, was drawn by the courts between latent and patent ambiguities appearing in the will and, until recently, extrinsic evidence was admissible only to resolve the latent form. This distinction and its recent demise is discussed beginning at the text accompanying footnote 38 infra.

14. Cal. Prob. Code § 105 provides: “When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.”

The intention sought for is not that which may have existed in the mind of the testator but is that which is expressed in the language of the will, giving such language, if clear, its ordinary meaning, and if ambiguous, the meaning it should have, in the light of the context and the circumstances shown to explain the meaning.\textsuperscript{17}

In 1968, however, the California Supreme Court's decision in 
\textit{Estate of Russell}\textsuperscript{18} signaled the demise of the plain meaning rule. Mrs. Russell had executed a valid holographic will in which, aside from bequests of two items of personal property to a relative, she left "everything I own Real & Personal to Chester H. Quinn and Roxy Russell." The plaintiff, Mrs. Russell's niece and only heir-at-law, filed a petition to determine heirship. At the hearing, extrinsic evidence was introduced to show that Roxy Russell was the testatrix's dog and thus excluded by Probate Code section 27\textsuperscript{19} from taking under a will. Plaintiff therefore contended that the share bequeathed to Roxy must fail and pass by intestate succession. Over plaintiff's objection, counsel for defendant (Quinn) introduced evidence to show that the testatrix intended to leave everything to Quinn, who was to provide for Roxy's maintenance and support.\textsuperscript{20} The lower court found Quinn's evidence persuasive, holding that the language of the will leaving property to Roxy was precatory in nature. Accordingly, the entire residue was awarded to Quinn. On appeal, the heir-at-law contended that because the wording of the will was clear and unambiguous, the admission of extrinsic evidence to support Quinn's contention was error. The supreme court reversed the lower court's decision—but did not base its decision on the ground that the lack of ambiguity rendered extrinsic evidence inadmissible. Rather, the court held that no language could be deemed free from ambiguity until it has been examined in the light of the extrinsic circumstances surrounding the execution of the will. In this case, although such evidence was properly admitted, it failed to support the lower court's interpretation of the testatrix's intent.\textsuperscript{21}

\textsuperscript{17} Id. at 594, 284 P.2d at 905-06.
\textsuperscript{18} 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968).
\textsuperscript{19} CAL. PROB. CODE § 27 lists beneficiaries who may take under a will. The listing does not include animals.
\textsuperscript{20} The dog was alive on the date of execution of the will, but it predeceased the testatrix. 69 Cal. 2d at 203, 444 P.2d at 355, 70 Cal. Rptr. at 563.
\textsuperscript{21} The court noted that "the infinitesimal portion of the extrinsic evidence actually referring to the care of the dog was devoid of all probative value." 69 Cal. 2d at 215 n.21, 444 P.2d at 363 n.21, 70 Cal. Rptr. at 571 n.21. The gift to the dog was void, and the property subject to the lapse passed by intestacy to Mrs. Russell's heir-at-law. Id. at 216, 444 P.2d at 364, 70 Cal. Rptr. at 572.
Regarding the admissibility of evidence, the court enunciated the following rule:

In order to determine initially whether the terms of any written instrument are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous. "Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended" [citation omitted].

The court then applied this general doctrine of interpretation to wills:

[E]xtrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute) may be considered by the court in ascertaining what the testator meant by the words used in the will. If in the light of such extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, "an uncertainty arises upon the face of the will" (§ 105) and extrinsic evidence relevant to prove any of such meanings is admissible (see § 106).

This decision places a new interpretative gloss on section 106. Courts are no longer confined to the text of the will in their search for contrary intent. Extrinsic evidence is now admissible to show that the apparently clear and unambiguous language of the will is in fact ambiguous. Sections 105 and 106 are to be applied in the following manner: If the extrinsic evidence does not reveal a reasonable alternative interpretation, section 106 commands that the terms must be used in their ordinary and common sense. If, however, the extrinsic evidence does reveal a reasonable second interpretation, the will is deemed

22. *Id.* at 208-9, 444 P.2d at 359, 70 Cal. Rptr. at 567. This rationale is supported by the leading text writers. *See* PAGE, supra note 2, §§ 32.10-.11; WIGMORE, supra note 6, §§ 2470-78; B. WITKIN, CALIFORNIA EVIDENCE, §§ 730-32 (2d ed. 1966); Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. REV. 161 (1965).

23. "As for example, under section 105 . . . which specifically excludes 'the oral declarations of the testator as to his intentions'. This opinion does not disturb the statutory proscription against the use of such evidence." 69 Cal. 2d at 212 n.18, 444 P.2d at 361 n.18, 70 Cal. Rptr. at 569 n.18.

24. *Id.* at 212, 444 P.2d at 361, 70 Cal. Rptr. at 569.

25. "If . . . in the light of such extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon
to be ambiguous, and section 105 will permit the admission of extrinsic evidence to discover the testator's intent.26

Four months later in Estate of Balyeat,27 a California court of appeal indicated the extremes to which the courts were willing to go under the rule enunciated in Russell. In Balyeat the testatrix had designated as residual beneficiaries her two sons who were to take equally. She then added an in terrorem provision under which were disinheritcd "each, any and all persons whomsoever claiming to be or who may be lawfully determined to be heirs at law of mine"28 who contested any part of her will. In a codicil added 2 years later, the testatrix provided that the residue was to be placed in trust for 3 years. The income from the trust, and the corpus after the 3-year period, were to be divided equally between the sons.29 After the death of the testatrix, both sons contested the validity of the codicil but later dismissed the action.30 The lower court refused to admit extrinsic evidence offered by one of the sons to prove that the testatrix included the in terrorem clause to protect the interests of the sons from third parties. The court ruled that "as a matter of law the in terrorem clause is clear and it is . . . a matter of law whether filing the contest and then dismissing it is sufficient to bring the in terrorem clause into being."31 The lower court held that it was sufficient, and that the residue passed by intestate succession. The court of appeal reversed, holding that under the Russell32 decision it was error not to receive such evidence. The court reasoned that since the overall design of the will was to pass the testatrix's property to her sons, their contention that the purpose for inclusion of the in terrorem provision was to protect the sons' interests was reasonable under the circumstances. Therefore, extrinsic evidence should have been admitted to prove this interpretation.33

Although the terms of the will in question were clear and gave no indication that the in terrorem clause was to be applied in a manner different from its usual application, i.e., to all contestants, nevertheless this clear language could be modified by an intention proved purely the face of the will (§ 105; [citations omitted]) and any proffered evidence attempting to show an intention different from that expressed by the words therein, giving them the only meaning to which they are reasonably susceptible, is inadmissible." Id.

26. See note 24 & accompanying text supra.
27. 268 Cal. App. 2d 556, 74 Cal. Rptr. 120 (1968).
28. Id. at 558, 74 Cal. Rptr. at 121.
29. Id. at 558-59, 74 Cal. Rptr. at 121-22.
30. The contestants claimed, first, that the testatrix was of unsound mind when she added the codicil, and second, that the codicil was improperly executed. Id. at 559, n.1, 74 Cal. Rptr. at 122 n.1.
31. Id. at 560, 74 Cal. Rptr. at 123 (quoting probate court ruling).
by extrinsic evidence. Balyeat therefore stands for the proposition that a contradiction between the clear and unambiguous terms of the will and a contrary intent based solely on extrinsic facts will constitute the "uncertainty arising on the face" of the will required by section 105 of the Probate Code. There is no necessity that particular words in the will be shown to be ambiguous.

The effect of these decisions is to abrogate the plain meaning rule in California. Following the policy of the legislature, as manifested in the Probate Code, California courts had consistently held that the testator's intent was to govern construction of the will. The discovery of that intention however, had often been made more difficult by the arbitrary requirement that the contrary intent be ascertained from the context of the instrument. California courts have dealt a death blow to this rule of no utility and have made the testator master of the words he used.


Before full meaning could be given to section 101 of the Probate Code, the California courts had to repudiate the irrational distinction which the rules of evidence had made between latent and patent ambiguities. Simply stated, a latent ambiguity could be resolved by extrinsic evidence; a patent ambiguity could not be so resolved. Before tracing the development of this distinction, it may be useful to explain the meaning and application of the terms "latent ambiguity" and "patent ambiguity."

A latent ambiguity is one which is not apparent upon the face of the instrument, but appears when the terms of the will are applied to the testator's property and designated beneficiaries. In *In re Estate of Donnellan*, for example, the testatrix left a portion of the residue of

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34. CAL. PROB. CODE § 101.
35. E.g., Estate of Thompson, 50 Cal. 2d 613, 617, 328 P.2d 1, 3 (1958); Rosenberg v. Frank, 58 Cal. 387, 404 (1881).
37. This abrogation of the plain meaning rule in wills construction follows an almost identical development in contract interpretation. Recent cases involving contracts have held that all credible evidence is admissible to prove that language which appears to be unambiguous is susceptible of two or more reasonable interpretations. Once the susceptibility is shown, extrinsic evidence is then admissible to prove which interpretation the parties intended. Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (1968); Delta Dynamics, Inc. v. Arioto, 69 Cal. 2d 525, 446 P.2d 785, 72 Cal. Rptr. 785 (1968); Note, *Chief Justice Traynor and the Parol Evidence Rule*, 22 STAN. L. REV. 547 (1970).
38. See Taylor v. McCowen, 154 Cal. 798, 802, 99 P. 351, 353 (1908); PAGE, supra note 2, at 254-59.
her estate to "my niece Mary, a resident of New York, said Mary being
the daughter of my deceased sister Mary." The sister of the testatrix
had two daughters: Mary, who lived in Ireland, and Annie, who re-
sided in New York. Only when these extrinsic facts were known did the
ambiguity arise.

A patent ambiguity, on the other hand, is one which appears on the
face of the will. For example, in Estate of Akeley, the testatrix,
purporting to bequeath the entire residue of her estate, gave 25 percent
to each of three charities. The ambiguity is, of course, apparent from
the terms of the will alone, as the testatrix had disposed of only 75 per-
cent of the balance of her estate.

This distinction was originally formulated by Lord Bacon in 1597
as Rule 25 of his Maxims. Bacon theorized that if extrinsic evidence
were admitted to resolve a patent ambiguity, the result would be to
give effect to the testator's desires which had not been reduced to a

40. Id. at 16, 127 P. at 167.
41. PAGE, supra note 2, § 32.7, at 255.
42. 35 Cal. 2d 26, 215 P.2d 921 (1950).
43. Id. at 28, 215 P.2d at 922.
44. Sir Francis Bacon wrote, "There be two sorts of ambiguities of words; the one
is 'ambiguitas patens' and the other is 'ambiguitas latens.' 'Patens' is that which ap-
pears to be ambiguous upon the deed or instrument; 'latens' is that which seemeth cer-
tain and without ambiguity for anything that appeareth upon the deed or instrument,
but there is some collateral matter out of the deed that breedeth the ambiguity.
'Ambiguitas patens' is never holpen by averment, and the reason is, because the law
will not couple and mingle matter of specialty, which is of the higher account, with
matter of averment, which is of inferior account in law; for that were to make all deeds
hollow and subject to averments, and so, in effect, that to pass without deed, which the
law appointeth shall not pass but by deed. Therefore, if a man give land to 'I. D. et
I. S. Hoeredibus,' that do not limit to whether of their heirs, it shall not be supplied by
avermment to whether of them the intention was the inheritance should be limited. . . .
But if it be 'ambiguitas latens,' then otherwise it is. As I grant my manor of S. to I. F.
and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that
I have the manors both of South S. and North S., this ambiguity is matter in fact; and
therefore it shall be holpen by averment, whether of them it was that the parties
intended should pass. . . . Another sort of 'ambiguitas latens' is correlutive unto this:
for this ambiguity spoken of before is, when one name and appellation doth denominate
divers things; and the second is, when the same thing is called by divers names. As, if
I give lands to Christ Church in Oxford, and the name of the corporation is 'Ecclesia
Christi in Universitate Oxford,' this shall be holpen by averment, because there appears
no ambiguity in the words: for the variance is matter in fact. But the averment shall
not be of the intention, because it does not stand with the words. For in the case of
equivocation the general intent includes both the special, and therefore stands with the
words: but so it is not in variance; and therefore the averment must be a matter that
doeth induce a certainty, and not of intention; as to say that the precinct of 'Oxford'
and of 'the University of Oxford' is one and the same, and not to say that the intention
of the parties was that the grant should be to Christ Church in the University of Ox-
ford." F. BACON, MAXIMS, rule xxv, quoted in WIGMORE, supra note 6, § 2472, at 239.
writing with the requisite formalities. Thus, in the example of the residue given to three charities,\footnote{45} if extrinsic evidence proved that the testatrix had actually intended that each of the three charities receive one-third of the residue, the court would be compelled to give that fraction to each charity. The court would be giving effect to a scheme which had never been formally executed, thereby sanctioning a violation of the Probate Code.\footnote{48}

From the above type of ambiguity, Bacon distinguished the "latent" ambiguity but used this term in a highly restricted and technical sense. Bacon intended to only include cases of "equivocation," where "one name and appellation doth denominate divers things; and . . . when the same thing is called by divers names."\footnote{47} Under these circumstances, the variance between the terms of the will and the actual property or persons which the testator intended to describe was a factual variance. If extrinsic evidence were used to resolve the ambiguity, the result would be to make the terms of the will sufficiently specific, not to give effect to an unexecuted intention. To use Bacon's example as an illustration, a testator devised his manor S to A and his heirs, but in fact the testator owned two manors, North S and South S.\footnote{48} If the court admitted extrinsic evidence to show that the testator intended North S, it has not, strictly speaking, added anything to the terms of the will; it has only made those terms more specific. As the will provided, a manor named S will pass by inheritance to A and his heirs.\footnote{49}

The term "latent ambiguity" has since been extended beyond equivocations to include all ambiguities not apparent on the face of the will, but which appear when an attempt is made to administer the provisions of the will.\footnote{50} This extension is the result of a misinterpretation of the Bacon Maxim, for the rationale upon which he based his rule will not support the admission of extrinsic evidence to clarify latent ambiguities other than equivocations. An example of such an ambiguity may be found in \textit{In re Estate of Donnellan},\footnote{51} which concerned the gift of the residue to "Mary, a resident of New York." It is a latent ambiguity but not an equivocation, for there is no general description which fits two possible beneficiaries. To admit extrinsic evidence, as was done in that case, to prove that Annie, the New York resident, was the intended beneficiary effected a disposition to "Annie" when the

\footnotesize{45. See text accompanying note 43 \textit{supra}.} \\
\footnotesize{46. See \textit{CAL. PROB. CODE} § 50. Section 50 is the California Statute of Wills.} \\
\footnotesize{47. See note 44 \textit{supra}.} \\
\footnotesize{48. \textit{Id.}} \\
\footnotesize{49. See 14 STAN. L. REV. 409 (1962).} \\
\footnotesize{50. \textit{E.g.}, \textit{In re Estate of Little}, 170 Cal. 52, 54, 148 P. 194, 194 (1915); \textit{In re Estate of Donnellan}, 164 Cal. 14, 20, 127 P. 166, 168 (1912).} \\
\footnotesize{51. 164 Cal. 14, 127 P. 166 (1912).}
will clearly stated "Mary." The terms of the will were not made more specific by the extrinsic evidence; rather, the court disposed of the property in a manner contrary to the expressed intent of the will. But Bacon believed that it was desirable to avoid this result; for that reason his Maxim forbade the use of extrinsic evidence to resolve patent ambiguities. Thus, the rationale which led to the distinction between patent and latent ambiguities was ignored, while the rule continued to be applied. Moreover, the meaning and application of the term "latent ambiguity" has been further expanded by the rule enunciated in the landmark case of Patch v. White:52 If extrinsic evidence discloses an ambiguity, then extrinsic evidence should be used to resolve it.53

Many writers have attacked the distinction between latent and patent ambiguities, regarding it as unnecessary and an "unprofitable subtlety."54 The Restatement of Property, in its adopted rules of construction, recognizes no difference between latent and patent ambiguities,55 and many states have abandoned the distinction altogether for purposes of determining admissibility of extrinsic evidence.56

The draftsmen of the California Civil Code of 1872 codified the distinction drawn by Lord Bacon, although they did not employ the terms "latent" and "patent." Section 134057 dealt with imperfect descriptions found when the court applied the will to persons or property (latent ambiguities) and section 131858 pertained to uncertainties arising upon the face of the will (patent ambiguities). Section 1340 followed the general rule that extrinsic evidence was admissible to resolve all latent ambiguities. But section 1318 did not adopt the principle

52. 117 U.S. 210, 217 (1886).
53. Wigmore, supra note 6, § 2470; see Annot., 94 A.L.R. 26, 47 (1935).
54. J. Thayer, A Preliminary Treatise on Evidence at the Common Law 424 (1898). "Generally speaking, ambiguities, or any other difficulties, patent or latent, are all alike as regards the right and duty to compare the documents with extrinsic facts. . . ." Id. at 425; accord, Page, supra note 2, § 32.7, at 258; Wigmore, supra note 6, at 2473-75; Warren, Interpretation of Wills—Recent Developments, 49 Harv. L. Rev. 689, 705 (1936).
55. Restatement of Property § 241, comment a (1940).
56. E.g., Bratton v. Trust Co. of Ga., 191 Ga. 49, 56, 11 S.E.2d 204, 208 (1940); State Trust Co. v. Pierce, 126 Me. 67, 136 A. 289 (1927); Rowe v. Strother, 341 Mo. 1149, 1154, 111 S.W.2d 93, 96 (1937); see Annot., 94 A.L.R. 26, 55-65 (1935).
57. Cal. Civ. Code § 1340 (1872) provided: "When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received."
58. Cal. Civ. Code § 1318 (1872) provided: "In case of uncertainty arising upon the face of a will, as to application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations."
which excluded extrinsic evidence for purposes of resolving patent ambiguities, as it allowed the court to consider the circumstances under which the will was made. The earlier cases, however, ignored the statutory language of section 1318 and held that extrinsic evidence was inadmissible when offered to resolve a patent ambiguity.59

In 1960 the California Supreme Court declared in *Estate of Torregano*60 that “[e]xtrinsic evidence is . . . admissible to explain an ambiguity arising on the face of a will, or to resolve a latent ambiguity which does not so appear.”61 As authority the court cited Probate Code section 105,62 which had incorporated both sections 1318 and 1340 of the 1872 Civil Code. Since *Torregano*, the courts have found no necessity to distinguish between latent and patent ambiguities and have admitted extrinsic evidence to resolve all ambiguities.63

This abolition of the distinction between patent and latent ambiguities is logically correct because the rationale which supported the Bacon Maxim is no longer accepted.64 Bacon believed that the written word had an inherent potency which required that any alteration of meaning be indicated by the writing itself. Today words are no longer regarded as magical symbols,65 but only as the means by which a writer expresses his intentions and desires. The goal of interpretation is the ascertainment of that intention or desire, and modern courts are repudiating formalistic rules which exclude relevant evidence tending to cast light on the meaning which the testator had ascribed to the

59. In re *Estate of Dominici*, 151 Cal. 181, 90 P. 448 (1907); In re *Estate of Young*, 123 Cal. 337, 55 P. 1011 (1899); In re *Estate of Greenwald*, 19 Cal. App. 2d 291, 65 P.2d 70 (1937). But see In re *Estate of Kurtz*, 190 Cal. 146, 149, 210 P. 959, 960 (1922) (“Evidence is always admissible to show extrinsic facts which serve to explain the meaning of ambiguous words appearing on the face of a will.”).

In *Young* the testatrix's holographic will directed to “my husband, my bank book shall be handet [sic] to him, with gold watch and chain, also two deeds. After my husband deatts [sic] the two deeds shall go to Katharine Muhr.” Enclosed in the envelope with the will were two deeds which represented real property owned by the testatrix at her death. The court held that the two deeds, even though clearly part of the circumstance, were inadmissible because “parol evidence is never admissible to explain a patent ambiguity” and cited Civil Code section 1318 as authority. 123 Cal. at 342, 55 P. at 1012.

60. 54 Cal. 2d 234, 352 P.2d 505, 5 Cal. Rptr. 137 (1960).
61. Id. at 246, 352 P.2d at 512, 5 Cal. Rptr. at 144.
62. See note 14 supra.
63. E.g., *Estate of Mohr*, 7 Cal. App. 3d 641, 86 Cal. Rptr. 731 (1970); *Estate of Black*, 211 Cal. App. 2d 75, 27 Cal. Rptr. 418 (1962); *Estate of Lyon*, 201 Cal. App. 2d 638, 20 Cal. Rptr. 249 (1962). But see *Estate of Jones*, 55 Cal. 2d 531, 360 P.2d 70, 11 Cal. Rptr. 574 (1961), where it was held that extrinsic evidence consisting of the testator's oral declarations was inadmissible under Probate Code section 105. This case is discussed in the text accompanying note 75 infra.
64. See note 22 & accompanying text supra.
65. See id.
words he chose. Thus the California courts have taken an important step towards fulfilling the statutory directive that the “will is to be construed according to the intention of the testator.”

**Admissibility of the Testator’s Oral Declarations**

An additional limitation upon the admissibility of extrinsic evidence to assist in ascertaining the testator’s intent is found in the language of Probate Code section 105, which prohibits the admission of the testator’s oral declarations as to his intentions. This limitation was based upon the same rationale which fostered the Parol Evidence Rule: if parties integrated an agreement in a written memorial, their oral utterances should have no bearing upon the legal effect of terms of the writing. The danger of perjury was simply too great to allow admission of such utterances, especially in wills cases where the declarant was deceased.

The California courts, however, have long recognized an exception to the rule. In *In re Estate of Dominici* the supreme court held that oral declarations made to the scrivener of the will were admissible to resolve a latent ambiguity. The court, noting that the California statutory proscription forbidding admission of oral declarations was contrary to the prevailing American and English law, declared that:

> [The prohibition] will not be extended, therefore, beyond its actual language, and will be held to apply to the mere incidental fugitive utterances or declarations of intent, as distinguished from the specific instructions [as to testamentary disposition] which it may be proved were given.

The opinion clearly limited this exception to the resolution of latent ambiguities, citing as authority the “familiar rule of evidence that a

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66. **CAL. PROB. CODE § 101.**

67. The text of this section is set forth in note 14 * supra.*

68. PAGE, *supra* note 2, § 32.9, at 271; WIGMORE, *supra* note 6, § 2425.

69. 151 Cal. 181, 90 P. 448 (1907).

70. When a description equally fits two persons or things, such an ambiguity may be removed “by any evidence either of circumstances or declarations of the testator.” *Id.* at 185, 90 P. at 450, quoting 2 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 298 (2d ed. 1898).

71. 151 Cal. at 185, 90 P. at 450.

72. The decision restricted the exception to latent ambiguities “where there are two persons or things equally answering the description,” or equivocations. *Id.* at 185, 90 P. at 450. Later cases interpreted the decision as standing for the proposition that oral declarations were admissible to resolve all latent ambiguities. *In re Estate of Little, 170 Cal. 52, 54-5, 148 P. 194 (1915); Estate of McDonald, 191 Cal. App. 2d 565, 571, 12 Cal. Rptr. 823, 826 (1961); Estate of Nunes, 123 Cal. App. 2d 150, 158, 266 P.2d 574, 578 (1954). This broadening of the use of the term “latent ambiguity” beyond equivocation and concomitantly, beyond the rationale which originally justified the application of a different rule to this form of ambiguity, is discussed in the text accompanying notes 50-53 * supra.*
doubt arising from extrinsic evidence may be removed by extrinsic evidence."\textsuperscript{73} The substantial majority of the cases decided since \textit{Dominici} have followed the strict formulation of this exception.\textsuperscript{74} The California Supreme Court recently reaffirmed the California rule that oral declarations would not be admitted to clarify a patent ambiguity in \textit{Estate of Jones}.\textsuperscript{75} Prior to the \textit{Jones} decision, two cases had indicated that the \textit{Dominici} exception might be expanded to include patent ambiguities.\textsuperscript{76} In \textit{Estate of Resler}\textsuperscript{77} the court held that if a will were ambiguous about the amount of a bequest, that ambiguity—whether latent or patent—could be resolved by the testator's oral declarations.\textsuperscript{78} But the court in \textit{Jones} ignored the \textit{Resler} decision and held that Probate Code section 105 expressly prohibits admission of the decedent's oral statements as to his testamentary plans and intentions. The court, however, did distinguish the line of decisions which admitted such evidence to resolve latent ambiguities.\textsuperscript{79}

At least one writer has wondered why the California courts anachronistically insist on perpetuating this distinction between latent and patent ambiguities in determining the admission of the testator's oral declarations.\textsuperscript{80} In the recent decisions which have permitted the admission of extrinsic evidence other than oral declarations to clarify uncertain provisions,\textsuperscript{81} the courts found no logical reason or statutory mandate to distinguish between the two classes of ambiguities. Nor is there any additional reason to discriminate between these two classes when the testator's oral declaration is the evidence in question. It is true that a witness might distort the deceased's testamentary intent through perjured testimony about his conversations with the testator.

\textsuperscript{73} 151 Cal. at 186, 90 P. at 450.
\textsuperscript{75} 55 Cal. 2d 531, 539, 360 P.2d 70, 75, 11 Cal. Rptr. 574, 579 (1961).
\textsuperscript{76} Estate of Resler, 43 Cal. 2d 726, 278 P.2d 1 (1954); Estate of Pierce, 32 Cal. 2d 265, 196 P.2d 1 (1948). In \textit{Estate of Pierce} the court held that oral declarations offered to resolve a patent ambiguity were inadmissible because not made to a scrivener and "therefore do not come within this exception." 32 Cal. 2d at 274, 196 P.2d at 6-7. This language implied that, if the oral declarations had been made to a scrivener, they would be admissible to resolve a patent ambiguity.
\textsuperscript{77} 43 Cal. 2d 726, 278 P.2d 1 (1954).
\textsuperscript{79} \textit{Estate of Jones}, 55 Cal. 2d 531, 539, 360 P.2d 70, 75, 11 Cal. Rptr. 574, 579 (1961). This decision was not affected by \textit{Estate of Russell}, 69 Cal. 2d 200, 44 P.2d 353, 70 Cal. Rptr. 561 (1968), in which it was specifically stated that that decision was not to disturb the proscription embodied in Probate Code section 105. See note 23 \textit{supra}.
\textsuperscript{80} 14 \textit{Stan. L. Rev.} 409 (1962).
\textsuperscript{81} See note 63 & accompanying text \textit{supra}.
But this danger exists, to the same degree, when the ambiguity is latent as when it is patent. This fear of perjury did not prevent the California Supreme Court from resolving a latent ambiguity by relying upon evidence consisting solely of oral declarations to the scrivener.  

Recent California cases have made a subtle distinction between oral declarations which manifest the decedent's "intentions" and those which indicate his "state of mind." Under this questionable differentiation, the latter form of evidence is admissible, whether the ambiguity is patent or latent. For example, in Estate of Fries, the testatrix, using a printed form for her will, failed to state to whom she was bequeathing or devising all her property. Faced with this patent ambiguity, the court allowed the husband to testify that the testatrix had orally promised to bequeath her entire estate to him. The court was of the opinion that this evidence was offered not to prove the intention of the testatrix, but to prove her "state of mind with respect to the meaning of particular language used by [her] in a will which is ambiguous." This evidence was therefore admissible because "the proscription [of Probate Code section 105] does not apply to oral declarations of a testator which are offered for the purpose of showing his state of mind." In the subsequent case of Estate of Gilliland the court of appeal held that the testator's oral declarations made to friends and servants should be admitted to prove a "state of mind" directly contradictory to the plain language of the will. The court believed that such evidence was

82. In re Estate of Little, 170 Cal. 52, 148 P. 194 (1915). The exception carved out of the proscription of Probate Code section 105 in Dominici was limited by that decision to oral declarations made by the testator to the scrivener. The court found "a broad difference between testimony of the casual remark of a man as to his intention . . . and the positive instructions which he has given to his attorney in the very performance of the testamentary act. . . ." In re Estate of Dominici, 151 Cal. 181, 185, 90 P. 448, 450 (1907). The recent cases, however, have ignored this distinction and broadened the exception to include such declarations made to a nonscrivener. Estate of Balyeat, 268 Cal. App. 2d 556, 567 Cal. Rptr. 120 (1968) (declarations made to friends & servants held admissible); Estate of Glow, 208 Cal. App. 2d 613, 25 Cal. Rptr. 416 (1962) (to beneficiaries of the testamentary trust); Estate of Doody, 204 Cal. App. 2d 419, 22 Cal. Rptr. 264 (1962) (to a legatee); Estate of Nichols, 199 Cal. App. 2d 783, 19 Cal. Rptr. 749 (1963). See also Annot., 94 A.L.R. 26, 280 (1935); PAGE, supra note 2, at 274.


85. Id. at 730, 34 Cal. Rptr. at 753. Contra, Estate of De Moulin, 101 Cal. App. 2d 221, 255 P.2d 303 (1950), which held oral declarations made to the scrivener inadmissible in a similar factual situation on grounds that Probate Code section 105 precluded admission of such evidence.

86. 221 Cal. App. 2d at 730, 34 Cal. Rptr. at 753 (1963).

made admissible by *Estate of Russell* to show that plain language is in fact ambiguous.

Although the distinction between "intention" and "state of mind" in the context of the above two cases is questionable, it does provide a method of circumventing the statutory prohibition of Probate Code section 105. The willingness of the courts to go to such extremes strongly suggests that the provision serves only as an obstacle to the admission of reliable evidence. It is clear that there is a trend in the rules of evidence which favors the admission of all relevant extrinsic evidence. Additionally, the fear of perjury has not precluded the courts from admitting the testator's oral declarations to resolve latent ambiguities, or to prove his "state of mind." Therefore, it is submitted that a statutory revision should entirely eliminate the prohibitory language of the statute. The tides of change and common sense have dashed its rational underpinnings, leaving only a law which serves no useful purpose.

**Summary**

It is now settled that extrinsic evidence will be admitted to demonstrate that a will, although clear and unambiguous on its face, is in fact ambiguous. If the proffered evidence shows that the provisions of the will are reasonably susceptible of two or more alternative interpretations, additional extrinsic evidence is admissible to prove which of the interpretations the testator intended. The intent of the testator is controlling, not his mistaken or imperfect attempt to express that intent.

Additionally, if a will contains either a latent or patent ambiguity, extrinsic evidence is now admissible to resolve the uncertainty. Again, the disposition actually intended by the testator is to be given effect, and extrinsic evidence is admissible to ascertain that intent regardless of how the ambiguity in the will is classified.

There remains only one remnant of the old common-law policy which excluded extrinsic evidence in most probate cases—the statutory provision of Probate Code section 105 prohibiting the admission of the testator's oral declarations regarding his intentions. This restriction is based upon the premise that the written word was omnipotent, a con-

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88. 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968).
89. 276 Cal. App. 2d at 264, 80 Cal. Rptr. at 880.
94. See note 14 & text accompanying note 67 supra.
cept which has been expressly repudiated by the California Supreme Court in *Estate of Russell*\(^9^5\) and in the recent cases concerning contract interpretation.\(^9^6\) The function of the court today is to give effect to the intentions of the testator, not to protect the sanctity of the written word; and any statutory prohibition preventing admission of evidence relevant to the search for the testator's intent cannot be justified. The only issue should be the weight to be given to the extrinsic evidence offered, an issue to be resolved by the finder-of-fact in the particular litigation.

The California courts have done much to eliminate from the process of interpretation of wills those rules based upon outmoded principles. The burden of reform now rests upon the California Legislature to complete this modernization by eliminating statutes which arbitrarily exclude extrinsic evidence. A statute allowing admission of all relevant extrinsic evidence is needed. Only then will the testator be fully elevated to his proper position of master over the words he used.

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95. 69 Cal. 2d 200, 444 P.2d 353, 70 Cal. Rptr. 561 (1968). See text accompanying notes 18-24 *supra.*
96. See note 37 *supra.*
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