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Admissibility of Testator's Declarations of Intention

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ADMISSIBILITY OF TESTATOR'S DECLARATIONS OF INTENTION

Introduction

Evidence is one of the most basic facets of legal endeavor, and contests involving the interpretation of wills give rise to a great deal of litigation. Combining the two premises, one reaches the conclusion that the admissibility of evidence in cases involving the construction of wills is of peculiar importance. This is buttressed by the obvious fact that the intention of the testator regarding his testamentary dispositions can no longer be gathered from him, and the only remaining sources are evidence contained in the words of the will and evidence which arises outside of the will.

One of the most troublesome types of such extrinsic evidence is the declarations of intent made by the testator prior to, concurrent with, or subsequent to the execution of the will. This class of extrinsic evidence is the subject of this article.

The Object of Construction

To do substantial justice to a discussion of the admissibility of extrinsic evidence, it is necessary to set out the exact reason for which the evidence is sought to be admitted. The object of construction is to establish the intention of the testator: what his intention was when he wrote the words which constitute his will and what disposition of property he intended to accomplish by those words. An excellent statement of this rule was made by the Supreme Court of South Carolina in *Rogers v. Rogers*[1] to the effect that the cardinal rule of construction is to ascertain the intention of the testator and to put it into effect unless it contravenes some well-settled rule of law.

The *intention* of the testator refers to the *intent* the words in the will indicate; their *sense* or *meaning* as opposed to any suggestion of *volition* of the testator.[2] Further, the intention of the testator which an action for interpretation seeks to determine is the intention expressed by the words in the will, *not* what the

1. 221 S.C. 360, 366, 70 S.E.2d 637, 640 (1952). See also Bettis v. Harrison, 186 S.C. 352, 195 S.E. 835 (1938); 95 C.J.S. *Wills* § 591 (1957).

2. MacDonald v. Fagan, 118 S.C. 510, 523, 111 S.E. 793, 796 (1922); see also 9 Wigmore, Evidence § 2472 (3d ed. 1940).

testator had in mind and did not express *or what he meant to say*.[3] South Carolina is in accord with this proposition.[4]

GENERAL RULE OF ADMISSIBILITY OF EXTRINSIC EVIDENCE

It follows from the fact that the testator's intention is to be determined from the words used in the will that no extrinsic evidence may be introduced to show what his intention was. This general rule is followed by all American jurisdictions.[5] It is merely a statement of the parol evidence rule which forbids the admission of parol evidence to vary or contradict the terms of a written document.

The reasons behind the rule are not complex. A will may be viewed as an integrated document. It represents the final product of the testator's thoughts, his notes and the thoughts and persuasiveness of those around him as well as of the draftsman. To be sure, the ingredients of the written will existed before the actual writing, but they were mingled with other thoughts and irrelevant ideas, both expressed and unexpressed. The written will represents the selection of ideas from the mass which embody its net effect. The will, alone, represents the testator's intention.[6] Once the act has been placed into one instrument which represents the testator's will, all other utterances on that topic are immaterial for the purpose of determining what are the terms of the act.[7]

From this, it can easily be seen that once the testator has expressed his intention in his written will, only those words which he used may be looked to in order to determine his intent. No extrinsic utterance may be brought in to bear on the question. The words of the will are supreme.

EXCEPTION TO GENERAL RULE IN CASE OF AMBIGUITY IN THE WILL

Every rule must have its exceptions, and the rule forbidding the admission of extrinsic evidence to throw light on the intent of the testator is no different, in that respect, from other rules.

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3. Annot., 94 A.L.R. 17, 257 (1935); *accord*, 95 C.J.S. *Wills* § 591 (1957).

4. 4 Rich. Eq. 447 (S.C. 1852); see also Dozier v. Able, 241 S.C. 358, 128 S.E.2d 682 (1962); Renneker v. South Carolina Ry. Co., 20 S.C. 219 (1893); Holbrook v. Gaillard, Riley's Eq. 167 (S.C. 1837).

5. 9 WIGMORE, EVIDENCE § 2425 (3d ed. 1940); see also Annot., 94 A.L.R. 17, 257 (1935).

6. 9 WIGMORE, EVIDENCE § 2425 (3d ed. 1940).

7. *Ibid.*

The only instances in which extrinsic evidence may be used occur when there is an ambiguity in the words of the will.[8] Ambiguities are of two types, patent and latent,[9] and the rules of admissibility differ with regard to each type.

South Carolina recognizes the distinction and describes a patent ambiguity as one which arises on the face of the will.[10] A latent ambiguity, on the other hand, is defined as one which arises when the words of the will are applied to the object or subject which they describe.[11]

With regard to a latent ambiguity, the rule is that extrinsic evidence may be introduced to clarify such an ambiguity.[12] In the case of a patent ambiguity, however, it has been said that "parol evidence is inadmissible to explain a patent ambiguity in a will."[13] This may be an unfortunate statement of a general rule which does not draw an analytical distinction that perhaps should be made. A more correct statement might be that extrinsic evidence may be admitted to resolve a patent ambiguity where it cannot be resolved from the face of the will or by rules of construction, but could be resolved by the use of extrinsic evidence. This, however, is not the stated rule, though it may be followed in practice.

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8. Foreign Mission Bd. of So. Baptist Convention v. Gaines, 42 F. Supp. 85 (E.D.S.C. 1942); Rogers v. Morrell, 82 S.C. 402, 64 S.E. 143 (1908); Reynolds v. Reynolds, 65 S.C. 390, 43 S.E. 420 (1903).

9. Jennings v. Talbert, 77 S.C. 454, 58 S.E. 420 (1907).

10. [A]mbiguities, however, are patent and latent; the distinction being that in the former case the uncertainty is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe, while in the latter case the uncertainty arises, not upon the words of the will, deed, or other instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe.

Jennings v. Talbert, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907).

11. *Ibid.*

12. Foreign Mission Bd. of So. Baptist Convention v. Gaines, 42 F. Supp. 85 (E.D.S.C. 1942). Extrinsic evidence has been admitted to resolve a latent ambiguity in South Carolina cases relating to the identity of a legatee whether an individual, a charity or a corporation, *Gaines, supra*; inaccuracy of designation or description, *Gaines, supra*; words of doubtful import and the particular land in question, Perry v. Morgan, 1 Strob. Eq. 8 (S.C. 1846); and a case of a legacy made to depend on a test outside of the will, Pell v. Ball, Speer's Eq. 48 (S.C. 1843). For a judicial enumeration, see Hall v. Hall, 2 McCord's Eq. 269 (S.C. 1827).

13. Jennings v. Talbert, 77 S.C. 454, 58 S.E. 420 (1907); Donald v. Denby, 2 McMul. 123, 130 (S.C. 1841); Holbrook v. Gailard, Riley's Eq. 167 (S.C. 1827).

THE TYPES OF EXTRINSIC EVIDENCE AVAILABLE TO AID IN THE CONSTRUCTION OF A WILL

Generally, extrinsic evidence is divided into two types; and for purposes of this article, these types will be designated as "indirect" and "direct." Indirect refers to evidence which is admitted to *explain* the *meaning* of the words used by the testator in his will; the circumstances surrounding the testator at the time of the making of the will and his comments which do not show his intent directly. It shows the intention of the testator, or the meaning of the words he used, circumstantially. For example, where there is ambiguity as to the identity of the beneficiary, the testator could be quoted as saying, "I am fond of *X*," to show that he meant the words in his will to give property to *X*. But if the will gave property to *Y*, the statement of the testator could not be used to show that he intended the property to go to *X*, as there is no ambiguity in the language of the will.

On the other hand, direct evidence refers to statements by the testator that directly indicate what he intended when he wrote his will. For example, the testator could not be quoted as saying, "I hope *X* will like the house I am going to give her," to show that the words of the will were meant to give the house to *X*. (This assumes the absence of an equivocation.)[14]

In other words, evidence which is ancilliary only to a right of understanding of the words to which it is applied, and which is therefore simply explanatory of the words themselves, is indirect, while evidence which shows what the testator *intended* to write, is direct.[15] This distinction is recognized and accepted by most American jurisdictions,[16] including South Carolina.[17]

Is the distinction valid? The first argument that it is lies in the fact that virtually every jurisdiction makes the distinction.[18] Aside from that, the second—and basic—reason for drawing the distinction between the types of extrinsic evidence is the difference in the degree of danger which is inherent in the admission of each type. By "danger" is meant the danger of having a for-

14. Annot., 94 A.L.R. 17, 55 (1935).

15. *Id.* at 258.

16. *Compare* 95 C.J.S. *Wills* § 591, *with* 95 C.J.S. *Wills* § 401 (1957); see also 9 WIGMORE, EVIDENCE § 2470, 2471 (3d ed. 1940); Annot., 94 A.L.R. 17, 258 (1935).

17. McCall v. McCall, 4 Rich. Eq. 447 (S.C. 1852); *accord,* Clarke v. Clarke, 46 S.C. 230, 24 S.E. 202 (1896); Schoppert v. Gilliam, 6 Rich. Eq. 83 (S.C. 1835).

18. Annot., 94 A.L.R. 17, 258 (1935).

mally executed writing nullified, or varied, by an informal, unattested testamentary declaration. In the case of indirect evidence, which merely shows the testator's intent circumstantially, the danger of giving effect to an informal statement of intent is much less than when dealing with a direct *declaration* of such intent.

ADMISSIBILITY OF DIRECT EVIDENCE

The general rule of exclusion of extrinsic evidence in actions for the construction of a will is subject to an exception which allows extrinsic evidence in the case of an ambiguity. This exception is itself subject to an exception which excludes direct evidence of the testator's intent.

General Rule Regarding Admissibility of Direct Evidence

The question sought to be answered on construction is: What is the meaning of the words used by the testator in his will?[19] As pointed out above, extrinsic evidence is admissible or inadmissible according to its bearing on the issue which this question raises.[20] The general rule, though not without exceptions, is: Evidence of declarations by the testator is not admissible to aid in the construction of a will.[21]

Among the various types of circumstantial evidence which are admissible in interpreting a will, there is one forbidden variety: expressions of intention dealing with the subject of the specific document.[22] The South Carolina position is in conformity with the general rule. In *Pell v. Ball*,[23] an effort was made to admit into evidence a memorandum book kept by the testator subsequent to the making of his will in order to show what he intended to pass by a clause in his will. The evidence was excluded on the grounds that since the requirements for the execution of a will were set forth in a statute, that the only competent evidence was the written document, and direct evidence of intent was to be excluded.[24]

19. *Id.*; see also Wheeler v. Dunlap, 13 Ky. (B. Mon.) 291 (1952); 95 C.J.S. *Wills* § 591 (1957).

20. McCall v. McCall, 4 Rich. Eq. 447 (S.C. 1852); Annot., 94 A.L.R. 17, 258 (1935), citing: WIGRAM, RULES OF LAW IN INTERPRETATION OF WILLS, 53-4 (3d ed. 1840).

21. Annot., 94 A.L.R. 17, 263 (1935).

22. 9 WIGMORE, EVIDENCE § 2471 (3d ed. 1940); see also Annot., 94 A.L.R. 17, 30 (1935).

23. Speer's Eq. 48 (S.C. 1843).

24. *Id.* at 82; see also Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964); Smith v. Heyward, 115 S.C. 145, 163, 105 S.E. 275, 281 (1920); Hall v. Hall, 2 McCord's Eq. 269 (S.C. 1827).

Reasons for the General Rule

It must be conceded that the very evidence which is excluded by the rule as stated is the most pertinent to the determination of what the testator meant by the words in his will. There are several reasons for this exclusion. The hearsay rule is *not* one of them.[25] The basic reason for the exclusion of direct evidence lies in the rule considered above, namely, that no extrinsic utterance may compete with and overthrow the words of a document which is the final embodiment of a transaction.[26] The effect of the rule is to deny any jural effect to such direct evidence, even though it is the best evidence available in interpreting a will.[27]

A second reason for the exclusion lies in the fact that the requirements for the execution of a will are set out in statutes,[28] and the direct statement of the testator's intent which does not meet those requirements is necessarily excluded as an invalid testamentary declaration. Page mentions the danger of perjury as a third reason and relates it to the motive behind the passage of the various statutes.[29]

Application of the Rule

In general, the application of the rule is not difficult; it merely prevents the introduction of the testator's oral and written instructions, or other declarations of intent, from being set up to enlarge, overthrow or replace the words of the will. In short, it excludes everything that would be excluded by the rule of integration.[30] The difficulties arise only when the various exceptions are considered.[31]

25. Such declarations are admissible under an exception to that rule. 6 WIGMORE, EVIDENCE §§ 1725, 1735 (3d ed. 1940).

26. Rogers v. Rogers, 221 S.C. 360, 70 S.E.2d 637 (1952); see also Bettis v. Harrison, 186 S.C. 352, 195 S.E. 835 (1938); 95 C.J.S. *Wills* 591 (1957); 9 WIGMORE, EVIDENCE § 2425 (3d ed. 1940). For a compilation of American jurisdictions, see Annot., 94 A.L.R. 17, 257 (1935).

27. The effect of that rule is to deny any jural effect to such declarations. When a transaction has been embodied in a single document, no other utterance of intent or will on the same subject can be given jural effect. Hence, such a declaration is excluded from consideration even in the process of interpretation, not because it would not for that purpose be useful, but because it would be improper for the other purpose.

9 WIGMORE, EVIDENCE § 2471 (3d ed. 1940).

28. S.C. CODE ANN. § 19-295 (1962); § 19-206, *Soldier's and Mariner's Wills*; §§ 19-291 to -294, *Nuncupative Wills.*

29. 4 PAGE, WILLS § 32.9 (3d ed. 1961).

30. 9 WIGMORE, EVIDENCE § 2471 (3d ed. 1940).

31. *Ibid.*

EXCEPTIONS TO THE RULE THAT DIRECT EVIDENCE IS NOT ADMISSIBLE

Exception for Equivocation

Direct evidence is, however, admissible to aid in the construction of a will where an equivocation exists. This term has caused no little confusion, most of it due to vague definitions and uncertain meanings of words used in the definitions. The first task, then, is to define "equivocation" precisely in order that the exception allowing direct evidence to be admitted will be limited to the correct situations.

A. Definition of equivocation. Webster defines equivocation as an "ambiguity of speech; the use of words of a double significance."[32] This is a good general definition, but it is not so precise as to be satisfactory for use in the legal field. Unfortunately, there is disagreement among both the cases and the writers as to the exact meaning of the word. The problem arises mainly because of the choice of words used in the definitions rather than because of lack of understanding.

Basically, there are two schools of thought. Those who follow the strict rule define an equivocation as language applying exactly to two or more persons or things.[33] An example of this would be a devise to Bob Wallace. If, on application of the language of the will, it is found that two persons bearing the name of *Bob Wallace* exist and could have been reasonably intended, the will would contain an equivocation. The liberal view, on the other hand, is adopted by those who define an equivocation as language applying equally or partly to two or more persons or things.[34] An example of this would be a devise to "my cousin John." Upon application of the language in the will, it is found that the testator has a *nephew*, John, and a cousin, *William*. The errant description does not fit either person *exactly*, but fits them both equally and partly.

Page uses the words "precisely and equally"[35] to define an equivocation, thus adopting the strict view. It is rather obvious that the word "equally" is unnecessary, because if the description fits both persons or things precisely, it follows that it must fit them equally. Wigmore and Wigram present more of a problem

32. WEBSTER, UNABRIDGED DICTIONARY (2d ed. 1964).

33. 4 PAGE, WILLS § 32.9 (3d ed. 1961).

34. 4 PAGE, WILLS § 32.9 (3d ed. 1961); 9 WIGMORE, EVIDENCE § 2472 (3d ed. 1940); RESTATEMENT, PROPERTY § 242, comment *j* (1940).

35. 4 PAGE, WILLS § 32.9 (3d ed. 1961).

than Page with regard to their stand on the issue. Wigmore defines an equivocation as "a term which, upon application to external objects, is bound to fit two or more of them equally."[36] The word *equally* is defined as "of the same quantity, size, number, value, degree, intensity, etc."[37] A description may fit two things equally *and* exactly, but it may also fit them equally and *partially*. This reasoning leads one to the conclusion that Wigmore defines an equivocation from the liberal point of view. That is, he recognizes that an equivocation exists when the description applies precisely and equally,[38] but he feels that a description which applies equally, but partially, to two things should also constitute an equivocation.[39]

Wigram presents another problem. He defines an equivocation as "terms which are applicable indifferently to more than one person or thing."[40] Webster defines the word *indifferently* as, "equally, impartially; without favor, prejudice or bias."[41] This definition brings Wigram within the scope of the logic relating to Wigmore. This being the case, Wigram espouses the theory that an equivocation occurs when the language of description applies either equally and *precisely* or equally and *partially*.

Thus, the situation appears to be that Page adopts the strict view and merely recognizes the liberal view, while Wigmore, Wigram, and the RESTATEMENT OF PROPERTY[42] recognize both and adopt the latter.

It is worthy of note that Wigmore comments that the rulings on evidence do not differ from state to state except in exemplifying one rule or the other.[43]

The latest case on the point in South Carolina is *Shelley v. Shelley*,[44] which involved the construction of a will devising land by the words "northern part" and "southern part." The court treated the description as a latent ambiguity which applied to two things equally. This is, as Mr. Justice Bussey pointed out, an equivocation. The importance of this case is the fact that the

36. 9 WIGMORE, EVIDENCE § 2472 (3d ed. 1940).
37. WEBSTER, UNABRIDGED DICTIONARY (2d ed. 1964).
38. 4 PAGE, WILLS § 32.9 (3d ed. 1961).
39. 9 WIGMORE, EVIDENCE § 2474 (3d ed. 1940).
40. Annot., 94 A.L.R. 17, 30 (1935), citing: WIGRAM, RULES OF LAW IN INTERPRETATION OF WILLS, 55 (3d ed. 1840).
41. WEBSTER, UNABRIDGED DICTIONARY (2d ed. 1964).
42. RESTATEMENT, PROPERTY § 242, comment *j* (1940).
43. 9 WIGMORE, EVIDENCE § 2472 (3d ed. 1940).
44. 244 S.C. 598, 137 S.E.2d 851 (1964).

words applied precisely and equally to the two objects. Thus, South Carolina does recognize the strict definition of an equivocation. The real question is whether the liberal view is also adopted. That is, does South Carolina allow an equivocation to arise when the descriptive language in the will applies equally, but only partially, to two or more persons or things? There has been no case directly in point. The closest case is *Hall v. Hall*,[45] where it was said:

> [P]arol evidence has been admitted to explain latent ambiguities, as in the case of two persons bearing the same name. There, parol evidence has been received to explain which of them was intended by the testator as the legatee. And so parol evidence has been received, to prove what property was intended when the testator was possessed of two of the same description.[46]

The significance of this language lies not in the statement of the strict rule, but in the exclusion of the liberal rule. The court was called upon to decide whether direct evidence of intent could be admitted to strike a clause in the will. In resolving this question, the court undertook to state when such evidence could be admitted and failed to declare the liberal rule as constituting such a situation. Beyond this, no South Carolina case has been found which mentions the liberal definition, nor has a case been found that admitted such evidence under the circumstances. This, of course, does not preclude the adoption of the liberal rule in the future.

B. Types of equivocation. There are two types of equivocation, patent and latent. The definitions of patent and latent equivocations are respectively the same as those for patent and latent ambiguities. An example of a latent equivocation would be a devise in a will giving property to *X*. On its face, the will shows no equivocation. If, however, upon the application of the language in the will, it is found that there are two persons named "*X*," the will would contain a latent equivocation. It is latent because it does not appear on the face of the will but arises only on the attempted application of the language in the will. It is an equivocation because the descriptive language fits two persons exactly.

45. 2 McCord's Eq. 269 (S.C. 1827).
46. *Id.* at 274-75.

On the other hand, a patent equivocation does appear on the face of the will. One of the best examples of such an equivocation is found in ATKINSON ON WILLS,[47] as follows:

> This doctrine has been applied even when the ambiguity appeared on the face of the will. Thus, where a will contained the legacy to "George Gord, the son of John Gord," and another to "George Gord, the son of George Gord," and also a devise to "George Gord, the son of Gord," it was permissible to show testator's declarations as to which of the Georges was intended as devisee.[48]

C. Admissibility in cases of equivocation. While there is no great difference in the admissibility of direct evidence according to which definition is adopted by a particular jurisdiction,[49] nevertheless, it is obvious that the number of situations in which such evidence is allowed will be larger in a jurisdiction recognizing the liberal view. Thus, given an equivocation, direct evidence is admissible to assist in interpreting an equivocation.[50]

The South Carolina cases on the subject are not numerous but are in accord with the general statement of the exception. As mentioned, in the *Shelley* case, the testator caused some confusion by designating the division of a piece of land by the words "northern part" and "southern part." This language was treated as a latent equivocation. The court was correct in finding an equivocation, but it appears to be patent rather than latent in nature. What could be more patently equivocal than "northern and southern part"? The northern part could start one inch from the southern boundary and go north, and the southern part could start one yard from the northern boundary and go south. Regardless of the nature of the equivocation, the important point is the language used by the court in admitting direct evidence of the testator's intent.[51]

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47. ATKINSON, WILLS § 60, at 287-88 (2d ed. 1953).

48. *Id.*, citing: Gord v. Needs, 2 M.&W. 129, 150 Eng. Rep. 698 (1836); see also Von Fell v. Spriling, 96 N.J. Eq. 20, 124 Atl. 518 (Ch. 1924), 34 YALE L.J. 214. *Cf.* Chafee, *Progress of the Law*, 35 HARV. L. REV. 673, 679 (1922).

49. 9 WIGMORE, EVIDENCE § 2474 (3d ed. 1940).

50. *Id.*; see also People's Nat'l Bank of Greenville v. Harrison, 198 S.C. 457, 18 S.E.2d 1 (1932); Annot., 94 A.L.R. 17, 257 (1935).

51. [W]e think it well to point out that while declarations of intention on the part of a testator are ordinarily excluded from consideration, they are, nevertheless, according to the great weight of authority, receivable to assist in interpreting an equivocation, or latent ambiguity.
Shelley v. Shelley, 244 S.C. 598, 606, 137 S.E.2d 851, 855 (1964).

Beckwith v. McAlister[52] involved the attempted introduction into evidence of a written memorandum between the testator and a third party for the purpose of showing to whom the testator meant to bequeath certain property. The contents of the agreement were such that they indicated the intent directly,[53] and the court excluded the evidence on that ground.[54]

In re Robb's Estate[55] seemingly contradicts the exception to the general rule, but on closer examination it becomes apparent that it does not. *Robb* involved a devise of land "to such persons as would take under the laws of descent and distribution." The testator was survived by no one who could take under the statute[56] but was survived by an illegitimate sister. The court found that the evidence of the testator's intent to pass the property to his illegitimate sister was competent. It consisted of testimony as to how he referred to his illegitimate "sister," and not what he intended to give her or to whom he intended to devise any part of his estate. Thus, the evidence was indirect, showed his intention circumstantially and, therefore, was properly admitted. Had it been direct evidence, the court would have had more difficulty in holding it admissible even in a case such as this.

A case very much in point is *Capps v. Richardson*,[57] involving declarations of intention made both prior and subsequent to the making of the will. These statements indicated that the testator wished certain property to go to a nephew, notwithstanding the terms of his will. The testimony was excluded by the trial judge and his action was affirmed by the court on the ground that the testimony "tends directly to alter, vary and contradict the language of the will."[58]

52. 165 S.C. 1, 162 S.E. 623 (1932).

53. "Should said sum of $275.00 per year be promptly and fully paid when due, then said Stelts hereby agrees he will allow the mortgages" given by Mrs. Beckwith, "to run on and will not allow them to stand, and to go to the parties provided for under his will hereinbefore mentioned." Beckwith v. McAlister, 165 S.C. 1, 11, 162 S.E. 623, 627 (1932).

54. The agreement of March 23, 1916, between Mrs. Beckwith and Stelts, having been executed after the will, and not being attested by three witnesses, cannot be received as a testamentary paper or as showing the interpretation to be placed on the will. *Id.*; see also, Smith v. Heyward, 115 S.C. 145, 163, 105 S.E. 275, 281 (1920).

55. 37 S.C. 19, 16 S.E. 241 (1892).

56. S.C. CODE ANN. § 19-52 (1962).

57. 215 S.C. 34, 53 S.E. 876 (1949).

58. *Id.* at 878; see also Hall v. Hall, 2 McCord's Eq. 269 (S.C. 1827); Wish v. Kershaw, reported in a note to Sherman v. Angel, Bailey's Eq. 351 (S.C. 1827).

D. Equivocation and latent ambiguity. There has been some confusion in the law regarding admissibility of direct evidence in the case of a latent ambiguity which does not rise to the status of a true equivocation (using either definition). This confusion has resulted from language in the cases using the term "latent ambiguity" as the equivalent of the term "equivocation" with regard to the admissibility of direct evidence of intent. For example, Mr. Justice Bussey, in the *Shelley* case, said that "while declarations of intention on the part of a testator are ordinarily excluded from consideration," they may be "receivable to assist in interpreting *an equivocation, or latent ambiguity.*"[59] (Emphasis added).

Although a normal reading of the pertinent language tends to indicate that direct evidence could come in to explain a latent ambiguity of every type, such is not the case. There are an infinite number of possible latent ambiguities; the types are as variable as the number of wills executed. On the other hand, there are few cases of true equivocation, and the exception was directed toward allowing the admission of direct evidence of intent only in the latter case. This is indicated by the following excerpt from the *Hall* case.

> In other cases parol evidence has been admitted to explain latent ambiguities, *as in the case of two persons bearing the same name.* There, parol evidence has been received to explain which of them was intended by the testator as the legatee. And so parol evidence has been received, to prove what property was intended when the testator was possessed *of two of the same description. All these cases are however treading on dangerous grounds.*[60] (Emphasis added).

As can be seen from the language used, the use of direct evidence of intent is limited to cases that involve an equivocation. The possibility of admitting such evidence in all cases of mere latent ambiguity is further negated by the statement of the court to the effect that to allow it in cases of true equivocations is dangerous, thus implying that to attempt to admit it in all cases of mere latent ambiguity would be so dangerous as to be beyond question.

Also in support of the view of limiting the use of direct evidence to cases of equivocation only is the New Jersey case of

59. Shelley v. Shelley, 244 S.C. 598, 137 S.E.2d 851 (1964).
60. 2 McCord's Eq. 269, 274-75 (S.C. 1827).

Griscom v. Evens.[61] There the court was faced with the problem of direct evidence and resolved the problem as follows:

> The only exception to this legal rule is that declarations of the testator may be resorted to in cases of a latent ambiguity, *which arises where there are two or more persons or things each answering exactly to the person or thing described in the will.* In such an event, parol evidence of what the testator said may be lawfully adduced to show which of them he intended . . . .[62] (Emphasis added).

The important language in the above quotation, for the purpose of this discussion, consists of the words "in such an event." The use of the singular form indicates that there is one, and only one, instance in which direct evidence of intent may be introduced—that of an equivocation.

The South Carolina position as to whether direct evidence of intent is admissible in all cases of latent ambiguity or only in the case of an equivocation is unclear to the extent that the specific question has never been decided. However, the language of the *Hall* case seems to give an adequate indication that direct evidence may be admitted only where there exists a true equivocation. This conclusion is also indicated by the fact that no South Carolina case so much as mentions the possibility of allowing direct evidence to be admitted in such a situation.

It is worthy of note that direct evidence is not admissible to show the character or quantum of the estate intended to be devised even in the case of an equivocation.[63] The rule is such because the nature or extent of the estate devised is determined by the legal effect of the words used to make the gift, and "this question must be determined by the process of construction according to established legal principles."[64]

Other Exceptions

Wigmore states that there are two further exceptions to the rule that declarations of the testator are not admissible in cases

61. 40 N.J.L. 402, 29 Am. Rep. 251 (Sup. Ct. 1878), *aff'd,* 42 N.J.L. 579, 36 Am. Rep. 542 (Ct. Err. & App. 1880); see also Annot., 94 A.L.R. 17, 267-68 (1935).

62. Griscom v. Evens, 40 N.J.L. 402, 407, 29 Am. Rep. 251, 253 (Sup. Ct. 1878), *aff'd,* 42 N.J.L. 579, 36 Am. Rep. 542 (Ct. Err. & App. 1880).

63. Annot., 94 A.L.R. 17, 269 (1935); no South Carolina cases cited.

64. *Ibid.*

involving the construction of an ambiguous will.[65] The first of these is the exception for erroneous description.[66] Wigmore discusses the existence of this exception in the light of two cases, *Miller v. Travers*[67] and *Doe v. Hiscocks*,[68] and comes to the conclusion that such an exception does exist, at least in England. With regard to its existence in the United States, he concludes that there is no firm rule established, but adds that there is no reason why an exception should not be recognized.[69] According to Wigmore, the exception arises when "the description applies in part only to each object."[70] A close reading of this language indicates that this definition is nothing more than the liberal definition of an equivocation. As this is the case, no additional exception exists at all as Wigmore already adopts the liberal definition of an equivocation which is the subject matter of the first exception discussed above.

The next exception involves the rebutting of an equity (legacies, advancements and pretermitted heirs). Generally, this exception operates "wherever in the interpretation of a will, a certain term of legal effect is implied by a general rule of law (and not as a matter of inference from the specific words or phrases of a particular will)."[71]

Wigmore relates this language variously to the appointment of an executor;[72] "the counter-presumption that a specific legacy to the executor negatives the implication of a bequest of the residue;"[73] and the case of statutes requiring "that a child's intestate share be distributed to him, in spite of a testamentary disposal to other persons, unless it is made to appear that the *child was 'intentionally omitted' from the will.*"[74]

FALSA DEMONSTRATIO NON NOCET[75]

We come now to a case of simple mis-description. This is to be carefully distinguished from the situation where the lan-

65. 9 WIGMORE, EVIDENCE §§ 2474, 2475 (3d ed. 1940).
66. 9 WIGMORE, EVIDENCE § 2474 (3d ed. 1940).
67. Cited in 9 WIGMORE, EVIDENCE § 2474 (3d ed. 1940)
68. *Ibid.*
69. 9 WIGMORE, EVIDENCE § 2474 (3d ed. 1940).
70. *Ibid.*
71. 9 WIGMORE, EVIDENCE § 2475 (3d ed. 1940).
72. *Ibid.*
73. *Ibid.*
74. *Ibid.*
75. ". . . a false description does not vitiate a document." ATKINSON, WILLS § 60, at 283 (2d ed. 1953).

guage is applicable to two or more items. Here, we are dealing with words which are in part correct and are in part incorrect, but the incorrect part is not applicable to any other particular object. An example would be a devise of "my *seven* houses on Hampton Street," when in fact the testator had *eight* houses on Hampton Street. The court would reject the word "seven" as a matter of mis-description.[76]

The immediate question at hand, however, is whether or not direct evidence of intent is admissible. "All courts recognize the doctrine though there is some doubt as to the exact situations in which it will be employed. While it is generally agreed that the court may put itself into the situation of the testator to discover his intention, circumstantially the testator's direct declarations of intention are not admissible."[77] This seems to conclude the matter, but Wigmore maintains that, while direct evidence is not admissible in the case of a mere mis-description, it is admissible when the correct words constitute an equivocation.[78]

South Carolina follows the general rule. In *McCall v. McCall*, which was decided on the basis of *falsa demonstratio*, the court said:

> [T]he bequest being of [N]egroes, there is enough of certainty in that description to sustain the gift, notwithstanding the partial mis-description arising from the misnomer. A description false in part may be sufficiently certain by references to extrinsic circumstances, to identify the subject intended; as where a false description is superadded to one which by itself is correct and adequate.[79]

Of course, if the superadded portion of the description is applicable to a particular person or object, you move from the area of simple mis-description into the area of equivocation, and, in the latter instance, direct evidence is admissible.

A BLANK AS AN EQUIVOCATION

This area is troublesome when related to the admission of direct evidence of intent. The general rule is that no evidence

76. ATKINSON, WILLS § 60, at 283 (2d ed. 1953), citing: Moore v. Moore, 1 Ir.R. 232 (1920); *but cf.* Mann v. Land, 177 Va. 509, 14 S.E.2d 341 (1941).

77. ATKINSON, WILLS § 60, at 283 (2d ed. 1953); citing: Haddox v. Jordan, 37 Ohio App. 209, 173 N.E. 11 (1930); Parsons v. Fitchett, 148 Va. 322, 138 S.E. 491 (1937).

78. 9 WIGMORE, EVIDENCE § 2473 (2)(3)(4) (3d ed. 1940).

79. 4 Rich. Eq. 447, 456-57 (S.C. 1852).

may come in to supply a blank in a will.[80] South Carolina follows this general rule. The cases are not numerous but the law is clear. The court, in *Roseborough v. Hemphill*,[81] went into the problem in detail, but the statement made in *MacDonald v. Fagan*[82] disposes of the matter quite well. There the court simply said: "it is too clear for anyone to doubt that the courts have no power to supply the omission."[83]

Although the law is clear, direct evidence could be admitted if the blank was such that it created an equivocation.[84] Bear in mind that the court could not fill the blank by the use of direct evidence, but it could be determined to whom the testator meant to give his estate by the use of direct evidence.

SUMMARY

With regard to South Carolina law, the present situation is as follows. The general rule is that extrinsic evidence cannot be introduced as an aid to the interpretation of a will when no ambiguity appears. If, however, there is a patent or latent ambiguity in the will, indirect evidence of intent may be introduced to explain the words used by the testator in his will. In such a case, direct evidence of intent is excluded. When the patent or latent ambiguity rises to the status of an equivocation, which is defined as occurring only when descriptive words apply precisely and equally to two or more persons or things, direct evidence of intent is admissible. Direct evidence is never admissible to explain the nature or extent of an estate granted by a will and is not admissible in a case of simple mis-description unless the applicable words constitute an equivocation. A blank space may not be clarified by direct evidence in South Carolina.

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80. Hunt v. Hort, 3 Bro.Ch.Cas. 311, 313, 29 Eng. Rep. 554 (Ch. 1791); Rosborough v. Hemphill, 5 Rich. Eq. 95, 108 (S.C. 1852).

81. 5 Rich. Eq. 95, 108 (S.C. 1852).

82. 118 S.C. 510, 111 S.E. 793 (1922).

83. *Id.* at 523, 111 S.E. at 796.

84. Is a blank space an equivocation? It certainly fits two or more objects equally; and where it represents merely an insufficient term in an attempted description it may be treated as an equivocation; because the writer has fixed upon an object, but his words do not carry the description far enough. On the other hand, where a blank space represents a failure to make a final expression of will, the act is incomplete; to supply declarations of intention would be to set up a rival will; there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular document whether a blank space is an equivocation.
9 WIGMORE, EVIDENCE § 2473 (3d ed. 1940).