*William A. Bradley, Plaintiff in error, *v.* The Washington, Alexandria and Georgetown Steam-Packet Company, Defendants in error.

Parol evidence.

The plaintiff in error had, by an arrangement in writing, hired a steamboat, to be put "on the route" from Washington, in the district of Columbia, to Potomac creek, until another steamboat, then building, should be prepared, and be put "on the route." The plaintiff in error was the contractor for carrying the mail of the United States, which was carried in a steamboat to Potomac creek; except in winter, when the navigation of the rivor Potomac was interrupted by ice, when the mail was carried by land; the steamboat so hired was employed in carrying the mail; the ice prevented the use of the steamboat; and the owners claimed, under the contract, the hire of the boat during the time her employment was thus interrupted. The circuit court refused to allow parol evidence to be given to show the purpose for which the steamboat was employed, and to explain the meaning of the terms used in the contract, and of other matters conducing to show the meaning of the contract; the court held, that the evidence was admissible.

It is a principle recognised and acted upon as a cardinal rule by all courts of justice, in the construction of contracts, that the intention of the parties is to be inquired into; and, if not forbidden by law, is to be effectuated.

Extrinsic evidence is not admissible, to explain a patent ambiguity, that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity, that is, one not apparent on the face of the instrument, but arising from extrinsic evidence; that is but to remove the ambiguity by the same kind of evidence as that by which it is created.

Extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter, by proving the circumstances under which it was made; whenever, without the aid of such evidence, the application could not be made in the particular case.[1]

Steam-Packet Co. *v.* Bradley, 5 Cr. C. C. 393, reversed.

Error to the Circuit Court of the District of Columbia, and county of Washington. This was an action on the case, brought in the circuit court, on the 24th December 1834, by the defendants in error. The claim of the plaintiffs was for $2765, alleged to be due on the 7th day of February 1832, for the hire of the steamboat Franklin, before that time let and delivered by the plaintiffs to the defendant, now the plaintiff in error.

The cause was tried in 1838, and the jury, under the directions of the court, found a verdict for the plaintiffs. The defendant tendered a bill of exceptions to the opinion of the court on the matters in controversy, which was duly signed and sealed. The court entered a judgment for the plaintiffs, according to the verdict; and the defendant prosecuted this writ of error.

The bill of exceptions stated, that the plaintiffs gave in evidence and read to the jury, the following paper, dated 19th November 1831, signed by William A. Bradley, as follows:

"I agree to hire the steamboat Franklin, until the Sydney is placed on the route, to commence to-morrow, 20th instant, at ($35) thirty-five

[1] Parol evidence of the surrounding circumstances is admissible, to show the subject-matter of the contract. United States *v.* Peck, 102 U. S. 64. It is admissible, of the circumstances surrounding and accompanying the transaction, tending to show the relation of the parties to each other and to the subject-matter of the contract, and the state or condition of the subject-matter, bearing on the intention of the parties. Phelps *v.* Claren, 1 Woolw. 204.

dollars per day, clear of all expenses, other than the wages of Captain Nevitt. W. A. Bradley."

"19th Nov. 1831.

*90] *"On the part of Washington, Alexandria and Georgetown Steam-Packet company, I agree to the terms offered by William A. Bradley, Esq., for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac creek; which is thirty-five dollars per day, clear of all expenses, other than the wages of Capt. Nevitt, which are to be paid by our company. W. Gunton, President."

"Washington City, Nov. 19th, 1831.

"Washington City, Dec. 5th, 1831.

"Pishey Thompson, Esq.

"Dear Sir:—I will thank you to advise the president and directors of Washington, Alexandria and Georgetown Steam-Packet company, that the navigation of the Potomac being closed by ice, we have this day commenced carrying the mail by land, under our winter arrangement; and have, therefore, no further occasion for the steamboat Franklin, which is now in Alexandria in charge of Capt. Nevitt. The balance due your company, for the use of the Franklin, under my contract with Dr. Gunton, will be paid on the presentation of a bill and receipt therefor. With great respect, Your obedient servant, W. A. Bradley."

"Pishey Thompson, Esq., Present."

In reply to this letter, the president of the steam-packet company wrote to the defendants as follows:—

"Washington, Dec. 6th, 1831.

"Sir:—Your letter of the 5th instant to Mr. Pishey Thompson, has been this afternoon submitted to the board of directors of the Washington, Alexandria and Georgetown Steam-Packet company, at a meeting holden for the purpose. After mentioning that the navigation of the Potomac is closed by ice, and that you had commenced carrying the mail by land, under your winter arrangement, you have therein signified you have no further occasion for the steamboat Franklin, and that she was then in Alexandria in charge of Captain Nevitt. The agreement entered into by you, contains no clause making its continuance to depend on the matters you have designated; but, on the contrary, an unconditional stipulation to 'hire the Franklin until the Sydney is placed on the route;' and I am instructed to inform you, that the board cannot admit your right to terminate the agreement on such grounds, and regard it as being still in full force, and the boat as being in your charge. However disposed the board might have been to concur with you in putting an end to the agreement, under the circumstances you have described, if the company had not been already in litigation with you and your colleague, for the recovery of a compensation for the use of the Franklin, under another contract, to the strict letter of which a

*91] rigid adherence is contended for on your part, notwithstanding *it had undergone a verbal modification; the board could not but recollect this, and be influenced thereby. Yours, respectfully,

"Wm. A. Bradley, Esq. W. Gunton, President."

The plaintiffs also proved, that the steamboat Sydney was in Baltimore, in November 1831, and continued there, until the 26th of January 1832; and that she left there and arrived in the Potomac, and was put "on the route" to Potomac Creek, on the 6th of February of that year. She had not been able to start from Baltimore until the 25th January 1832. The plaintiffs claimed the hire of the Franklin, from the 20th of November 1831, to the 6th day of March 1832, at $35 per day.

The defendant, to support the issue on his part, offered to prove, by competent witnesses, that for several years immediately preceding the date of the contract, he had been, and was still, contractor for the transportation of the United States mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat from Washington to Potomac creek, thence by land to Fredericksburg, in which steamboat, passengers were also usually transported on said route; that during all that time, the defendant had used a steamboat belonging to himself on said route; that he also kept an establishment of horses and stages for the transportation of said mail all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice; and had been obliged for a considerable portion of every winter, during the time he had been so employed in the transportation of the mail, to use his said stages and horses for the transportation of the mails all the way by land to Fredericksburg; in the meantime laying up his steamboat. That just before the date of said contract, the defendant's own steamboat, usually employed as aforesaid on said route, had been disabled, and the defendant was at the time about completing a new boat, called the Sydney; which had been built at Washington and sent round to Baltimore for the purpose of being fitted with her engine and other equipments necessary to complete her for running on said route; and that she lay at Baltimore, in the hands of the workmen there, at the date of said contract; that on the morning of the 5th day of December 1831, Captain Nevitt, the commander of the said steamboat Franklin, refused to go on the said route of the defendants to Fredericksburg, in consequence of the ice then forming in the river, unless he was directed to do so by the plaintiffs; that application was then made to Doctor Gunton, the president of the company, and he directed the said captain to proceed as required, and obey the orders of the defendant; that the said captain did then proceed on the said route, and returned as far as Alexandria, where he stopped, and sent up the mail by land; and, although required to do so by the agent of the said defendant, he refused to come up to the city of Washington with the boat, in consequence of the ice which had formed in *the river; [*92
and that said boat lay at Alexandria, frozen up in the harbor, from that time till the 5th February 1832; that at the same time, the navigation of the Potomac river became obstructed as aforesaid, the navigation at and from Baltimore became also obstructed from the same cause, and the said steamboat Sydney was also frozen up in the basin at Baltimore, before she had been completely equipped with her engine; that at the time she was frozen up, she wanted nothing to complete her equipment, but the insertion of two pipes, a part of her engine, which pipes had been made, but not then put in place, the completing of which would not have required more than two days, and the boat would have been in complete order for being sent round to Washington, and put upon said route; but the ice having inter-

posed, it was deemed by the workmen, and those in charge of the boat, that the insertion of said pipes ought to be postponed till the navigation was clear; that in January 1832, the said pipes were inserted, and the said boat being completely equipped for her voyage, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt that voyage; was again stopped by the ice, and obliged to put in at Annapolis, whence she proceeded to Washington as soon as the ice left it practicable to recommence and accomplish the voyage, and arrived at Washington on the 6th February 1832, and was, the next day, placed by defendant on said route; that during the whole of the period from the first stopping of the navigation as aforesaid, until the said 6th February, the defendant had abandoned the said route to Potomac creek, and prosecuted the land route from Washington to Fredericksburg.

2. That it was known to and understood by plaintiffs, at the time the contract in question was made, and was a matter of notoriety, that as soon as the navigation should be closed by ice, the United States mail from Washington to Federicksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg; and that the said steamboat Franklin would not be required by defendant, and could not be used under said contract, when the navigation should be closed.

3. That it was communicated to the plaintiffs by defendant, or his agent, before the time of making said contract, that the defendant intended to keep said steamboat in use under said contract, so long as the navigation remained open, and no longer.

To the admissibility of which evidence the said plaintiffs by their counse objected, and the court refused to permit the same to go to the jury; but, at the instance of plaintiffs, gave the following instruction, viz: That if the jury shall believe, from the evidence aforesaid, that the said defendant did, on the 19th day of November 1831, write to said plaintiffs the said paper of that date, bearing his signature, and that said plaintiff did accept the same, by the said paper of the same date, and that said defendant and
*93] plaintiffs did respectively *write to each other the papers bearing date the 5th and 6th of December 1831, and that the said steamboat Sydney did in fact first arrive in the Potomac river, on the 6th February 1832, and was placed on the route to Potomac creek, mentioned in the said evidence, on the 7th February 1832; that then the said plaintiffs are entitled to recover, under said contract so proved as aforesaid, at the rate of $35 per diem, from the said 20th November 1831, to the said 6th of February 1832, both inclusive. To which refusal, by the court aforesaid, to admit the evidence so offered by the said defendant, as also to the granting by the court of the said instruction aforesaid, so prayed for by the said plaintiffs, the said defendant by his counsel accepted.

The case was argued by *J. H. Bradley* and *Jones*, for the plaintiff in error; and by *Coxe*, for the defendants.

The counsel for the *plaintiff* in error maintained, that the evidence offered on his part, and rejected by the circuit court, ought to have been admitted, and that it imported a full defence to the action; and that the terms of the instruction from the court to the jury were in other respects

erroneous and untenable, upon the data assumed in the instruction itself. The hiring of the Franklin was from day to day. The contract was made under the known circumstances of the case ; and was so understood by all the parties to it. The purpose for which the boat was hired was to convey the mail, for the conveyance of which the plaintiff in error was the contractor ; and it had reference to two circumstances, viz., one expressed, that the Sydney should be in a condition to be placed on the route, for which it was known she was preparing ; the other, equally well understood, that the interruption and prevention of the running of the steamboat, by the ice in the Potomac, would oblige the contractor to convey the mail by land ; in which case, as the boat could no longer be used, the hiring would cease.

The evidence offered by the plaintiff in error, was to explain, not to contradict, the written contract. It was to show what the route for which the boat was employed was ; and that the plaintiff could only use the boat while the river was navigable. It was to show that after the river was closed, the mail was transported by land. Such evidence is admissible by the rules of law. Cited, 1 Mason 10 ; 4 Camp. ; 8 T. R. 379, 382 ; 3 Dall. 415 ; 5 Wheat. 326 ; 8 Johns. 116 ; 19 Ibid. 313 ; 2 Barn. & Ald. 17 ; 11 East 212 ; 2 Bos. & Pul. 503 ; 10 East 555 ; 2 Camp. 627. According to reason, and analogous cases, there can be no doubt of the propriety and legality of the evidence. We are to look at the terms of the contract, and to the usage of the business in which the Franklin was to be employed. She was to be used in carrying the mail ; and it must have been known, that when she could no longer carry the mail, she would not be employed. The prevention *by causes not within the control of either party, would excuse both [*94 from the performance of the contract. He who hires, is to have the enjoyment and use of the thing hired. If the hiring is for a specific purpose, the purpose must be accomplished. In this case, the hiring was for a public, notorious purpose ; and it was well known and well understood, that on certain events occurring, the Franklin would be no longer employed.

Was it an engagement which was to depend for its determination solely on the Sydney's being placed on the route? This would have compelled the plaintiff in error to pay for the Franklin to the end of time, if the Sydney had been burned, or had not been capable of proceeding on the route. The length to which this position would extend proves its error.

Coxe, for the defendants in error, contended, that the engagement to hire the Franklin, was to continue until the happening of a particular event ; until the Sydney should be fit to take her place on the route. The suspension of the performance of the boat, could be but temporary ; and this was one of the contingencies to which the plaintiff in error had subjected himself by the contract. There is nothing to distinguish this case from the case where an embargo has interposed to suspend the voyage of a ship.

The evidence was properly excluded. The contract was express, plain and simple ; and did not require the testimony. No difficulty existed as to the meaning of the terms used in the agreement. "The route," was well understood. It was not a mail route only, but it was used by the plaintiff in error for the conveyance of passengers ; and this was one of the objects of the contract. It was on these principles the circuit court proceeded in the case.

BARBOUR, Justice, delivered the opinion of the court.—This case is brought before us by a writ of error to a judgment of the circuit court of the district of Columbia, for the county of Washington. It was an action of *assumpsit*, brought by the defendants in error, against the plaintiff in error, to recover a sum claimed for the hire of the steamboat Franklin. The claim was founded upon a written contract, concluded between the parties, by the following correspondence: On the 19th of November 1831, the plaintiff in error wrote to the defendants in error, a note, of which the following is a copy: "I agree to hire the steamboat Franklin, until the Sydney is placed on the route, to commence to-morrow, 20th instant, at ($35) thirty-five dollars per day, clear of all expenses other than the wages of Captain Nevitt. W. A. Bradley." To this note, W. Gunton, as president of the company, replied on the same day, in the following words: "On the part of the Washington, Alexandria and Georgetown Steam-Packet Company, I agree to the terms offered by William A. Bradley, Esq., for the *use of the steamboat Franklin, until the Sydney is placed on the route to Potomac creek, which is thirty-five dollars per day, clear of all expenses, other than the wages of Captain Nevitt, which are to be paid by our company." *95]

Upon the trial of the cause, on issue joined upon the plea of *non assumpsit*, a bill of exceptions was taken by the defendant; from which it appears, that the plaintiffs in the court below, having given in evidence the correspondence already stated, further gave in evidence a note, signed by William A. Bradley, dated December the 5th, 1831, addressed to Pishey Thompson, requesting him to advise the president and directors of the steam-packet company, that the navigation of the Potomac being closed by ice, they had that day commenced carrying the mail by land, under their winter arrangement, and had, therefore, no further occasion for the steamboat Franklin, which was then in Alexandria, in charge of Captain Nevitt; and offering to pay the balance due for the use of the Franklin, on the presentation of a bill, and receipt therefor; and also a letter from W. Gunton, addressed to William A. Bradley, dated the 6th December 1831, in which, after stating that the letter of the 5th, from Bradley to Thompson, had been submitted to the board of directors of the company, he informed him, that the board could not admit his right to terminate his agreement, on the grounds which he had stated in his note to Thompson; and that they regarded it as being still in full force, and the boat as being in his charge. The plaintiff also proved, that the steamboat Sydney was not placed on the route, until the 7th of February 1832; that the Sydney belonged to the defendant, and that she was not finished, so as to be able to start from Baltimore, until the 25th of January. And thereupon, the plaintiffs claimed the hire of the steamboat Franklin, from the 20th of November 1831, to the 6th of February 1832, seventy-nine days, at $35 per day; allowing credit for $350, paid by the defendant, and leaving a balance of $2415.

It appears from the bill of exceptions, that after the plaintiff had closed his evidence, the defendant, amongst other things, offered to prove, that he, for several years, had been, and then was, contractor for the transportation of the mail from Washington to Fredericksburg; that the customary route of said mail was by steamboat from Washington to the Potomac creek, thence by land to Fredericksburg, and that passengers were also transported on that route; that he kept an establishment of horses and stages,

for the transportation of the said mail all the way by land from Washington to Fredericksburg, at seasons when the navigation of steamboats was stopped by ice ; and had been obliged, for a considerable portion of every winter, during the time he had been so employed in the transportation of the mail, to use his said stages and horses, for the transportation of the mail, all the way by land to Fredericksburg, in the meantime laying up his steamboat ; that just before the date of the contract, the defendant's own steamboat, *usually employed on said route, had been disabled, and [*96
the defendant was, at the time, about completing a new boat called the Sydney, which had been built at Washington, and sent round to Baltimore for the purpose of being fitted with her engine and other equipments ; that in January 1832, the Sydney, being completely equipped, left Baltimore for Washington, as soon as the state of the ice made it practicable to attempt the voyage, was stopped by ice, and obliged to put in at Annapolis, whence she proceeded to Washington, as soon as the ice left it practicable ; arrived at Washington on the 6th of February 1832, and was on the next day placed by defendant on the route ; that on the 5th of December 1831, Captain Nevitt, the commander of the Franklin, refused to go on the said route of the defendant, in consequence of the ice then forming in the river, unless he was directed to do so by the plaintiffs ; that upon application to the president of the company, he directed the captain to proceed as required, and obey the orders of the defendant ; that the captain did then proceed on the route, and returned as far as Alexandria, where he stopped, and sent up the mail by land, and although required by defendant's agent, refused to come up to Washington with the said boat, in consequence of the ice, which had formed in the river ; and that the said boat lay at Alexandria, frozen up in the harbor, from that time to the 5th of February 1832 ; that it was matter of notoriety, and known to and understood by the plaintiffs, at the time the contract in question was made, that as soon as the navigation should be closed by the ice, the United States mail from Washington to Fredericksburg would have to be transported all the way by land carriage, instead of being transported by steamboat to Potomac creek, and thence by land to Fredericksburg ; and that the steamboat Franklin would not be required by defendant, and could not be used under said contract, when the navigation should be closed.

The court refused to permit the evidence thus offered by the defendant to go to the jury. And then, on the motion of the plaintiffs, instructed the jury, that if they believed from the evidence, that the defendant wrote to the plaintiffs the paper of the 19th November 1831, and that the plaintiff accepted the offer, by the same date, and that plaintiffs and defendant respectively wrote to each other the papers bearing date the 5th and 6th December 1831, and that the steamboat Sydney did in fact first arrive in the river Potomac, on the 6th February 1832, and was placed on the route to Potomac creek, on the 7th of February 1832, that then the plaintiffs were entitled to recover, under the contract so proved, at the rate of $35 *per diem*, from the 20th of November 1831, to the 6th of February 1832, both inclusive.

The questions then arising upon this record, are : first, whether the court erred in refusing to permit the evidence offered by the defendant to go to

the jury? And secondly, whether they erred in giving the instruction to the jury which they did give, at the instance of the plaintiffs?

*97] *As to the first question. It is a principle recognised and acted upon by all courts of justice, as a cardinal rule in the construction of all contracts, that the intention of the parties is to be inquired into; and if not forbidden by law, is to be effectuated. But the law has laid down certain rules, declaring by what kind of proof, in any given case, this intention is to be ascertained. Amongst these rules, a leading one in relation to written contracts, to which class the one in question belongs, is this: That extrinsic evidence is not admissible to explain a patent ambiguity; that is, one apparent on the face of the instrument; but that it is admissible to explain a latent ambiguity; that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; for this is but to remove the ambiguity by the same kind of evidence as that by which it is created. The rule thus stated seems to be in itself quite plain and intelligible, and yet much difficulty has arisen in its application. The illustration most usually given of the operation of this rule in the admission of extrinsic evidence, is that of a description of a devisee, or of an estate, in a will, where it turns out that there are two persons, or two estates, of the same name and description. These, however, are put, not as measuring the extent of the rule, but as exemplifying its application; and all other cases within the scope of the principle are, in like manner open to explanation, by the same kind of evidence. Accordingly, it is laid down, in a very accurate writer on the subject of evidence (3 Stark. 1021), that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter.

Let us examine some of the many cases which have been decided upon the subject of the admissibility of this evidence, in relation to written instruments. In the first place, wherever there is a doubt as to the extent of the subject devised by will, or demised, or sold, it is matter of extrinsic evidence, to show what is included under the description, as parcel of it. Accordingly, in 1 T. R. 701, Buller, Judge, said, whether parcel or not of the thing demised, is always matter of evidence.[1] So, where a grantor in a deed described the premises, as the farm on which he then dwelt, this was held to be a latent ambiguity, which might be explained by evidence *aliunde;* and evidence was admitted, that a particular piece of land, claimed under the deed, was, at the time of the grant, in a state of nature, uninclosed, and separate from the rest of the farm, and that the grantor remained in possession, and occupied it as his own till his death—to show that it was not within the grant. 4 Day 265.

In 8 Johns. 116, the case was this: A., by a written contract, agreed to receive of B. sixty shares of the Hudson Bank, on which ten dollars per share had been paid, and to deliver B. his note for $667, and pay him the balance in cash, and also to pay five per cent. advance. It was decided, that this was a case of latent ambiguity, and the nominal value of each share

*98] being fifty dollars, parol *evidence was admitted, to show whether the five per cent. advance was to be paid on the sum paid in only, or on the nominal amount. In 2 Leigh 630, the principle is laid down by

[1] See the case of Warner *v.* Brinton, *post*, p. 106 n.

the court, that parol evidence is not admissible to vary, contradict, add to, or explain a written agreement; but in cases of equivocal written agreements, the circumstances under which they were made may be given in evidence to explain their meaning.

In the case of *Birch* v. *Depeyster*, 1 Stark. 210, the charter-party stipulated that the master should receive a specific sum, in lieu of privilege and primage, and the question was, whether the terms of the contract excluded all right on the part of the master to use the cabin for the carriage of goods, on his own account. GIBBS, Chief Justice, said, "evidence may be received to show the sense in which the mercantile part of the nation use the term privilege, just as you would look into a dictionary to ascertain the meaning of a word; and it must be taken to be used by the parties in its mercantile and established sense." So, where a charter-party stipulated that a freighter should pay a certain sum per pound, &c., British weight; it was held, that as the word weight had two meanings, gross and neat, this was such a latent ambiguity as to warrant the introduction of parol testimony. 1 Nott & McCord 45. In the case of *Peisch* v. *Dickson*, 1 Mason 11, it is said by the judge, that if, by a written contract, a party were to assign his freight in a particular ship, it seemed to him, that parol evidence might be admitted, of the circumstances under which the contract was made, to ascertain whether it referred to goods on board the ship, or an interest in the earnings of the ship; or in other words, to show in what sense the parties intended to use the term.

Nor is this principle at all confined to mercantile contracts; for in *Robertson* v. *French*, 4 East 130, Lord ELLENBOROUGH, speaking on this subject, said, that the same rule which applied to all other instruments, applied also to a policy of insurance. The admission of this kind of proof has been carried to a great extent, too, with a view to a correct construction of wills. In the case of *Shelton's Executors* v. *Shelton*, 1 Wash. 56, it is said, that to discover the intention of a testator, parol evidence may be admitted of his circumstances, situation, connection with the legatees, and his transactions between the making of his will and his death. And this same doctrine is advanced by the same court, in 3 Hen. & Munf. 283. We will close this reference to cases with that of the *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat. 326. In that case, it was held by this court, that where a check was drawn by a person who was the cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument, whether it was an official or a private act, parol evidence was admissible, to show that it was an official act; and, accordingly, many facts and circumstances were given in evidence, to prove in what character it was drawn.

*The cases which we have thus collected together from amongst the very many which exist, will serve to show in how many aspects [*99 the question of the admissibility of extrinsic evidence in relation to written contracts has been presented and decided; and in how many forms, according to the various circumstances of the cases, the principle which we have been considering has been applied. Sometimes, it has been applied to deeds, sometimes, to wills, and sometimes, to mercantile and other contracts. In some cases, it has been resorted to, to ascertain which of several persons was intended; in others, which of several estates; in some, to ascertain the identity of the subject; in others, its extent; in some, to ascertain the

meaning of a term, where it had acquired by use a particular meaning; in others, to ascertain in what sense it was used, where it admitted of several meanings. But in all, the purpose was the same—to ascertain by this medium of proof, the intention of the parties, where, without the aid of such evidence, that could not be done; so as to give a just interpretation to the contract.

Without attempting to do what others have said that they were unable to accomplish; that is, to reconcile all the decisions on the subject, we think that we may lay down this principle as the just result—that in giving effect to a written contract, by applying it to its proper subject-matter, extrinsic evidence may be admitted, to prove the circumstances under which it was made; whenever, without the aid of such evidence, such application could not be made in the particular case.

With this principle in view, we proceed to inquire, whether the evidence offered by the defendant, in this case, ought to have been received by the court. Now, had the evidence been received, it would have disclosed the following state of facts: That the route mentioned in the contract, was one on which the plaintiff in error transported passengers, and also the mail; that the steamboat Sydney, mentioned in the contract, was designed to perform this service; and that the Franklin was wanted for the same purpose; that the Sydney was then at Baltimore, for the purpose of being fitted with her engine and equipments; that although the transportation of passengers and the mail was carried on, by the plaintiff in error, in a steamboat, whilst the river was open; yet, when the river was closed by ice, so that navigation was obstructed, the plaintiff in error then transported passengers and the mail all the way over land to Fredericksburg; that when the river was thus obstructed, the plaintiff in error could not, and did not, use a steamboat; and that all these facts were known to the defendant in error. We think that this evidence ought to have been received, because it would have tended to show, by the circumstances under which the contract was made, what was the intention of the parties; and, in the language of the rule which we have laid down, that the contract, without its aid, could not be applied to its proper subject-matter.

*100] The terms used in the written contract are, "for the use of the *steamboat Franklin, until the Sydney is placed on the route to Potomac creek." It is contended, that this amounted to a stipulation to keep the Franklin in use, until the Sydney was placed on the route; no matter what length of time may have elapsed before that was done. Suppose, that the Sydney had been accidentally consumed by fire, the day after the hiring of the Franklin, the effect of this construction would be, to make that hiring co-extensive in point of time with the existence of the Franklin, in a condition for use; although it is obvious, that a temporary hiring only was in the contemplation of the parties. Again, suppose, the plaintiff in error had sold the Sydney, and bought another boat, and put that other on the route; the construction contended for would lead to the result, that the hire of the Franklin would still have continued to have gone on, indefinitely. If this were so, it must be upon the principle that it entered into the contemplation of the parties, as a material term of the contract, that the plaintiff in error should keep the Franklin in use, not until he ceased to want it, by having a steamboat to take its place, but until the identical steamboat

Sydney, and no other, should take its place. We think, that the evidence offered, and rejected by the court, would have shown why reference was made to the Sydney being placed on the route ; that is, because she was expected to be ready for use, in a very short time. It would have shown further, that the defendants in error knew the service for which their boat was wanted ; what was the nature of that service ; that whenever the river was obstructed by ice, the Franklin would not be wanted, because it could not be used, and because then another mode of transportation was resorted to. From all this, it would have been competent to infer, that the words, "until the Sydney is placed on the route," were not intended to fix that time as the period to which the hiring was to continue, at all events, and under all circumstances ; but as being referred to, because the Sydney was then expected to be ready for use, in a very short time ; and so soon as she could be used, the Franklin would not be wanted, even although there should be no obstruction to navigation by ice. And moreover, it would have been competent to infer, that as the defendants knew why the Franklin was wanted ; for what service she was wanted ; the character of that service, that is, that it would cease when she could not be used, by reason of the river being closed with ice ; that, therefore, the real intention of the parties, to be derived from the written contract and the parol evidence taken together, was, a hiring and letting to hire, for so long a time as the boat could be used, that is, until the navigation was obstructed ; subject to being terminated at any previous time, when the Sydney was ready to take her place. We think, that the rule of law, which admits extrinsic evidence for the purpose of applying a written contract to its subject-matter, justifies its admission, beyond the mere designation of the thing, or *corpus*, if we may so express it, on which the contract operates, and extends so far as to embrace the circumstances which accompany the transaction ; when, without the *aid of those circumstances, the written contract could not be applied to its proper subject-matter. [*101

This principle is illustrated by the cases which we have before referred to. Take, for example, the case cited from 1 Mason 11. That was *assumpsit* for a balance alleged to be due on consignments. In that case, parol evidence was received of the circumstances under which a contract was made, which contained this clause relating to the plaintiff's goods, viz : "On which goods Mr. D. (the defendant in the case) has advanced me $5833, for which amount he will hold for reimbursement, on the amount and net proceeds of the sales of said goods, which are only considered answerable, for said amount advanced, as *per* our agreement ;" for the purpose of showing, whether it was intended to waive any personal claim on the plaintiff, and to restrict the defendant's security for the repayment of the advance, to the goods only ; or was meant merely to exempt the goods of the shippers on freight, from being included as a security for the advance on the plaintiff's goods. So, we have seen, in the case from 2 Leigh 630, the proposition is stated, in terms, that in equivocal written agreements the circumstances under which they were made may be given in evidence, to explain their meaning ; and accordingly, in that case, the judges rely upon the circumstances as disclosed by the parol evidence, in connection with a written promise of indemnity, in deciding on its legal effect.

We could suggest many cases which we think would illustrate this prin-

ciple, and prove, that from the necessity of the case, and consistently with the rules of law, the circumstances under which a written contract is made, must be open to proof by extrinsic evidence, in order to ascertain the intention of the parties, and thus correctly interpret it. Suppose, that during the late war, a person had been engaged, by contract, to transport munitions of war to the army; that, for that purpose, he had hired a steamboat of another, and had signed a written agreement, by which he engaged to take good care of the boat; suppose, that whilst he was engaged in this transportation, the boat had been destroyed by the enemy, as it might rightfully have been, by reason of the hostile character impressed upon it; that, thereupon, a suit had been brought by the person who let it to hire, upon the stipulation to take good care of the boat. Can it be doubted, that it would have been competent for the defendant to have proved, that he was a contractor with the govenment to transport munitions of war; that he had hired the boat for that express purpose; and that these facts were known to the other party, so as to show the intention and understanding of the parties as to the kind of danger to which the boat would unavoidably be exposed, in performing the very service for which it was hired.

We will state only one case more, founded on the suggestion of Mr. Chief Justice Ellsworth, in a note to 3 Dall. 421. Suppose, a *man
*102] signs a written agreement in these words, viz: "I will take your ship John." May not the party, as the chief justice asked, go beyond the note, to explain, by existing circumstances, the meaning of the word take; which, accordingly, as the circumstances might be one way or another, might equally embrace a purchase or a charter-party?

All the cases which we have cited, in which extrinsic evidence has been received, and those which we have supposed, in which we think that it would be admissible, proceed on one principle only, and can only be justified upon that principle. And that is this: that the rule which admits extrinsic evidence, for the purpose of applying a written contract to its proper subject-matter, extends beyond the mere designation of the thing on which the contract operates; and embraces within its scope the circumstances under which the contract concerning that thing was made; when, without the aid of such extrinsic evidence, such application of the written contract to its proper subject-matter could not be made. Hence Mr. Starkie, in his third volume on Evidence, p. 1021, after having laid down the principle, that extrinsic parol evidence is admissible to give effect to a written instrument, by applying it to its proper subject-matter; adds, "and also as ancillary to the latter object (that is, the application to its proper subject-matter), for the purpose, in some instances, of explaining expressions used in a peculiar sense, and of annexing customary incidents," &c.

Let us take a case under each branch of this rule; and by this exemplification, we shall more clearly see the operation of the rule itself, and the very decided bearing which it has upon this case. Then, as to the first branch, as to parol evidence for the purpose of explaining expressions used in a peculiar sense. Let us take the case before cited, where the question was as to the legal effect of a written contract, to receive a stipulated sum in lieu of privilege and primage—in other words, what was the meaning of these terms? Parol evidence was received, to show the sense in which the mercantile part of the nation used the word privilege; and why? Because,

the real question was not what was the meaning of the word privilege, in general; if that had been the question, it would have been a patent ambiguity, and parol evidence would have been clearly inadmissible; but the real question was, what was the meaning of the word privilege, as used in that contract; it being a word which had acquired in the mercantile world a peculiar meaning, that meaning must be inquired into, by parol evidence, to get at the intention of the parties, as it was a mercantile contract. Thus, it will be seen, that it was necessary to go into the mercantile sense of the word, that being the sense in which it was used in the case stated, in order to apply the written contract to its proper subject-matter. Accordingly, Mr. Starkie, in his book on evidence, p. 1033, states that to be the reason why evidence is admissible to prove the special and peculiar sense in which a word is understood.

*Now, let us take a case to exemplify the second branch of the rule, as to annexing customary incidents. The case of *Senior* v. *Armitage* will illustrate the second branch of this rule, that of the admission of parol evidence, to annex customary incidents. In that case, it was held, that a custom for a way-going tenant to provide work and labor, tillage and sowing, and all materials for the same, in his way-going year, the landlord making him a reasonable compensation, is not excluded by an express written agreement between the landlord and tenant, which is consistent with such a custom. Now, here proof of the custom was considered as necessary to apply the contract to its proper subject-matter. So, in the two cases which we have supposed of the steamboat, and the ship; we think the extrinsic evidence which we have mentioned would be admissible, because the question would not have been the meaning of the stipulation to take proper care of the boat, in the one case, and to take the ship in the other, in the general sense of these expressions; but what was the meaning of *proper care*, as to that steamboat, and of the word *take*, as to that ship, under the circumstances which attended the respective contracts concerning them: neither a steamboat in the one case, nor a ship in the other, was the proper subject-matter of the contract, but each of them, in connection with its accompanying circumstances; in other words, that steamboat, under the circumstances under which it was hired; and that ship, under the circumstances under which it was taken. [*103

And so, in the case before us, upon the same principle, the subject-matter of the contract was not merely the steamboat Franklin, but the steamboat Franklin under the circumstances under which it was hired. The parol evidence, then, in this case, was admissible; because, without its aid, the written contract could not be applied to its proper subject-matter; and therefore, it was proper to prove the circumstances attending the transaction. Having thus stated our opinion to be, that evidence ought to have been received to prove the facts stated in the bill of exceptions on the part of the defendants; it follows, as a consequence, that the court below erred, in giving to the jury the instruction which they did give, at the instance of the plaintiffs in the circuit court.

We think, therefore, that the judgment is erroneous, and must be reversed, with costs; and a venire *facias de novo* is awarded; with instructions, that upon the next trial, the court shall receive parol evidence, to prove the facts stated in the bill of exceptions, to have been offered to be proved by

the defendant, at the former trial; except the fact of the communication made to the plaintiff, by the defendant, or his agent, before the time of making the contract, that the defendant intended to keep the steamboat Franklin in use, under the contract, so long as the navigation remained open, and no longer; and with the further instruction to the court, not to give the jury the instruction stated in the exception to have been given at the former trial.

*104] *Thompson, Justice. (*Dissenting.*)—I have not been able to concur in the opinion of a majority of the court in this case. I admit, in the fullest extent, the rule, that parol evidence is admissible to explain a latent ambiguity. But I cannot perceive any ambiguity in the contract in this case, requiring the application of that rule. The contract is dated the 19th of November 1831, and was for the hire of the steamboat Franklin, to be placed on the route from Washington to Potomac creek, until the Sydney should be placed on the route; and to commence on the day after the date of the contract, at the rate of $35 per day, clear of all expenses, other than the wages of the master, which were to be paid by the company. The only question in the case is, as to the admissibility of the parol evidence offered on the trial. I think it was properly rejected by the court. Whatever related to any conversations or negotiations on the subject, previous to the consummation of the contract, were merged in the final conclusion of the contract, according to the well-settled rule of law. And whatever passed between the parties, after the contract was concluded, was also inadmissible; because it tended to vary the contract, and substitute another for that which had been concluded between them. The contract was for the use of the Franklin, without any specified limitation as to time. It was to continue until the Sydney was placed on the route. The Sydney was owned by Mr. Bradley, and was, at the time the contract was entered into, at Baltimore, for the purpose of being fitted with her engine, and other equipments necessary to complete her. The time, therefore, for which the Franklin was to be employed, depended entirely upon the Sydney's being placed upon the route. And this was at the election of Mr. Bradley; the boat was his, and the repairs or equipments were under his directions, and could not be hastened by the owners of the Franklin; and they had it not in their power to put an end to the contract, but were bound to keep their boat ready for the use of Mr. Bradley, until the Sydney was placed on the route. It is not at all probable, from the date of the contract, about the middle of November, that either party anticipated the freezing of the river as early as it did; or some provision would have been made in the contract for such event. The loss resulting from such an unexpected and temporary obstruction by the ice, ought to fall on the party who is chargeable with the delay in placing the Sydney on the route—and that was Mr. Bradley. The boat was his; and the placing her on the route was at his election, and, of course, at his risk.

Catron, Justice. (*Dissenting.*)—The contract given in evidence to sustain the action below is free from any ambiguity on its face; and the question is, can oral evidence be resorted to—first, to raise an ambiguity, by showing the objects of, and circumstances that lead to, the contract; and second, to explain the ambiguity created by the oral evidence?

*105] *I think no such ambiguity, by extrinsic and inferior evidence, can

be created, thereby to open the contract to explanations and additions inconsistent with its face. Nor can oral evidence be called in, to explain the ambiguity inferred from the circumstances and unexpressed intentions, in reference to which the parties are supposed to have contracted. Their entire meaning is taken to be in the writing. 3 Stark. Evid. 999, 1000. By this means, new and independent stipulations are sought, as I apprehend, to be added, *dehors* the written agreement, varying its terms plainly expressed; so that it may be made to operate different ways, according to the explanatory evidence.

This case well illustrates the effect of the doctrine. Had the ice not closed the river, then Mr. Bradley would have had no excuse; this is matter of proof. Had the Sydney not been repaired, then he would have had no excuse; this is also matter of proof. Had the steamboat company established that they, in previous winters, took their boat, the Franklin, out of the Potomac, after the ice formed in this river, and run her in other waters, not subject to ice; and that Mr. Bradley prevented them from taking the usual course, until the boat was frozen up in the river; then all equity and justice would have been on the side of the plaintiffs below. Hence, the rights of the parties on another trial will not depend on the written contract; but it will operate according to the oral proof, and the conditions thus inserted into it. It is clear, the oral evidence, and not the writing, must produce the definite effect.

I hold, nothing can be added to a written agreement, unless there be a clear subsequent, independent agreement, varying the former; but not where it is matter passing at the same time with the written agreement. Truly, where the terms of the written instrument are clear, oral evidence is used to point the application to this or that subject-matter. It acts in aid of the written instrument, to give it the intended application; not to add to its terms, by inserting new conditions and limitations in the contemplation of the parties, and to be inferred from extrinsic circumstances, existing when the agreement was made. To control its construction, by oral proof of the objects of the contracting parties, and the purposes of the contract, would lead to the dangerous result of construing every writing, not by its face, not by the language employed; but by matters extrinsic, variant in each case, as human testimony should make it; the construction, of necessity, to be determined by the jury, and not by the court, whose usual province it is to construe written agreements.

The controlling extrinsic circumstance invoked as an element to construe the contract before the court, is, that the boat Franklin was hired to carry the mail; and that so soon as the ice prevented her from running, it must be inferred, the object of Mr. Bradley (at the date of the contract), was, to surrender the boat, and carry the mail *in stages. As to this, the agreement is wholly silent, and the oral proof may contradict the [*106 assumption; if so, no ambiguity will be raised by the proof, as a foundation for further explanation. Suppose it to be proved, that the intention of the plaintiff in error was to carry passengers; and to have the entire transportation on the Potomac, at the opening and close of the session of congress; and that he was willing to pay the price *per* day for the Franklin, for the sake of the monopoly, and the power to increase the fare; that he bought out a rival, risking the chances of the season, and the number of

passengers : or, suppose it be proved, that Mr. Bradley had (at the date of the agreement) taken his horses off of the stage line, and had no reliance to carry the mail but this boat ; and that he designed to keep her until he supplied her place, even should the river close for a time. In these events, the written contract would be construed to mean, as the oral evidence proved Mr. Bradley intended when he made it. He had the power to retain the Franklin, as long as he chose to keep the Sydney out of the river ; throughout the whole spring and summer of 1832 ; and may have so intended, had the winter been an open one, and the river not obstructed. If Mr. Bradley had the power to elect, according to a reserved intention, and put an end to the agreement ; so had the other side, on a similar reservation, not expressed, but to be inferred from circumstances existing at the time, and in reference to which the parties are supposed to have contracted.

I think no oral proof could be let in, to raise an ambiguity, and to explain it, when raised ; and that in this case, as in all others, the parties must abide by their agreement, fairly made, and plainly expressed.

Story, Justice. (*Dissenting.*)—I had not intended to express any dissent from the opinion of the court in this case. But as my silence might now, under the circumstances, lead to the conclusion that I concurred in that opinion, I wish to state, that I concur in the opinion delivered by my brothers, Catron and Thompson, and for the reasons given by them.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed, with costs ; and that this cause be and the same is hereby remanded to the said circuit court, with directions to award a *venire facias de novo.*

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[1] In Warren *v.* Brinton, Judge Baldwin, in 1835, delivered a very learned opinion upon the question of the admissibility of parol evidence to explain an ambiguity in a will, as follows

Baldwin, Justice.—Edward Brinton, in his lifetime, was seised of a tract of land in Birmingham township, Chester county, lying on the southside of the Kennett road, on which he resided, containing by estimation eighty acres ; he died, leaving one son, the defendant, and eight daughters, of whom the wife of the lessor of the plaintiff is one. Six of the other daughters, with their husbands, have conveyed their shares to him, so that he is invested with the title to seven ninth parts of the land, if Edward Brinton had not disposed of it in his lifetime, by his will duly executed, so as to pass the land to the defendant, and will be, in such case, entitled to your verdict. On the other hand, if Edward Brinton did devise this land to his son James, your verdict must be for the defendant ; the whole case, therefore, turns on the single question of whether he made a valid testamentary disposition of this property, by which the descent to all his children, as directed by the act of assembly, in case of his dying without a will, will be interrupted in favor of his son. It is not pretended, that Edward Brinton died without any will, it is admitted, that the paper executed on the 7th August 1806, is a valid will, duly executed and proved according to law, to pass real estate, but by this will he only disposes of the property in question, during the widowhood of his wife, saying nothing to whom it should go, after her marriage or death. Unless, therefore, he has disposed of the remainder in fee, by some other paper duly authenticated to pass lands, or which can be transferred to, and be made a part of, his last will and testament, the law considers him as dying intestate as to this land, as if he had made no will at all.

The act of assembly requires that all wills concerning real estate shall be in writing, and be proved by two witnesses. You will then consider a will to be the written declaration of

a man of his intention as to what shall become of his property after his death—proved by two witnesses. The evidence in the case is before us, in the transcript of the proceedings of the register's court of Chester county (see the copy of the will and certificate of probate) and the petition to the legislature. This is legal and competent evidence to establish the paper set up as a will, in the absence of any opposing testimony. None has been offered in opposition to the executed will. You will, therefore, take that, so far as it goes, as the established will of Edward Brinton, agreed to by both parties now, and never intended to be contested by any of the family.

As to the paper of instructions, or the rough draft of the will, drawn up by Mr. Gibbons, which is copied into the certificate of probate, you will take it only as *primâ facie* or presumptive evidence of its being any part of the will of Edward Brinton, open to be contradicted or disproved by any testimony competent to show, either that he did not make it his will in fact, or that it is not in law his will. The other children are as fully at liberty to contest the paper after probate as before; the decree of the register's court concludes them in no matter either of law or fact, whether it relates to the sanity of the testator, the execution proof, or construction of the paper. 3 Rawle 20; 4 S. & R. 193; 12 Ibid. 283; 10 Ibid. 84. It is only in virtue of the act of assembly, that the proceedings of the register, or the register's court, can be admitted in evidence; neither the copy nor probate of a will are evidence of a devise of lands, at common law (5 S. & R. 213; 3 W. C. C. 582–3; 10 Wheat. 465–70, 201–4); and however regular and full the probate my be, it is only *primâ facie* evidence; its effect is destroyed if, on the face of it, the will appears to have been unduly admitted to record, or it appears by extrinsic evidence. 5 S. & R. 215; 1 W. C. C. 302, 346. This may be done, by proof of the incompetency of the witnesses, defect in their evidence to establish the necessary facts, or by showing that in point of law the proof before the register was insufficient to establish the paper admitted to probate, as the last will and testament of the testator. 1 Yeates 87, 90; 4 Ibid. 413. In order to show the legal insufficiency of the proof on which the register's court acted in the present case, the plaintiff has given in evidence the whole proceedings before the register, and in the register's court, which were the foundation of their decree, admitting the paper in question to probate as part of the will of Mr. Brinton. It was necessary for them to do this, in order to make their objections to its establishment as a will, for otherwise the certificate of probate, under the seal of the court, would have been open to the allegation that it was made on due and legal evidence; and as the copy and probate were evidence, without inquiring on what ground the court acted, the plaintiff would have been much embarrassed without resorting to the testimony referred to in their minutes. By inspecting them, it now appears, that the only proof of the devise of this land to the defendant is contained in the minutes of the evidence of James Gibbons, of William and Amos Brinton, and a deposition or statement of James Gibbons which was read in the register's court, but is now lost, and no copy or evidence of its contents produced, and the instructions themselves. These minutes are as follows: See minutes and instructions.

There is no doubt, that the plaintiff had a right to refer to these minutes, to show the foundation of the decree of the register's court, but we entertain strong doubts whether they are competent evidence, on an ejectment to try the title of the land; they relate exclusively to a matter wholly unconnected with the personal estate, or the administration of the will, and it might have been a serious question, whether the evidence was admissible, had the objection been made. See 4 W. C. C. 187; 6 Cranch 219; 7 Ibid. 270–1, 412; 6 Wheat. 113; 2 Yeates 341; 2 Binn. 511; 3 Rawle 20; 4 Yeates 413; 4 S. & R. 193; 10 Ibid. 84; 12 Ibid. 283–4; 2 Rawle 178; 4 Wheat. 220; 10 Ibid. 201–4, 465–70; 5 S. & R. 214–15; 4 W. C. C. 187–8. But as the counsel on both sides have considered it properly before as, and have rested the case of their respective clients on its legal sufficiency to establish this clause in the instructions or rough draft of the will, as a devise of the land in question, the court will consider it in this aspect alone. Taking the testimony as it is reduced to writing, with all legal inferences which a jury can legally draw from it, as true to the full extent, and connecting it with the only other evidence in the case, the petition to the legislature, we proceed to inquire, whether Edward Brinton did devise this land to the defendant.

For all the purposes of this case, the facts as stated are admitted to be proved, and the only question which remains, is their sufficiency in law to make out the issue on the part of the defendant. This is a question of law which the court must decide. 8 Co. 155 *a*. It is a universal rule of property, that it must descend and be enjoyed according to the course which the law has prescribed, unless the owner has made some other disposition of it, which the law recognises as valid and binding. 3 Rawle 20. The acts of assembly of Pennsylvania

have directed that the estate of a person, undisposed of by will, shall descend to and be enjoyed equally by all his children; of the natural justice of this provision and its perfect congeniality with the genius and spirit of all the institutions of the state and country, no man can doubt. It was a rule of the common law, founded in the wisdom of ages, and adopted by our ancestors, that the heir-at-law shall not be disinherited, unless by the plain words or necessary implication from the will of his ancestor; and this rule is assumed as a sacred landmark of property in all countries where the law of the land is respected, as the guardian of the rights of the people. It is never departed from, in that country from which we derive our best rules of jurisprudence, in which the oldest son is the sole heir to all his father's lands; surely it ought not to be less respected here, where there is no odious law of primogeniture, and equality of right between the sexes has been established, from the first settlement of the province, in conformity with the policy of its founder. This law leaves every man at liberty to do with his property as he pleases—his will is the supreme law, and when it speaks, it must be obeyed—it is only when he makes no will, or none which disposes of any particular part of his estate, that the law makes a will for him, and does that which he omits to do for himself, by declaring to whom it shall go, if he leaves behind him no directions testifying his intention in writing and so attested as to afford authentic evidence of his will, as a muniment of title to the favored object of his bounty. There is no rule more reasonable than that which imposes on those who wish to divert the property of a deceased person from the established course of succession, the necessity of doing it by legal and satisfactory proof; nor is there any subject on which a regard to the peace of society and the security of property makes it more incumbent on juries and courts to adhere to fixed and settled rules, than in cases of wills. They are the title deeds to a vast proportion of the property held by our citizens, and unless they are regulated by steady and well-established principles, we lay a train of gunpowder under the possession of purchasers. If a paper be established as a will, upon other than legal proof, with any view to avoid a supposed hardship, in a particular case, the consequences are interminable. If a paper, defective in law to pass an estate, should be permitted to disturb the succession established by the act of assembly, we must give effect to one, the object of which was to revoke a former will, and thus, in the zeal to make wills, where a deceased person had made none, we should destroy those which had been most solemnly executed. For it must not be forgotten, that the same evidence which will take an estate from an heir-at-law, will take one from a devisee under a will, which, generally speaking, is made and recorded by the same acts, and they have the same effect for both purposes. The law is very liberal in favor of last wills; it makes great allowance for infirmities of body and mind; dispenses with all forms, and requires no solemnities which are not absolutely indispensable in point of substance to show the deliberate intention of the maker to dispose of his property in some definite manner. The requisites are few and simple, every man, however unlettered, has the means of making his will, by expressing his intention in writing, and the writing proved by two witnesses; he has only to thus point out the thing he gives, the person to whom it is given, and the law effectuates his intention, by declaring such paper to be his last will and testament.

Has Edward Brinton done so, as to this tract of land? if he has, the defendant is entitled to it, if not, we cannot make a will for him; the question is, whether this paper is his will? In cases of this kind, very interesting questions often arise as to the kind of evidence, which is admissible to prove the various facts on which the validity of wills depend. Those which have been made in this case are highly so, they have been argued on both sides with great ability and learning, and deserve your and our most serious consideration. We do not know how much property may depends on the final settlement of the principles involved, and questions arising on this case, and cannot proceed with too much deliberation; we cannot settle the law; our opinion is subject to the revision of a higher tribunal, which will correct our errors, but cannot reach yours. In laying down the law to you, it is not as one may think it ought to be, but as in our consciences and on our oaths we believe it to be settled by the legislature and courts of justice, as a rule from which we cannot depart. We shall do it plainly and without reserve, so that whether our judgment is affirmed or reversed, this case will eventually place some principles beyond further discussion, and those who will read it, be able to understand what is, and what is not a will. There is but one kind of evidence on which a paper can be established as the last will and testament of any man, it must be in writing, and proved by two witnesses to be the written declaration of the maker's intention, to dispose of his property according to its directions. The disposing intention and the fact of disposition, must appear substantially on the face of the paper, there must be a devisor and a devisee, and a thing devised; when

by a fair construction of the instrument, it contains these three requisites, it is a will, however informal, if duly proved—if either is wanting, it is no will.

In the will executed by Mr. Brinton, and witnessed by the subscribing witnesses, there is no devise of the remainder of this land; if there is any, it is by the instructions or rough draft written by Gibbons, but it is admitted, that these were superseded in everything but the one paragraph, by the executed will. We must then be satisfied that this clause of the rough draft was legally intended to remain as his will, while all the rest was supplied. The law requires that the will should be in writing, and proved by two witnesses, but it need not be signed by the testator (6 S. & R. 454), or be formally declared to be his will (1 Ibid. 263–5), nor attested by subscribing witnesses, though it must be proved by two (2 Dall. 286; 6 S. & R. 47, 223, 484; 16 Ibid. 84; 1 W. C. C. 302, 346); it need not be written by the testator, if done by his desire or consent, by another, and he adopt it, and that is proved by two witnesses, it is sufficient (1 Yeates 91; 1 S. & R. 263; 6 Ibid. 454); or if a paper containing "the substance of a will, with the usual act of execution subjoined, though without subscribing witnesses or proof of publication, if found in his possession, that is *primâ facie* evidence of its adoption as a testamentary act." But if the paper is destitute of every formal act of authentication, the presumption is adverse, in the absence of proof of actual publication or any other act of recognition equally satisfactory. The omission to perfect an instrument which carries with it intrinsic evidence of a design to superadd an act of authentication which the decedent has not been prevented from executing by sudden death, is referred to a change of intention. Scraps of paper, notes or memoranda, or indorsements on bonds, though intended to denote a testamentary disposition, must contain at least the substance of a devise. 3 Rawle 20–1; 4 S. & R. 557. The testator may intend to correct the paper, he may give the rough notes or instructions to a scrivener to make a formal draft of a will, yet these will not invalidate it as a will, if he dies before the formal draft is executed or read over to him for his approbation, if the original instructions are duly proved, they will control it, when they differ (3 Yeates 511–14), and positive proof by one witness and circumstances equal to such proof by another are sufficient (16 S. & R. 84–5); but the paper must contain sufficient intrinsic evidence of a testamentary disposition, and be intended to be his last act in disposing of his property after his death.

This then is the important question in this case, was this devise in the instructions devising the homestead to James, intended by the testator to be his last will, as to this part of his estate; that it was so in fact, we have no doubt, but this does not suffice to make it operative as a will, under the act of assembly. That intention must not only have existed in fact, but be now so proved as to enable the court to carry it into effect according to the law. As at present advised, we should not doubt, that if the testator had died without an opportunity of putting the rough draft into form, by executing a will, these instructions would have been considered as his testamentary disposition of his property; but in the event which has happened a very different case is presented. He makes a formal will, executes it in all legal form and solemnity, it is attested and proved by three subscribing witnesses, and published as such in their presence, it expressly revokes all former wills by him before made, declares this and no other to be his last will and testament. Such a will would have revoked the most solemnly executed will which he had made before, and it must have the same effect as to all other papers of a testamentary nature; the important question then arises, can this clause in the rough draft be now established as his will, in relation to the property in controversy, on the evidence before us. If it has any effect in law, it must be to make another will besides the one he has thus executed, when he has solemnly declared that no other will shall be his will, though before made by him; to confirm and ratify what he has annulled, by setting up a revoked paper, and virtually expunging the revoking clause from the executed will. The evidence must go further than enabling us to get rid of the revocation, it must authorize us to add the revoked paper to the will, so as to make it a part of it, in the same manner as if it had been introduced into it by the testator himself.

On a careful examination of the evidence, we find none which goes to show any act of declaration of the testator in relation to the disposition of his property, subsequent to the execution of his will; what precedes the execution can have no bearing on the revoking clause, for a revoked will must be republished before it can have life or effect. 4 S. & R. 296–7. The testator has declared the execution to be his only and last will and testament, so we must adjudge it, unless the law will permit us to alter, explain or construe it by evidence *aliunde* as a case of ambiguity; either, 1st, an ambiguity or doubt on the fase of or in the body of the will, 2d, that which arises on matter not in the will, but out of it, when the words are

clear; 3d, that which is intermediate, partaking of the character of patent and latent ambiguity (Bacon L. Tracts, 99, 100; 3 Mason 9–12); or 4th, that which arises from a mistake of the testator, or his omission to express himself intelligibly, without explanation by averment or collateral proof. In the case of Packer *v.* Nixon, we expressed our entire concurrence with the declaration made by the present chief justice of the supreme court of this state, that "any settled rule which leads to a determinate effect (in comparison with which the fulfilment of any particular intent is of secondary value) is preferable to a process which would destroy everything like stability of decision and leave titles depending on intention to the decision of chance and the sport of opinion." 2 Rawle 32; 10 Wheat. 228. We also laid it down as a settled rule, that the intention of a testator must be collected from the words of the will; that no averment ought to be taken out of the will, which cannot be so collected from the whole will applied to the subject-matter to which it relates (3 Co. 28 *b;* 3 Atk. 258; 4 Co. 48; 5 Ibid. 68 *b;* Latch 137; Harg. L. T. 495–6; 1 Bro. C. C. 216; 3 Binn. 148, 161); and that the parol declaration of the testator as to who should be his heir, was of no effect in law.

There are, however, cases in which parol evidence will be admitted, to show or explain the written intention of a testator, in cases of what are termed latent ambiguities, or doubts, which are thus defined by Lord Bacon: "There be two sorts of ambiguities; by words *patens* is that which appears to be ambiguous on the face of the instrument; *latens* is that which seemeth certain, 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. Bacon's L. T. 99; 1 Marsh. 11; Hob. 32; 4 Dow P. C. 93. *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 averment, and so in effect, that to pass without deed that which the law appointeth shall not pass but by deed." Bac. Abr. 99. See 4 Cranch 224, 234; 8 Co. 155. "Ambiguity of words by matter within the deed, and not out of the deed, shall be holpen by construction, or, in some cases, by election, but never by an averment, but rather make the deed void for uncertainty." 8 Co. 155 *a.* "As, if a man give land to J. D. and J. S. and heirs, and do not limit to whether of their heirs; or give land in tail, the remainder in tail, with a proviso, that if he or they, or any of them, do any, &c., it cannot be averred on this clause, that the restraint was only on him in the remainder, and the heirs of his body, and that the tenant in tail in possession was meant to be at large." Bac. Abr. 99. "When the uncertainty cannot be helped by construction or intention, it shall be holpen by election," as if I grant ten acres of wood in sale, where I have an hundred acres; whether I say in my deed or not, that I grant out of my hundred acres, yet here shall be an election in the grantee which ten he will take, and the reason is plain, for where the thing is only nominated by quantity, the presumption of the law is, that the parties had indifferent intention which should be taken. Bac. Abr. 100; 2 Eng. C. L. 290; 8 Co. 155; Hob. 32. But if the ambiguity is latent, as if I grant my manor of S. to I. F., and I have two manors, North S. and South S., this ambiguity is matter of fact, and shall be holpen by averment, whether of them it was that the party intended should pass. But if the deed recites, whereas I am seised of the manor of North S. and South S., and I lease you one manor of S., there is clearly an election; so if the recital is of two tenements in D., and one is leased; these cases are where one name and appellation denominates diverse things.

There is another class of cases where the same thing is called by divers names, which shall be holpen by averment, because there is no ambiguity in the words, the variance is matter of fact, but the averment shall not be of intention, because it doth stand with the words, for in the case of equivocation, the general intent includes both the special, and therefore, stands with the record. Bac. Abr. 101; S. P. 1 Mason 11–12; 5 Wheat. 336–7. "As, if I give lands to Christ's Church in Oxford, and the name of the corporation is C. C. in the university of O., this shall be holpen by averment, because there is no ambiguity in the words." Bac. Abr. 101; Hob. 32.

These are the illustrations of the maxim, "*ambiguitas verborum verificatione suppletur, nam quod ex facto oritur ambiguam verificatione facti tollitur*, by a great jurist in ancient times, conformable to which are those which have since received the highest judicial sanction. When a latent ambiguity is produced in the only way in which it can be produced, that is, by parol evidence, it must be dissolved in the same way; and there is no case for admitting it to show the intention, upon a patent ambiguity on the face of the will. They are all cases of latent ambiguity, and the objection to supply the imperfections of a will, are founded on the soundest rules of policy and law.

2 Cranch 29. 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 that it should be controlled by collateral averments out of the will; and if they are admitted, how can there be any certainty, a will may be anything, everything, nothing. 1 Johns. Cas. 234; 6 Conn. 273. The statute appointed the will to be in writing, to make a certainty, and should we admit collateral averments and proofs, and make it utterly uncertain, the witnesses and not the testator would make the will. 1 Mod. 210; 3 P. Wms. 354. "If the effect of the introduction of the evidence would be, to add new mattter to the will, either the subject of the devise, or the name of a devisee, it would also authorize the striking out of what was contained in an executed will, and thus, though the will was made in form by the testator in his lifetime, it would be really made by the attorney, after his death, and all the guards of the law be utterly swept away." 21 Eng. C. L. 288, 292.

The established rules of law are safer guides in the administration of justice, than any considerations as to their bearing on any particular case of supposed hardship; and it is more wholesome to struggle not to let little circumstances take a case out of a general rule, than to struggle by them, to prevent its application. 6 Ves. 641.

As to instructions for making a will, the established rules are: That where they are subscribed as preparatory to a will, the execution of the will supersedes them, and where they differ, the presumption is, that the testator adopted the alteration. 21 Eng. C. L. 292. To establish any paper as a testamentary one, the court must be satisfied, that the testator intended it to be a part of his will, it must be shown that they were intended to be cumulative. 1 Cond. Eng. Eccl. 452; Ibid. 30, 63. If an unfinished draft is propounded as a will, it must appear that the deceased was prevented from executing it by invincible necessity or the act of God. Ibid. 30–1, 63; s. p. 3 Rawle 20–1. If he omits to transfer a provision from the draft to the will, it cannot be supplied by parol evidence, in connection with the draft, whatever may be the opinion of the court as to the actual intention or hardship of the case, though when the mistake was pointed out to the testator, he proposed to insert the omitted legacies in the formal will, but as he did not do it, the court could not supply the defect. 1 Cond. Eng. Eccl. 63–4. When an instrument is executed by a competent person, he is presumed to know its contents and effect, and intend to give it the effect which follows from its contents and construction. 3 Ibid. 290; 4 Ibid. 209. Subsequent instructions, intended for a new will, duly proved, may be a codicillary paper, and operate as a revocation *pro tanto* of a former executed will. 1 Ibid. 267, 269–70; 3 Rawle 20.

In some cases, instructions may be given in evidence, when the executed will is ambiguous on the face of it, as to the person devisee—as a bequest to "her." The question was, to whom the reference was—the instructions were admitted to show that the testator had directed the legacy to be given to his wife, and that her name was omitted by mistake of the scrivener. 1 Cond. Eng. Eccl. 444, 455. Here, the will pointed out the ambiguity, and on its face, necessarily referred to an explanation of the intention as to the meaning of the word "her," it was a case of an ambiguity helped by the reference in the will itself. So, where the executed will was, "I give 60,000*l.* in legacies," which were enumerated to the amount of 51,000, it then gave "the residue, 4000"—making only 55,000, the draft of the will, in testator's handwriting, at the bottom of which he had inserted the date of the will and the names of the witnesses, was admitted, to show the mistaken omission. 2 Ibid. 509, 512. Here, the mistake appeared on the face of the will, and was helped by reference. So, when the twentieth sheet of a will was missing, and it appeared from the nineteenth and twenty-first pages, that the missing sheet was necessary to connect them as a component part of the will, that its omission was unintentional, and that it had been detached by accident—it was supplied by proof of instructions and other evidence. Ibid. 506; s. c. 21 Eng. C. L. 294. So where a paper was executed in 1802, declared to be a codicil to the will of 1798, which had been destroyed, and a new one executed in 1800; these facts were admitted to show that the testator intended to refer to an existing will of 1800, and had by mistake referred to the cancelled one of 1798. 1 Cond. Eng. Eccl. 445, 452. So, where a will was indorsed "plan of a will," and so headed, but was otherwise perfect and complete, evidence was admitted to show whether it was intended to be a will, or was only authenticated as instructions (Ibid. 452), being consistent with the words of the will. So, where a will in trust for A. and B. was indefinite as to the parts they should take, a deed from the trustee, defining their shares, and other evidence, was admitted to show, that it was according to the intention of the parties, who intended that both instruments should operate as one deed (17 S. & R. 110), both being executed at the same time.

In this respect, there is no distinction between devises of real and personal property.

In a leading case, the testator devised his estate to his executors, one of whom owed him by bond 3000*l.*; evidence was offered, to show that he instructed the scrivener in writing to give the money to the executor, but he refused to insert it in the will, insisting that making him executor, would release the debt; that the testator took counsel on it, who gave the same opinion, in confidence of which the testator executed the will without the devise; the evidence was not received, and the debtor executor was decreed to pay his co-executor one-half of the bond. Cas. temp. Talb. 1. On an appeal to the house of lords, they refused to hear the evidence read, and affirmed the decree. 4 Bro. P. C. 180–4. The authority of this case remains unquestioned, and it has been expressly adopted in this state. 2 Yeates 304; 7 S. & R. 114; 1 Johns. Ch. 235.

It matters not how clear and full the instructions may be, or that they are signed by the testator, and in the body of them declared to be a will, if the executed will contains no reference to them and is on its face clear of ambiguity as to the other subject-matter. 3 Cond. Eng. Eccl. 290; 4 Ibid. 209; 2 Ves. & B. 318; 6 Conn. 276; 4 Desauss. 215. Instructions to a scrivener cannot be given in evidence, 2 Vern. 98. He cannot be allowed to prove that he used a word with a meaning different from its import, of the true meaning of which he was ignorant. 7 S. & R. 113–14. A mistake in drafting a will does not make it void. 8 Conn. 265. And when a testator declares a paper to be his will, the court must take it as it is written. 1 Cond. Eng. Eccl. 452–6; 6 Conn. 274–5. Mistakes are not to be supposed, if any construction that is agreeable to reason can be found out—the will that is in writing must pass the land, and must be decided by what is contained in it. 1 Atk. 415. The written declarations of a testator, made after the will, are not evidence (5 Bing. 435; 8 Conn. 264), unless the paper may be proved as a codicillary (1 Cond. Eng. Eccl. 267, 270), or a testamentary one. 6 Ves. 397; 4 Dow P. C. 89. A paper may be a will as to personal, though not as to real property, here and in England; the statute of wills of 34 & 35 Hen. VIII., requires only that wills should be in writing, and the statute of frauds and perjuries requires subscribing witnesses only to wills devising real estate. Instructions may be read, to prove that testator knew he had particular relations, but not further, to prove what he ment by the words "poor relations." 1 Ves. 231–2. On the question, whether the devise to the wife was in lieu of dower, a rough draft of the will in testator's handwriting, containing the devise and the words "in lieu of dower," which was omitted by the mistake of the scrivener, was not admitted. 2 Yeates 304.

The rule deducible from these cases is, that inetructions are in no case admissible to control or contradict the plain words of a will, or to supply an omission, unless there is something on the face of the executed will, which shows a mistake or omission, by pointing or referring to something which the instructions will explain. When there is such a reference, whether the ambiguity is latent or patent, it may be removed by the instructions or other matter referred to, or pointed out; the thing referred to being considered as connected with the will by the reference, so as to bring the case within the rule, "*id certum est quod certum reddi potest.*" But when the will is ambiguous in its words, and contains no reference to anything which can make it certain, or on its face admits of no construction, it is void. 1 Johns. Ch. 255–5, 286; 3 Atk. 258; 3 S. & R. 607; 7 Ibid. 114; 8 Co. 155.

As to parol or extrinsic evidence, the rules are well settled. It is not admissible to fill up a blank (2 Atk. 239; 3. Bro. C. C. 311, 313; 21 Eng. C. L. 291–3), or the omission of a devisee (3 Atk. 257), nor to supply the written words of a will, it must be construed *ex visceribus suis* (1 Yeates 432; 2 Ibid. 304), nor to explain it, unless it refers to something *dehors*, of so ambiguous a nature as to require explanation. not of a doubt in the will, but a doubt on a matter out of the will (7 S. & R. 113–14; 1 Johns. Ch. 234); not in its construction but its *factum*. 3 Cond. Eng. Eccl. 290; 4 Ibid. 209; 21 Eng. C. L. 291. When there is no description of the devisee or thing devised, it is not admissible, nor where the thing devised is well described or defined in terms or by reference, in order to embrace what is not so described. As, a devise of "my money," evidence will not be admitted to show that the testator intended to give bonds, notes and mortgages (1 Johns. Ch. 231–4; 14 Johns 9, 14); so, of a devise of my farm in the occupation of A., an averment that he intended to pass land in the occupation of B. cannot be admitted. 11 Johns. 212, 220; 14 Eng. C. L. 291; Godb. 16. If the devise has a certain effect and operation to pass lands at the place described, it shall not be extended by intrinsic evidence, to embrace lands elsewhere, unless the intention can be collected from the will itself. 21 Eng. C. L. 290. A new description cannot be introduced into the body of the will, and no estate can pass that does not answer the description it contains, nor can evidence be received which amounts to a new devise, which the testator is supposed to have omitted, or to add words which he has not used (Ibid. 291; 3 T. R. 87); or where the

will is silent, to apply it to a new subject-matter of devise, or a new devisee, as to prove that the word "Gloucester" was omitted by mistake, so as to make the lands in that county pass by the will, though not referred to (21 Eng. C. L. 292–4, citing Newburg *v.* Newburg, 3 Bro. P. C. 553); but is admissible where a description of the subject-matter is imperfect; so of the devisee—or where the description is true in part but not in every part, if there be a sufficient indication on the face of the will to justify the application of the evidence. 21 Eng. C. L. 294.

If there be in any part of the will a sufficient description, it shall not be vitiated by any mistaken description or circumstance, for, "*utile per inutile non vitiatur.*" 7 Johns. 217; 1 M. & S. 301. See Bac. L. T. 102, &c., Reg. 25. Or, if it can be collected from the words of the will, that the description of the two estates has been transposed by mistake—the local description may be rejected as surplusage for "*falsa demonstratio non nocet,*" where enough appears after the false description is rejected. 21 Eng. C. L. 281–4. An averment to take away surplusage is good, but not to increase that which is defective in the will of the testator. Godb. 131; Hob. 32. In deciding on the admission of evidence, and the construction of wills, the court will look to the situation of the testator's family when it was made (3 Dow P. C. 68; 2 Ves. 217; 1 Wash. (Va.) 55–6), and of the property he owned, in order to ascertain to whom he intended to give it, and what he intended to give, by construing the words consistently with the state of his property and family, but not to introduce new words into the will. 21 Eng. C. L. 288, 294. Or to strike out those it contains, as a devise of all my lands in the parish of C., called Hoplands, to my son J.; if he dies without issue, Hoplands shall remain to B. Hoplands was an entire farm, extending into two parishes, but that part only passed which was in C. Cro. Jac. 223. So, a devise of my lands of Ashton, or at Ashton (which mean the same thing), other lands not situate there will not pass by any evidence *aliunde.* 3 Dow P. C. 65, 87, 91. The same rule was adopted on a devise of "his freehold and real estates, in the city of Limerick and county of Limerick." The testator had a small estate in the city, but none in the county of L., but had estates in the county of Clare, yet evidence of his intentions was not admissible, to show that he intended to give the estates in the county of C. 21 Eng. C. L. 28–9; 8 Bing. 244. "The court cannot do for a testator what he has not done for himself." 1 Mason 11–12. Or make a will for him while he sleeps in his grave (6 Conn. 174), and they cannot receive evidence of his declarations before or after the making of the will. 2 Vern. 98; 8 Conn. 264; 4 W. C. C. 265; 4 Desauss. 215, &c.; 1 Gallis. 170: Pet. C. C. 87; 8 Wheat. 211.

Courts of law have always been jealous of admitting extrinsic evidence to explain the intention of the testator, and it is admitted only where an ambiguity is introduced by extrinsic circumstances (4 Dow P. C. 93), or in that class of intermediate cases referred to by Lord Bacon and Judge Story, which partake both of the character of latent and patent ambiguity; as where the words are clear, but admit of two constructions consistently with the meaning. Bac. L. T. 100; S. P. 1 Mason 12; 5 Wheat. 336–7; 2 Ves. 217. The admission of the evidence, in such cases, is to give effect to the will, by removing the ambiguity (4 Dow P. C. 93), and is of such a nature as stands well with the words of the will. 8 Co. 155 *a.* It is admitted, where there are two persons of the same name, to show which was intended. 2 Atk. 373–5, 686; 2 Dall. 70, 72; 8 Co. 155; 1 Wash. (Va.) 55. Where there is a mistake in the christian or surname of the devisee (2 Ves. 218; 2 Atk. 373; Godb. 17; Co. Litt. 3 *a*), if there is a certainty of the person meant. Swinb. 480. In cases of resulting trusts. 2 Atk. 573; 1 Vern. 31 *a.* Or, where the testator used to call James, "Jackey" and gave a legacy to "John." Ambl. 175; 2 Dall. 70; 1 Ves. 231. So, where he had a niece named "Gertrude Yardley," whom he used to call "Gatty," and often declared he would do well for her; she took a legacy given to "Catherine Evanley," there being no such person as C. E. 2 P. Wms. 141–3. If the testator errs in the name, and not in the person, the devise is not hurt by the error. Swinb. 480–81. If a devise is made to the church, it shall go the parish church of the testator; or, if he names a church, and there are divers of the same name, it shall go to the one where he usually resorted; so, if to "the poor," it shall go to the poor of his parish. Swinb. 489. Or, if he was a refugee, and devises to the poor generally, it shall be intended to mean poor refugees of the same nation with himself (Ambl. 422; 2 Roper on Leg. 147), or to the charity school, and if there were two in the place, the legacy went to one, of the children of which the testator was fond, and to whom he had declared he would leave something at his death. 1 P. Wms. 674–5.

The court will look to the situation and circumstances of the testator, to ascertain his intentions (2 Eq. Cas. Abr. 366; 2 Ves. 213), the use to which the thing devised had been applied (3 P. Wms. 145), and the association of the testator with one of the persons of the

same name to whom he had given a legacy. 2 Dall. 70–2; 2 Vern. 593; 1 Ibid. 31. On the same principle, the court will look to the testator's property, in order to ascertain what he intended to devise. 1 Wash. (Va.) 55, &c. As, where he had no real estate of his own, but had a power of appointment over real estate, and devised "all his real estate," it will pass the latter, otherwise the will would be inoperative. Hob. 160–6, 176; 3 S. & R. 111, 115; 1 Rawle 249; Seaton *v.* Kuhen, 2 Ves. jr. 589; 21 Eng. C. L. 292. So, where one devised all his freehold houses in a street, but had no freehold houses there, though he had leased houses there, the latter passed by the will. 1 P. Wms. 386; 21 Eng. C. L. 292; 2 Leon.; Cas. temp. Talb. 153; 3 P. Wms. 386. It is sufficient, if the devise shows the intention of the testator in substance, though it is defective in circumstances, or they fail. Hob. 32. As, a devise of "my T. farm, in the occupation of A." it appeared, that only part was in his occupation, yet, as the T. farm was a sufficient description, the whole passed. 1 M. & S. 301. So, where he owned a house in Fourth street, occupied by A., and devised his house in Third street, occupied by A., the house in Fourth street passed. 2 Wash. (Va.) 475–6. For these purposes, extrinsic evidence is admissible, to correct mistakes or remove ambiguities, by referring to the facts and circumstances on which the will is predicated, to apply the words and written intention of the testator to the devisee and thing devised, and thus to effectuate the declared objects of the testator consistently with his will. But when the evidence offered does not remove the doubt completely, then it is inadmissible (3 Cond. Eng. Eccl. 290; 4 Ibid. 209); for if, admitting its truth, there is a doubt on the words of the will, it is void for uncertainty, by the judgment of the law, and no averment *dehors* can make that good which, upon consideration of the deed, is apparent to be void. If the averment which is out of the will stands well with its words, it shall be tried by the country, if otherwise, it is matter of law. 8 Co. 155 *a*.

On a subject which has so often arisen in courts of law and equity as this has, there is a multitude of cases in which general principles have been settled or recognised, from the passage of the statutes of wills, that have never been departed from; we have noticed a sufficient number of the leading ones, to enable us to come to a conclusion entirely satisfactory in their application to this case. Here is a perfect will, duly and fully proved, which wholly omits any disposition of the land in question; there is no ambiguity on its face, which can make it void; the revoking clause is absolute, unqualified and without exception; we can, therefore, establish no other paper or part of a paper, as the will of the testator, without directly expunging the clause of revocation. There is no latent ambiguity which arises from the application of the words of the will to the subject-matter of the devise, or the person to whom it is devised; the evidence relied on does not "stand well with the words of the will," it is wholly extrinsic and *dehors* the will, which as to the remainder of the estate in the homestead, contains neither a devisor, devisee, nor anything devised. To make out the existence of either, we must introduce into the body of the will, a clause from the instructions, to which no reference is made, which cannot be connected with it by any construction, but is a new subject-matter of devise, wholly foreign from the will. This is a fatal objection to the title of the defendant, which cannot be removed by the court, without overruling the best established rules and principles of law in the con- of the statutes of wills, in England, adopted in this country in their application to our own acts of assembly. See 1 Rawle 120–1.

If, in the adjudged cases, we had found any judicial precedent to authorize us to add this clause to the executed will, we should have felt at liberty to have followed it, as it would have accorded with what we are satisfied was the actual intention of the testator, as proved by the witnesses to the instructions or rough draft, as well as the general understanding of the family, appearing by their assent to the decree of the register's court, and their petition to the legislature to supply the omission, to insert the devise in the will.

But in every view which we can take of the case, there are difficulties which cannot be overcome. There is not a particle of evidence to justify us in striking out the revoking clause of the executed will, it must remain as an operative clause; and while it remains, we can adjudge no other paper to be his will; if however this objection to the defendant's title could be removed, the others are insuperable. The evidence removes no doubt or ambiguity which existed without it; the only defect which it could cure is, the want of a clause devising the homestead; but as the will is wholly silent on this subject, the effect of the evidence is to make a new devise, not to explain a doubtful phrase or word in the will. 1 Rawle 120–1. This would be more than filling a blank by extrinsic averments, for it would be to supply the three indispensable requisites of a will, by collateral proof out of the will, when the law directs that they shall appear in writing in the body of the will.

That which is executed contains no dispo-

sition which affects the case: there is no devisor, devisee, or thing devised, without declaring the law to be, that instructions or the rough draft of a will are not superseded by a perfect executed instrument, and that the latter shall not be inferred to a change of intention when they differ, but shall be controlled by the former. Admitting, that the omission to transfer the devise from the draft to the will, was a mistake in the scrivener, or of the testator, it is a case which has often occurred, and repeatedly decided to be incurable, unless there is some allegation of fraud or imposition practised on the testator, neither of which is alleged in this case. The consequences of an omission to make a will at all, or to dispose of any particular part of a man's estate, is not to authorize a court and jury to make such an one as they may think he intended to make, but omitted to do it by mistake—that would be a repeal of the statutes of wills and introducing the very ills against which they were intended to guard, produce the most utter confusion in titles depending on dispositions of property which were to operate after the death of the owner. There may be cases of hardship growing out of the application of the law to special cases of individuals, they, however, are of trifling consideration, when contrasted with the general mischiefs which would pervade society, if there was no certainty in the law.

If men intend to dispose of their property by will, in a particular way, and do not do it in the manner pointed out by law, they die intestate; the fault is not in the law, it is in the testator; the hardship which it may cause to the intended object of his bounty, is not visitable on the administrators of the law, who must act within the line defined by the legislature. If the law is unjust, it must be amended by the legislative department of the government; you and we have only to ascertain what the law is; they must declare what it ought to be. In the decision of causes, we have our appropriate duties; it is yours to declare what facts are proved by the evidence before you; it is ours to declare what the law is upon the evidence offered or the facts found. In this case, there is no question of fact; the truth of all the evidence is admitted; it is upon paper, showing for itself; it admits of no doubt. You can find nothing more than that Edward Brinton intended to devise his homestead to James; that he put that intention into writing, by instructions or rough draft, and intended to insert it in the will, but that by mistake, or some other cause, it was not done. Yet you cannot find that he did not make the executed will; that he did not revoke all former wills, or that the last one contains every clause which disposes of the remainder to James, or shows any mistake in its body. The facts which you can find are out of the will; they cannot be introduced into it by any power save that of the testator; they cannot be deemed a new will, as they existed before the execution of the authenticated one; they cannot amount to a will by themselves, because the paper is revoked, nor be connected with the existing will, which contains not the least reference to the matter. The law, therefore, adjudges the evidence to be entirely insufficient to establish as the will of Edward Brinton any other paper than the one he executed.

The counsel of the defendant has endeavored to take his case out of the general rules of law, by the introductory clause, "as to what worldly estate God has been pleased to bless me with, I give and dispose of in the following manner," which he considers as indicating an intention to dispose of the whole estate by that will, and that the omission to do it is an ambiguity which can be explained and cured by averment of extrinsic matter. There is no authority for giving such operation to this clause, as to let in evidence of a devise not referred to in the will; the law is well settled, that an introductory clause will not, by its own force, enlarge an estate given in the body of the will, nor for such purpose be attached to a subsequent devising clause, so as to give it a wider range. 1 Rawle 415. The most that can be said is, that where the words of the devise admit of passing a greater interest than for life, courts will lay hold of the introductory clause to assist them in ascertaining the intention. 10 Wheat. 228–9; 4 W. C. C. 195. It is carried down to the devising clause, in order to show the intention, but will not of itself give a fee. 8 S. & R. 289. Nor carry an estate that is clearly omitted; but if it be dubious whether it be omitted or not, it will help the interpretation. 1 Dall. 226. See 1 Rawle 415.

In this case, there is no devising clause to which the introductory words can be carried; if we give them any effect, it will be to make them the will itself, by republishing and establishing a revoked paper; this would be to overrule all authority, and to reverse every settled principle which governs the construction of wills. A clause which cannot connect a devise for life with one in fee, cannot, by its own force, create a fee, where no devise is made. Besides, if we consider it evidence of the intention of the testator to dispose of his whole estate, it will not answer the purpose of the defendant, for the declared intention is to dispose of it by that will, and not a former one; it contains no reference to any other paper, and declares that

he disposes of his estate in the following manner—that is, as the will directs, and none other. The utmost meaning, therefore, of which it is susceptible, is to show that, as to the land in question, he had not fully executed his first intention declared in the beginning of the will; in other words, he has not devised the fee-simple, and has left it to be distributed according to law. It is lastly contended, that connecting the other evidence with the executed will, such a case is presented, as will authorize the court to make it conform to the evident intention of the testator. As a court of law, we have no power to reform any instruments; we must decide upon them according to their legal construction, effect and operation, apparent on their face, or with the aid of such evidence as is admissible, by the rules of law, to explain them. Courts of equity will reform instruments made to carry into effect the contracts and agreements of parties, according to their original intention; the agreement, being the standard of right and equity between the parties, will be carried into effect, notwithstanding any defect in the instrument adopted as its execution. Yet where an instrument has been deliberately executed by the parties, under a mistaken opinion of both as to its legal effect, a court of equity will not reform it, though it fails to effectuate their intention. 1 Pet. 1, 17. But there is no analogy between these and cases of wills; there is no antecedent or existing standard by which to reform the instrument made to carry into effect the final and last will of a testator; unlike a contract or agreement, which requires the meeting of two minds to give it efficacy; a will is the written declaration of the party, proved by two witnesses to be a testamentary disposition of the testator's property. It then becomes its own standard; the only evidence of the will and volition of the testator which a court of law or equity can notice. The intention must be found in its body, and when once ascertained, cannot be altered by any other power than that which formed and expressed it in writing.

In cases of contracts, courts of equity act upon the conscience of a party, by compelling him to execute it in good faith, according to the intention with which it is made, but they do not assume the power of altering or reforming original agreements differently from the intention of the parties, the extent of their power is to correct any instrument, reducing it to writing or executed to carry it into effect, contrary to the true meaning and intention of the contracting parties. In cases on wills, the executed declaration of intention, made according to the forms and solemnities enjoined by law, is the standard of right, by all the rules of law as well as equity, between the heir-at-law and the devisee, which no court can alter, modify, construe or reform, on any other evidence of intention than can be collected from its words, as the testator has made and declared it. So all courts and juries are bound to take and respect it, as his last will and testament, revoking all others, and passing only such estate as it professes to dispose of, or such as by construction can be brought within its provisions. We must take this will as we find it, and notwithstanding any evidence, which has been received, feel bound to declare, that it does not devise the property in question to the defendant.

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*107] *The Bank of the United States, Appellants, *v.* Elizabeth Lee, Edmund J. Lee and Richard Smith, Appellees.

Deed of trust.—Statute of frauds.

R. B. L., in 1809, then residing in Virginia, for a valuable consideration, made a conveyance, in trust for the benefit of his wife, of certain personal property and slaves, which deed was duly recorded according to the provisions of the act of the legislature of Virginia; the property thus conveyed remained in the possession of the husband and wife, while they resided in Virginia; and in 1814, R. B. L. removed to the district of Columbia, with his wife and family, and brought with him the slaves and property so conveyed in trust. In 1817, R. B. L. borrowed a sum of money of the Bank of the United States, on his promissory note, indorsed by one of the trustees named in the deed of trust of 1809; at the time the loan was made, R. B. L. executed a deed of trust of eleven slaves, and among them were the slaves, and the household furniture, conveyed by the deed of 1809, to secure the bank for the amount of the loan. In 1827, R. B. L. died, entirely insolvent; during his residence in Washington, being in reduced circumstances, he sold some of the slaves conveyed by the deed of 1809, for the support of his family; without objection by his wife or her trustees. In 1834, the debt to the bank being unpaid, a bill was filed against Mrs. E. L., the wife of R. B. L., and the trustees,