that a system requiring taxation at the place where the property has been located for the greater part of the year is the best system available under an assessment arrangement.

OMISSION OF MISTAKEN INSERTIONS IN WILL CONTESTS

Although the English probate courts frequently have exercised the power to omit words mistakenly inserted in a will, American courts have neither exercised nor denied this power. However, if the mistaken insertion results in a misdescription of the person or object intended, and if the description in the will is ambiguous when disposition of the property is attempted, the power of construction will be used by both the English and American courts to clarify the ambiguity, thereby correcting the mistake. Unfortunately the construction power cannot be used to correct all such misdescriptions. Several states have adopted a strict rule excluding extrinsic evidence which purports to prove the ambiguity of a description which applies perfectly to an existing person or object due to facts and circumstances relating to the testator; thus, even when a testator describes property that he does not own, this rule has been applied to prevent the admission of extrinsic evidence to show that the description is ambiguous because the testator owns property similarly described.[1] Furthermore, mistaken insertions which result in misdescriptions that are not ambiguous when disposition is attempted, or which result in non-misdescriptions[2] cannot be corrected by construction because the only evidence available to correct the mistake would be evidence that a word was inserted by mistake; and, such evidence is not admissible in a construction proceeding. The English probate courts would correct such mistaken insertions by omission. Assuming that a remedy should exist to correct all mistaken insertions and thereby

1. Estate of Lynch, 142 Cal. 373, 75 Pac. 1086 (1904); Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919); Stevenson v. Stevenson, 285 Ill. 486, 121 N.E. 202 (1918); McGovern v. McGovern, 75 Minn. 314, 77 N.W. 970 (1899); Barner v. Lehr, 190 Miss. 77, 199 So. 273 (1940). *But see* Wheaton v. Pope, 91 Minn. 299, 97 N.W. 1046 (1904).

2. The term "non-misdescription" refers to situations in which the mistake does not involve a description and to situations in which the property described is intended but there is a mistake as to the amount intended. See note 39 *infra*. Although non-misdescriptions could include all patent and latent mistaken insertions which do not result in misdescriptions, the term has significance only with respect to latent mistaken insertions and is, therefore, used only in reference to latent mistaken insertions. However, even if the term were used to include patent mistaken insertions, correction by construction would be impossible except in a few rare cases. See note 47 *infra* and accompanying text.

effectuate testators' intent, justification is needed for the failure of American lawyers to request American probate courts to follow the English common law precedent of omission. Before seeking justification, it must be determined whether or not omission is consistent with sound probate theory.

THE LEGAL THEORY: PROBATE OMISSION AND THE STATUTORY REQUIREMENTS

Anglo-American law grants to testators the right to determine the posthumous disposition of their property To effectuate this right a testator must express his testamentary intent in a writing which has been signed by the testator and which has been attested and subscribed by the requisite number of witnesses.[3] If the writing expresses the subjective disposition which the testator wished to be made of his property, the testamentary intent has been expressed.

A writing which complies with the foregoing formalities is generally the best possible objective evidence of testamentary intent. It would seem to follow that the purpose of the writing requirement is to force decedents to provide such evidence in order that distribution of their property can be made with the greatest possible certainty of effectuating their testamentary intent.[4] To achieve this purpose probate statutes arbitrarily provide that only such a writing may be probated as a will and also provide an intestate plan of distribution for decedents who fail to execute such a writing.

However, the writing allegedly provided by a testator is not always reliable or sufficient evidence of testamentary intent. In order for a court to be reasonably certain that the writing offered for probate is both reliable and sufficient evidence of testamentary intent, two determinations may be necessary. First, the court must determine whether or not the writing was duly executed whenever an issue of due execution is raised. This determination is made by inquiring whether or not all the words in the writing were, under a free and normal exercise of the testator's mental processes, intended to be physically included as a part of the writing. For, if fraud, duress, or any other valid objection to the due execution occurred, all, or a part, of the writing does not constitute the testator's testamentary intent. The objectionable part should therefore be denied probate. Second, the court must determine the meaning

3. See, *e.g.*, IND. ANN. STAT. §§ 6-502-03 (Burns 1953). See also 1 PAGE, WILLS §§ 46, 238, 273, 306 (3d ed. 1941). An exception to these requirements is sometimes made for nuncupative wills.

4. In addition to greater certainty, the writing requirement provides greater speed at less expense in distributing testator's property.

which the testator was attempting to convey by the words expressed in the writing. Since the meaning of language is frequently dependent upon the circumstances in which it was uttered, failure to seek the meaning of the writing in accordance with such circumstances may result in a failure to effectuate the testator's testamentary intent.

Both of the foregoing determinations require the admission of extrinsic evidence. However, if such evidence is admitted, the writing requirement will have the limited effect of excluding only extrinsic evidence of testamentary intent which is offered for probate as a part of the testator's will.[5] Admittedly, the language of the statutes is consistent with this limitation. Furthermore, if the writing requirement was to have the broader effect of excluding all extrinsic evidence, the purpose for the writing requirement, viz., certainty as to the testamentary intent, would be frustrated. Therefore, the admission of extrinsic evidence for making both determinations appears to be consistent with the language and purpose of the writing requirement. In addition, the fact that courts have made both determinations for several hundred years and the fact that probate statutes frequently provide for making both determinations seem to confirm that the effect of the writing requirement was intended to be so limited.

The procedure for making the two determinations is not the same. Generally, probate statutes provide that the due execution of a will may be challenged in a will contest. On the other hand the meaning of the will is determined in a construction proceeding in accordance with rules of construction which are used by the court to enable it to ascertain the testamentary intent.[6] Although power to construe the will may be derived from an express statutory provision,[7] courts have, apparently, always

5. Even this limited effect might be considered to be too broad. Although it is undoubtedly necessary to exclude extrinsic evidence of testamentary intent which a testator has allegedly omitted from the writing, it is open to serious question whether or not extrinsic evidence of testamentary intent which has been omitted due to fraud or mistake should or need be excluded. In the latter case it cannot be argued that the admission of such evidence will result in a failure by testators to express their testamentary intent in writing. Also, extrinsic evidence of testamentary intent which was fraudulently or mistakenly omitted is the best evidence of the testamentary intent. Finally, it seems that a fraudulent or mistaken omission can be as reliably proved as a fraudulent or mistaken insertion. The admission of such evidence is admittedly a policy question, but the reasons for its admission seem to outweigh any reasons for its exclusion.

6. The separation of will contests (probate issues) and construction proceedings (construction issues) is derived from the English common law procedure. In England, probate issues are tried by the Probate Division of the High Court of Justice (superseding the ecclesiastical court) while construction issues are tried by the Chancery Division of the High Court of Justice (superseding the Chancellor). Although a distinction is still made between probate and construction issues, a single court decides both issues in most states. See text accompanying notes 36-40 *infra*.

7. See, *e.g.*, IND. ANN. STAT. § 6-605 (Burns 1953).

made this determination as a matter of necessity without express authority.

From the foregoing discussion it appears that extrinsic evidence is admissible in a will contest to provide any valid objection to the due execution of a will. Since a mistaken insertion is not intended by the testator to be executed as a part of his will, the existence of a mistaken insertion is a valid objection to the due execution of a portion of the will.[8] Therefore, extrinsic evidence, *if reliable,* should be admissible to prove the existence of a mistaken insertion. Once the mistaken insertion is proved, it should be omitted from the will.

It remains to determine whether or not extrinsic evidence of a mistaken insertion can be reliably admitted as a valid objection to the due execution of the writing. The law is settled that certain types of extrinsic evidence[9] may be admissible to show the undue execution of a will because of fraud, duress, or undue influence.[10] Such evidence should have even greater reliability in many mistaken insertion cases because the existence of the mistake is indicated by evidence as reliable as a will or by the will itself.[11] Therefore, it would seem that such extrinsic evidence can be reliably admitted to prove that a word was mistakenly inserted in a will.

It is essential that mistaken insertions be distinguished from other mistakes of fact.[12] Mistakes of fact can be conveniently classified into three categories. First, there are mistakes in the expression of intent. This category includes situations where the testator is mistaken as to some fact concerning a person or object which the testator has attempted to

8. See, *e.g.,* IND. ANN. STAT. § 7-117 (Burns 1953) providing that the grounds for contesting a will include ". . . the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity. . . ." This provision would appear to include any objection to the execution of the will which would be valid at common law. Since the existence of a mistaken insertion is a valid objection to the execution of the mistaken portion of the will under the English common law, the statute appears to expressly provide for the correction of mistaken insertions.

9. For example, evidence of the testator's surrounding circumstances is admissible while testimony by a witness that the testator had said that he intended to make a bequest to the witness is generally inadmissible.

10. See, *e.g.,* IND. ANN. STAT. § 7-117 (Burns 1953). Although probate statutes generally provide for will contests, in most jurisdictions the grounds for contesting a will are determined by case law rather than by statute. For an exhaustive list, see 1 PAGE, WILLS §§ 177, 181, 192, 193, 195 (3d ed. 1941).

11. See, *e.g.,* Fulton v. Andrew, L.R. 7 H.L. 448 (1875); Goods of Walkley, 1 R. 480 (1893). See p. 573 and note 83 *infra* for a discussion of these cases. Furthermore, a mistaken insertion can be proved with greater certainty than fraud in the inducement, duress, or undue influence because it is not necessary to weigh the impact of the circumstances on the testator's mental processes.

12. Mistakes of law raise different questions than mistakes of fact and are not discussed herein. Generally, mistakes of law cannot be corrected. *In re* Gluckman's Will, 87 N.J. Eq. 638, 101 Atl. 295 (1917), *reversing* 87 N.J. Eq. 280, 98 Atl. 831 (1916). See also 1 PAGE, WILLS § 165 (3d ed. 1941).

describe and also situations where the testator has ascribed to his words a meaning which differs from the meaning given to those words by the average person.[13] For example, a testator devises a "red house" which, unbeknown to the testator, has been painted green. Since the words used by the testator are intended to be physically included, the mistake is not a valid objection to the due execution of the will. But, the words are inadequate to convey the testator's meaning with sufficient clarity. Mistakes in the expression of intent involve the *meaning* of the words used and thus raise construction rather than probate issues.

Second, there are mistakes in the inducement of intent. In such a situation the testamentary intent is induced by some extrinsic fact of which the testator is mistaken. For example, a testator stipulates in his will that "all my property, which I wanted my son to possess, should be given to XYZ charity as my son is dead." After the testator's death, the son returns from a foreign country, where he previously had been reported as dead. If it appears in the will that a mistake was made, that the mistake induced the disposition, and what disposition would have been made but for the mistake, there is some authority that the disposition included in the will should be ignored and the testator's testamentary intent, but for the mistake,[14] given effect. As the words used by the testator are intended to be physically included in the will, inducement mistakes are not valid objections to the due execution of the will; rather, such mistakes involve the expression of an alternative[15] testamentary

13. See Moseley v. Goodman, 138 Tenn. 1, 195 S.W. 590 (1917) where extrinsic evidence was admitted to show that a devise to "Mrs. Moseley" was intended for a woman named Mrs. Trimble, whom the testator generally called "Mrs. Moseley," even though there was a claimant named "Mrs. Moseley." An argument can be made that such a situation does not represent a mistake in the expression of intent. The inclusion of such situations is based upon the testator's mistaken expression of his intent in terms of the normal meaning of the words which he used.

14. Gillespie v. Gillespie, 96 N.J. Eq. 501, 126 Atl. 744 (1924), *aff'd*, 98 N.J. Eq. 413, 414, 129 Atl. 922 (1925) (revocation of legacy based on mistake); *In re* Wright Estate, [1937] 3 West. Weekly R. (n.s.) 452; Campbell v. French, 3 Ves. Jun. 321, 30 Eng. Rep. 1033 (P. 1797) (revocation of legacy based on mistake); Gifford v. Dyer, 2 R.I. 99, 102, 57 Am. Dec. 708, 709 (1852) (dictum). In most states a similar result is achieved, in part, by the statutory protection of the pretermitted child. See 1 PAGE. WILLS § 525 (3d ed. 1941). See also GA. CODE ANN. § 113-210 (1937). The testamentary intent of the testator would normally be effectuated by giving effect to the intent but for the mistake. However, when the mistake involves more than one person, the intent but for the mistake may not be sufficiently certain in regard to the proper disposition among the several persons. In the latter situation intestacy may, more or less, achieve the testator's intent when only members of the family are involved. *In re* Wright Estate, *supra*. If intestacy is insufficient, possibly a constructive trust could be imposed by a court exercising equitable jurisdiction to prevent unjust enrichment of the legatee mistakenly named in the will.

15. Alternative intent should be distinguished from conditional intent which all courts will effectuate. The latter is exemplified by the following: "I leave all my property to my son. But, in the event of his death, I leave the property to XYZ charity."

intent. The disposition to XYZ charity in the foregoing example was an alternate, or substitute, for the disposition to the son which the testator would have made if the facts were not as he mistakenly believed them to be.[16]

Third, there are mistakes in the execution of the intent. For example, a testator attempts to give all his property to his son, but the word "real" is mistakenly inserted before the word "property" in the testator's will. Such a situation will be referred to as a mistaken insertion. In addition to mistaken insertions, this category includes situations where an entire writing is executed which is not intended to constitute the testator's will. In the latter situation, the entire writing is omitted from probate.[17] However, in mistaken insertion cases, only a portion of the words in the writing have been inserted by mistake. Such words should be omitted. As mistaken insertions are the only mistakes other than mistakes as to the entire writing which constitute a valid objection to the due execution of a will, only mistaken insertions can be corrected by omission.

Although omission of a mistakenly inserted word should be requested by commencing a will contest,[18] the same result may be achieved in a construction proceeding by giving a word *no* meaning whenever the writing and the surrounding circumstances of the testator convince the court that a word was either not necessary to or not properly included in the testamentary intent which the testator had attempted to express.[19] However, correction by construction is basically[20] limited to misdescription cases in which the court concludes that a description in the will is ambiguous when disposition is attempted, and that the remainder of the

16. If the words "which I wanted my son to possess" were omitted, the intent but for the mistake would not be so clear. The possibility that less than all the property would have been given to the son might result in some courts refusing to allow the son to take any of the property. *Contra, In re* Wright Estate, [1937] 3 West. Weekly R. (n.s.) 452.

17. Bradford v. Blossom, 207 Mo. 177, 105 S.W. 289 (1907); Goods of Hunt, L.R. 3 P. & D. 250 (1875); 1 PAGE, WILLS §§ 162, 163 (3d ed. 1941).

18. See notes 6, 8 *supra* and accompanying text.

19. See Patch v. White, 117 U.S. 210 (1886); Pate v. Bushong, 161 Ind. 533, 69 N.E. 291 (1903). See also Hertford v. Harned, 185 Ind. 213, 113 N.E. 727 (1916) where an entire clause was given no meaning. It was not clear in either the *Patch* or the *Pate* case whether the mistake was a mistaken insertion or a mistake in expression. Both cases involved misdescriptions. In such cases it is frequently stated that the court must reject the false part of the description and give effect to the remainder. Pate v. Bushong, *supra* at 553, 69 N.E. at 298. Rejection of the false part of a description is often referred to as an application of the maxim, *falsa demonstratio non nocet.* See note 34 *infra.* A court must determine which part of the description, if any, is false or should be given no meaning. This determination is not difficult when the description is of property because of the presumption that a testator intends to dispose of only his own property. See text accompanying notes 29-32 *infra.*

20. For a rare exception, see note 47 *infra* and accompanying text.

description is sufficient to identify the person or object intended by the testator.[21] The following exemplifies such a situation: a testator owned a green house on Third Street; the testator had never owned any other house; in his will the testator described the house as "my red house on Third Street." Unless the court determines that the testator meant "green" when he used the word "red," the court, in effect, would have to give the word "red" no meaning in order to find the description adequate to devise the house.

The mistake in the foregoing example could be the result of either a mistake in expression, susceptible to construction, or a mistaken insertion, susceptible to omission; the former would be exemplified by a mistake as to the color of the house while the latter would consist of a mistaken insertion of the word "red." If there is available evidence indicating that the latter occurred, the word should be omitted rather than given no meaning. However, if the evidence indicates the former occurred, or if there is no evidence to indicate which occurred, correction by construction seems quite proper and probably more desirable than correction by omission.

The foregoing examination of probate theory demonstrates that the omission of words mistakenly inserted in a will appears to be not only permissible by the language of probate statutes but also completely consistent with the underlying theory of such statutes. As American lawyers have not requested the omission of mistaken insertions, there is a need to determine when omission should be requested and why such requests have not been made.[22]

Correction by Construction

Some mistaken insertions can be corrected in a construction proceeding. A construction proceeding involves an issue as to the meaning of the

21. Whitcomb v. Rodman, 156 Ill. 116, 40 N.E. 553 (1895).

22. Although omission has been requested in will contests, none of the cases involved mistaken insertions. Burger v. Hill, 1 Bradf. 360 (N.Y. 1850), *equitable relief denied,* Hill v. Burger, 10 How. Pr. 264 (N.Y. 1854); Alexander's Estate, 206 Pa. 47, 55 Atl. 797 (1903). In Burger v. Hill, *supra,* the testator mistakenly thought that the term "real estate" included a leasehold. Since the case did not involve a mistaken insertion, the omission made by the court was erroneous. The same result possibly could have been achieved in a construction proceeding by giving the words "real estate" the special meaning of the testator. See Mosely v. Goodman, 138 Tenn. 1, 195 S.W. 590 (1917) and cases discussed therein. Since there was no property to which the testator's language could apply in the absence of a special meaning, such evidence might have been admitted even though it is often stated that evidence of a special meaning is inadmissible where the words have a common, unambiguous meaning. See, *e.g.,* Jones v. Bennett, 78 N.H. 224, 99 Atl. 18 (1916) (affirmed on rehearing). See also note 35 *infra* and accompanying text. On the other hand, relief might even be denied in a construction proceeding on the basis that mistakes as to the legal effect of words expressed in a will cannot be corrected. *In re* Gluckman's Will, 87 N.J. Eq. 638, 101 Atl. 295 (1917), *reversing* 87 N.J. Eq. 280, 98 Atl. 831 (1916). See also 1 Page, Wills § 165 (3d ed. 1941).

words used in the will. When the words used are ambiguous and can be clarified by evidence relating to the testator's meaning, the ambiguity will be clarified. The availability of construction, therefore, depends upon whether or not the words mistakenly inserted create an ambiguity susceptible of clarification by such evidence. Generally, the creation of such an ambiguity will depend upon whether the mistaken insertion is latent (not apparent upon the face of the will) or patent (apparent upon the face of the will).

A. Latent Mistaken Insertions: Herein Latent Ambiguities

A latent mistaken insertion may result in a misdescription of the person or object intended by the testator. In such a case extrinsic evidence, introduced to identify the beneficiaries or the property disposed of by the will, may indicate that the description is ambiguous. Such ambiguities are referred to as latent ambiguities in a construction proceeding. Misdescriptions represent one type of latent ambiguity which may be clarified by construction. The following exemplifies a misdescription which could result from a latent mistaken insertion and which could be clarified as a latent ambiguity: the testator devises his house to "John Smith"; extrinsic evidence indicates that the testator knew no "John Smith" but had a friend named Bill Smith. Generally, such a description would be found ambiguous and further extrinsic evidence would be admitted to determine which Smith was intended by the testator.[23] The word "John" would be effectively given no meaning and the word "Smith" would be found adequate to identify the person known and therefore intended by the testator. However, the mistake in such a case could also be the result of a mistake in expression.[24]. Since the issue is only the meaning of the words used, it is unnecessary for a court to determine whether the misdescription resulted from a mistaken insertion or a mistake in expression. When the misdescription is a latent ambiguity and results from a mistaken insertion, correction by construction provides a method of correction alternative to omission.

In several states, however, the strict application of the single plain meaning rule would prevent the clarification of some misdescriptions by denying the existence of a latent ambiguity.[25] If a description in the will

23. See Thayer v. Boston, 81 Mass. (15 Gray) 347 (1860); Powell v. Biddle, 2 Dall. (Pa.) 70 (1790); *Ex parte* King, 132 S.C. 63, 128 S.E. 850 (1925); Siegley v. Simpson, 73 Wash. 69, 131 Pac. 479 (1913). *But see* Polsey v. Newton, 199 Mass. 450 85 N.E. 574 (1908); Tucker v. Seaman's Aid Soc., 48 Mass. (7 Met.) 188 (1843). The absence in the description of the words "my friend" should not affect the decision. See note 32 *infra*.

24. See text accompanying notes 18-22 *supra*.

25. Estate of Lynch, 142 Cal. 373, 75 Pac. 1086 (1905); Perkins v. O'Donald, 77 Fla. 710, 82 So. 401 (1919); Stevenson v. Stevenson, 285 Ill. 486, 121 N.E. 202 (1918);

perfectly describes an existing person or object and misdescribes another person or object, such states refuse to admit extrinsic evidence to prove that the description is actually ambiguous due to facts relating to the testator,[26] and to prove that the testator intended the person or object misdescribed. Such evidence, it is said, would disturb the single plain meaning of the words used in the will. Thus, in the foregoing example, if there were only one John Smith such courts apparently would find no ambiguity and thus find nothing to clarify.[27] This result appears to be directly contra to the testator's testamentary intent. If there were evidence that the word "John" had been inserted by mistake, it could be omitted, and construction would then be available to clarify the ambiguity as to which "Smith" was intended. However, an exception would be made and omission would be unnecessary if the words "my friend" preceded the words "John Smith";[28] in such a case there would be an ambiguity capable of clarification because "John" clearly was not a friend of the testator.

The single plain meaning rule has been applied more frequently in cases involving a misdescription of property as opposed to the misdescription of a person. Thus, in one case[29] it appeared that the testator had interchanged the township and range numbers in his description of certain real property. Even though the testator did not own the land described, but did own land which would have been described if the

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McGovern v. McGovern, 75 Minn. 314, 77 N.W. 970 (1899); Barner v. Lehr, 190 Miss. 77, 199 So. 273 (1940). *But see* Wheaton v. Pope, 91 Minn. 299, 97 N.W. 1046 (1904). *Compare* Tucker v. Seaman's Aid Soc., 48 Mass. (7 Met.) 188 (1843) where the single plain meaning rule was applied to a bequest made to a beneficiary unknown to the testator even though the testator knew a beneficiary which could be similarly described, *with* Bullard v. Leach, 213 Mass. 117, 100 N.E. 57 (1912) where the rule was not applied to a bequest of funds in a bank perfectly described because the testator had no funds in the bank described but did have funds in a bank similarly described. A possible explanation of the inconsistency between the *Tucker* and *Bullard* cases is that the court believed extrinsic evidence was unreliable in the former because the testator's lack of knowledge of the beneficiary described was not (or could never be) adequately proved while the non-existence of funds in the bank and the absence of any contact with the bank was and could be adequately proved in the latter case. However, it seems that, as a general rule, lack of knowledge by a testator as to the existence of a person described in his will is susceptible of being proved with adequate certainty.

26. For example, the testator may neither know the person nor own the property which is perfectly described.

27. This raises a problem as to the area to be included in determining the number of persons answering the description. If there is more than one person perfectly described, there is an equivocation and extrinsic evidence is admissible to determine which person was intended by the testator. Furthermore, extrinsic evidence is admissible to clarify an equivocation by proving that the testator intended a third person who is imperfectly described by the will. *In re* Jackson, [1933] Ch. 237. See note 35 *infra* and accompanying text.

28. See Stevenson v. Stevenson, 285 Ill. 486, 495, 121 N.E. 202, 205 (1918).

29. Stevenson v. Stevenson, *supra* note 28. *But cf.* Stevens v. Felman, 338 Ill. 391, 170 N.E. 243 (1930).

numbers had not been interchanged in the will, the court held that there was no ambiguity because the description perfectly described an existing tract of land. As a result, the testamentary intent of the testator was seemingly frustrated. The normal presumption that a testator intends to dispose of only his own property was held not applicable because the will expressly disposed of property not belonging to the testator. But, the use of words such as "my real estate," or their equivalent,[30] would give rise to an ambiguity, allowing the normal presumption to apply.[31] Fortunately such absurd reasoning has been rejected in most jurisdictions.[32]

If there were evidence that the township and range numbers had been inserted by mistake in the foregoing case,[33] omission of those numbers would have avoided the unfortunate result of the decision. If the range and township numbers of the property which the testator did not own had been omitted from the will, there would have been no conflict between the express provisions of the will and the normal presumption that a testator intends to dispose of only his own property. The normal presumption would apply and the description in the will would, therefore, have been adequate to dispose of the testator's land notwithstanding the absence of range and township numbers identifying the property intended.

The other type of latent ambiguity is a description which extrinsic evidence indicates to be equally and perfectly applicable to two or more persons of objects. These ambiguities are commonly referred to as equivocations.[34] If a testator bequeaths property to his "nephew Arthur Murphy" and evidence indicates that the testator has more than one nephew so named, there is an equivocation. The court will admit extrinsic evidence to determine, if possible, which nephew was meant by the

30. For example, the will might have stated that all the testator's property was disposed of in the will.

31. Decker v. Decker, 121 Ill. 341, 12 N.E. 750 (1887); Stevenson v. Stevenson, 285 Ill. 486, 495, 121 N.E. 202, 205 (1918) (dictum). See also note 35 *infra* and accompanying text.

32. See, *e.g.*, Patch v. White, 117 U.S. 210 (1886); Pate v. Bushong, 161 Ind. 533, 69 N.E. 291 (1903). See also 4 PAGE, WILLS § 1620 n.19 (3d ed. 1941).

33. It would seem that clarification by construction could be made with greater certainty when the mistaken insertion consists of interchanging the township and range numbers which were intended to be a part of the description than when the mistaken insertion consists of words which were not intended to be physically included in the description.

34. Latent ambiguity is sometimes defined so as to include only equivocations. When so defined, misdescriptions are considered as proper situations for application of the maxim, *falsa demonstratio non nocet*. 9 WIGMORE, EVIDENCE §§ 2472, 2476 (3rd ed. 1940). See note 19 *supra*. This limitation has not been made by the courts which have sometimes defined latent ambiguities to include both equivocations and misdescriptions, thereby including the maxim within the term latent ambiguities. The definition in the text follows the latter approach to avoid the unnecessary use of two terms.

testator.[35] It is difficult to perceive an equivocation resulting from a latent mistaken insertion, because, if the description is equivocable after the insertion, it necessarily was equivocable before the insertion. Therefore, although equivocations are construed as latent ambiguities, they are not mistaken insertions and may not be remedied by omission.

From the foregoing analysis it appears that construction can be used to correct those latent mistaken insertions which result in misdescriptions that are latent ambiguities. But, a latent mistaken insertion may result in a misdescription which is not a latent ambiguity.[36] Suppose a testator intends to devise his house to Bill Smith; but, by mistake, "John" is inserted instead of "Bill." The words "my friend" are not included. Extrinsic evidence indicates that although the testator knew John, Bill was a good friend.[37] In such a case an ambiguity would probably not be found by any court. Instead, the single plain meaning rule would be applied because the court would not be reasonably certain from evidence relating to the testator's meaning that "Bill" was intended rather than "John."[38] However, since these misdescriptions are not latent ambiguities, the application of the single plain meaning rule to these cases must be distinguished from its application elsewhere by a few courts which merely refuse to recognize the existence of an ambiguity. Similarily, construction would be unavailable when a latent mistaken insertion results in an non-misdescription. For example, suppose a testator intended to make a specific bequest of all his shares in XYZ Company and his attorney mistakenly inserted a numerical limitation causing a portion of the shares to pass either by the residuary clause or by

35. *In re* Jackson, [1933] Ch. 237. Dictum in this case suggests the absurd results which can occur when the single plain meaning rule is applied rigidly and when the testator's special meaning is not given effect. There were three Arthur Murphys' involved. Two of them were nephews of the testatrix while the third was the illegitimate son of the testatrix's sister and had married one of the testatrix's nieces. Evidence was admitted of the testatrix's relationship with the three "nephews" and of a description in a prior will in which the testatrix had referred to the illegitimate "nephew" as her nephew. The court held that the illegitimate nephew was entitled to the bequest. However, the court stated that, if there had been only one legitimate nephew, the foregoing evidence would not have been admissible because there would have been no latent ambiguity; therefore, the legitimate nephew would have taken the bequest contra to the testatrix's testamentary intent.

36. Unless the cases involving mistakes as to the *amount* of property intended to pass by a provision are considered as misdescriptions, rather than non-misdescriptions, the only misdescriptions which are not latent ambiguities would be mistakes as to the person intended.

37. This same situation could be caused by a mistake in expression. However, in such event, the mistake could not be corrected.

38. This would follow, a fortiori, in those states which find nothing ambiguous in a devise to a person whose existence was unknown to the testator. However, the same decision would probably be made in other states. Dunham v. Averill, 45 Conn. 61 (1877). See also 4 PAGE, WILLS § 1627 n.3 (3d ed. 1941).

intestacy.[39] In both of the foregoing situations, the only evidence which could correct the mistake would be evidence that a word was mistakenly inserted. Such evidence is inadmissible in a construction proceeding.

The reason for the inadmissibility of such evidence is based upon the nature of a construction issue. A construction issue raises a question as to the meaning of the testamentary intent, expressed by the language of the testator in the will. When a court in a construction proceeding corrects a mistaken insertion by clarification of a misdescription, it does not purport to correct a mistake but only to clarify the meaning of the words used in the will. But, the meaning of the words used is not the issue in either of the foregoing examples; the issue is whether or not all the words used were intended to be executed as a part of the will. As indicated supra, such issues are determined in will contests.[40]

B. Patent Mistaken Insertions: Herein Patent Ambiguities

Patent mistaken insertions are considered patent ambiguities in a construction proceeding. The term "patent ambiguity" is broader than patent mistaken insertion as a patent ambiguity may be caused by either a mistaken insertion or a mistake in expression. Although it is frequently stated that a patent ambiguity cannot be clarified by extrinsic evidence,[41]

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39. Arguably, this example, involving a mistake as to the amount of property intended, could be deemed a misdescription that is not a latent ambiguity. Its classification in either category is rather arbitrary. But, its classification will not affect the availability of either construction or omission. See note 81 *infra* for other examples of non-misdescriptions.

40. See note 6 *supra* and accompanying text. A further distinction between the two proceedings is the normal absence of statutory limitation on construction proceedings as contrasted with the normal presence of statutory limitation on the period for will contests. See, *e.g.*, IND. ANN. STAT. § 7-117 (Burns 1953) imposing a limitation of six months. In addition to other factors, the nature of the factual issues in will contests makes some limitation necessary. But, in construction proceedings, evidence of the testator's surrounding circumstances is fairly reliable even many years after the testator's death. See, *e.g.*, IND. ANN. STAT. § 6-605 (Burns 1953) which authorizes construction of the will during the period of administration by the court in which the will is probated. However, the statute does not preclude construction of the will in a proper case in suits other than probate proceedings (See official comment of commission). Construction in non-probate proceedings would be subject to the statutory limitation applicable to ejectment actions instituted to recover possession of realty or conversion for the recovery of personalty. The Indiana statute is adopted from the Model Probate Code § 60.

41. See, *e.g.*, Evans v. Van Meter, 320 Ill. 195, 150 N.E. 693 (1926); Engelthaler v. Engelthaler, 196 Ill. 230, 63 N.E. 669 (1902). See also Annot., 94 A.L.R. 26 (1935). The distinction between patent and latent ambiguities as to clarification by the admission of extrinsic evidence is based upon the conception that a sufficient expression of testamentary intent is made in cases of latent ambiguities but not in cases of patent ambiguities; and, therefore, to admit extrinsic evidence in the patent ambiguity cases would allow extrinsic evidence to establish the subjective testamentary intent without a writing. However, except when there is a complete failure by the testator to express his testamentary intent, such intent is ultimately no more clearly expressed when there is a latent ambiguity than when there is a patent ambiguity. The testator's intended disposition cannot necessarily be effectuated with greater facility in the one case than in

such a rule is too broad because the only patent ambiguities which cannot be so clarified are those which result from a complete failure by the testator to express his testamentary intent.[42] However, whenever testamentary intent has been expressed, any patent ambiguity resulting therefrom may be clarified by the admission of extrinsic evidence of the testator's surrounding circumstances.[43] But, even in the latter situation, extrinsic evidence of statements of testamentary intent is apparently inadmissible.[44] In addition, patent ambiguities may be clarified whenever extrinsic evidence is unnecessary. Therefore, to the extent that either extrinsic evidence of the testator's surrounding circumstances or the will itself is sufficient for clarification, the patent ambiguity may be clarified.

As patent mistaken insertions generally consist of two inconsistent provisions in the will, evidence that one, or part of one, provision was inserted by mistake would be the only evidence available to indicate which of the two provisions was intended by the testator to be his will.[45] Such evidence, as indicated above, is inadmissible because the meaning of the words is the issue in a construction proceeding rather than whether or not the words were intended to be physically included.[46] However, when a patent mistaken insertion causes only an uncertainty

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the other. The inconsistency of the distinction is illustrated by the following two examples. Suppose a testator bequeaths a legacy to John Smith, of Athens. If there are two John Smiths, parol proof is allowed to show which was intended. On the other hand, suppose the same testator gives a specific legacy to his wife and niece, and says, "In addition to what I have given her, I bequeath to her the rest of my property remaining at my death." In such a case you cannot, by parol, prove which "her" was meant, whether the wife or the niece. See Armistead v. Armistead, 32 Ga. 597, 601 (1861).

42. See, *e.g.*, Engelthaler v. Engelthaler, 196 Ill. 230, 63 N.E. 669 (1902) (failure of the testator to specify the remainderman in a provision intended to devise a remainder cannot be corrected by the admission of extrinsic evidence to prove whom the testator intended).

43. Payne v. Todd, 45 Ariz. 389, 43 P.2d 1004 (1935) (exclusion of evidence concerning advancements made by the testator to his children during his lifetime and concerning the relations of the parties held to be reversible error); Will of Dever, 173 Wis. 208, 180 N.W. 839 (1921) (in addition to evidence that the testator was uneducated and that he had personally dictated the will using another person's will as a guide, evidence admitted on the following: the extent of the testator's estate; the testator's family relations; the testator's attitude toward his relatives and toward claimants under the will). See also 4 PAGE, WILLS §§ 1623, 1624 (3d ed. 1941).

44. Achelis v. Musgrove, 212 Ala. 47, 101 So. 670 (1924); Alexander v. Bates, 127 Ala. 328, 28 So. 415 (1899); Gordon v. Burris, 141 Mo. 602, 43 S.W. 642 (1897); Matter of Tinker, 157 Misc. 200, 283 N.Y. Supp. 151 (1935); Lewis v. Douglass, 14 R.I. 604 (1884); *In re* Halston, [1912] 1 Ch. 435.

45. Since mistakes in expression which result in patent ambiguities would seem to be frequently susceptible of clarification by extrinsic evidence of the testator's surrounding circumstances, they could often be clarified.

46. Compare the non-misdescription cases and misdescription cases which do not involve latent ambiguities where there is no ambiguity in addition to the inadmissibility of extrinsic evidence of a mistake.

which can be clarified by either extrinsic evidence of surrounding circumstances or the will itself, it can be clarified as a patent ambiguity. Apparently only the latter has ever occurred, and it with extreme rarity.[47]

In summary, construction seems to be available only for the correction of latent mistaken insertions which cause a misdescription that is a latent ambiguity and for the correction of patent mistaken insertions which result in uncertainties. The former situation is probably the type of latent mistaken insertion most frequently made by testators. But, the unavailability of construction as a remedy for most patent mistaken insertions, for latent mistaken insertions resulting in non-misdescriptions, and for latent mistaken insertions resulting in misdescriptions which cannot be clarified either because of the single plain meaning rule or because they are not latent ambiguities makes omission a valuable and essential method of correction.

The major remaining problem is to determine when evidence is admissible and sufficient to prove the existence of a mistaken insertion in those cases in which omission must or can be made. Since omission of mistaken insertions has apparently never been requested of the American courts, a review of the English cases is mandatory in order to ascertain the admissibility of extrinsic evidence in a mistaken insertion case.

Correction by Omission in England

It frequently has been contended that if the will has been read to or by the testator,[48] or if the sense of the remainder would be changed by omission,[49] extrinsic evidence of a mistaken insertion is not admissible; therefore, omission of a mistaken insertion could not be made in such cases. But, as to the former contention, only extrinsic evidence which establishes either that the will has been *properly* read to or by the testator, or that the contents of the will have been brought to the testator's attention in some other way[50] is conclusive that words were not inserted

47. Goods of Schott, [1901] P. 190; Goods of Duane, 2 Sw. & Tr. 590, 164 Eng. Rep. 1127 (P. 1862).

48. Harter v. Harter, L.R. 3 P. & D. 11 (1873); Atter v. Atkinson, L.R. 1 P. & D. 665 (1869); Guardhouse v. Blackburn, L.R. 1 P. & D. 108 (1866).

49. Rhodes v. Rhodes, 7 App. Cas. 192, 198 (1882) (dictum); *In re* Horrocks, Taylor v. Kershaw, [1939] P. 198, 218 (C.A.) (dictum); Gray, *Striking Words Out of A Will*, 26 Harv. L. Rev. 212 (1913).

50. For example, a will executed in accordance with the testator's instructions is sufficient to show that the testator was acquainted with and approved the contents of the will. *In re* Will of Sharpley, 32 Del. 154, 120 Atl. 586 (1923); *In re* Estate of Bose, 136 Neb. 156, 285 N.W. 319 (1939).

by mistake.[51] The difficulty lies in determining when the contents of a will have been properly read or have been brought to the testator's attention. A mere reading of the will to or by the testator is insufficient.[52] Rather, the jury should be convinced that the will was read to or by the testator in such a manner that all of the words included in the will had his approval.

As to changing the sense of the remainder, Lord Blackburn suggested in the case of *Rhodes v. Rhodes*[53] that:

> "A much more difficult question arises when the rejection of words alters the sense of those which remain. For even though the Court is convinced that the words were improperly introduced . . ., it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will. 4 & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning."[54]

However, in cases since *Rhodes* a contra position has been taken by allowing omissions to be made when the sense of the remainder was changed. In *Morrell v. Morrell,*[55] the court's omission of a numerical limitation of a specific bequest caused a greater amount of property to pass by the bequest. And, in *Vaughan v. Clerk,*[56] the court omitted the word "real" which had been inserted by mistake before the word "property," resulting in the passage of both real and personal property by such provision.

The view expressed in the *Morrell* and *Vaughan* cases seems to be the proper approach. The statement that the sense of the remainder will be changed by an omission amounts to nothing more than a recognition that the sense of the words remaining without the words inserted by mistake is not the same as it was with the words inserted by mistake. If the meaning of the remainder expresses the testamentary intent of the testator, the omission should be made; and the meaning of the remainder.

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51. *In re* Triebe's Will, 114 N.J. Eq. 227, 168 Atl. 404 (1933); *In re* Hopkins' Estate, 277 Pa. 157, 120 Atl. 807 (1923); Fulton v. Andrew, L.R. 7 H.L. 448 (1875); Brisco v. Hamilton, [1902] P. 234.

52. Fulton v. Andrew, L.R. 7 H.L. 448 (1875); Gregson v. Taylor, [1917] P. 256.

53. 7 App. Cas. 192, 198 (1882) (dictum).

54. This reasoning was approved in the dictum of a recent case. *In re* Horracks, Taylor v. Kershaw, [1939] P. 198 (C.A.).

55. 7 P.D. 68 (1882).

56. 87 L.T.R. (n.s.) 144 (P. 1902).

when the words inserted by mistake were included, is irrelevant if the existence of the mistake is clearly proved.

A. Mistaken Insertions—Patent

A patent mistaken insertion is one which appears on the face of the will (although extrinsic evidence may be necessary to prove, with certainty, whether or not a mistake was made and what the mistake was).[57] Such mistakes are referred to as patent ambiguities in a construction proceeding. The latter, however, includes both mistakes of expression and mistaken insertions. In some of the patent mistake cases, it was clear from the will that a mistake had been made although it was not clear which of two inconsistent provisions had been inserted by mistake. Extrinsic evidence was admitted to determine which provision to omit from probate.[58] Although it is quite probable that extrinsic evidence would be insufficient, in some cases, to determine with reasonable certainty which of two inconsistent provisions had been inserted in the will by mistake, a court should always hear extrinsic evidence to determine whether or not it is reliable.[59] In one English case[60] it was not clear that a mistake had been made, as there was merely an uncertainty in the will caused by two equal bequests of money to the same beneficiary. The court had to rely upon extrinsic evidence not only to determine whether or not a mistaken insertion had been made but also to determine which provision was inserted by mistake. While extrinsic evidence was admitted by the English court in the latter case, it would seem that reasonable certainty would be more difficult to attain in such a case. Mistaken reference is another type of patent mistake. In such cases extrinsic evidence was admitted to prove that a reference in a codicil to the date of a prior revoked will was mistakenly inserted.[61] It would seem that extrinsic evidence can always be admitted in mistaken reference cases.[62]

57. This definition includes a situation which is neither completely patent nor latent. This situation occurs when a mistaken insertion creates an uncertainty in a will but the existence of the mistake is not determined until extrinsic evidence is admitted. See notes 61, 68 *infra* and accompanying text.

58. Goods of Schott, [1901] P. 190; Goods of Walkley, 1 R. 480 (1893); Goods of Duane, 2 Sw. & Tr. 590, 164 Eng. Rep. 1127 (P. 1862).

59. When a jury is being utilized, it may be desirable to hear the evidence without their presence.

60. Goods of Boehm, [1891] P. 247.

61. Jane v. Jane, The Times, March 30, 1917; Goods of Reade, [1902] P. 75; Goods of Snowden, 75 L.T.R. (n.s.) 279 (1896); Goods of Gordon, [1892] P. 228. The inclusion of these cases as patent rather than latent mistakes is debatable. Their inclusion is based upon the fact that when the testator's will, which includes his codicil, is examined, it appears that the codicil portion refers to the date of a prior revoked will.

62. An intent to revive the revoked will was not indicated in any of these cases. If such intent had appeared, omission could not have been made.

In several of the English cases in which omission was made, the mistake could probably have been corrected by construction. In *Goods of Schott*[63] there was a provision in which all of the testator's real and personal estate, not otherwise specifically disposed of, was devised and bequeathed to his trustees. In another provision it was stated that after payment of the testator's debts, funeral and testamentary expenses, and specific devises and bequests, the trustees should "stand possessed of the net revenue of the said proceeds" upon the trusts declared in the will. The evidence indicated that the will was not read to the testator. The instructions of the testator and the testimony of the solicitor indicated that the word "revenue" had been substituted for "residue" as a result of a clerical error by the testator's solicitor. The court omitted the words "revenue of the said." Although the provision would not have been quite as clear with the words "of the said" included,[64] those words were not inserted by mistake and should not have been omitted. As the trustees would not have held the revenue of the proceeds in trust unless the proceeds were also held in trust, and as the will bequeathed the residuary estate to the trustees in another provision, the testamentary intent seems clear. Thus, a construction court could have achieved the same result by treating the provision as patently ambiguous and by giving no meaning to the words "nett revenue" or "revenue of the said." Furthermore, in the mistaken reference cases the erroneous reference in the codicil to the date of a revoked will could have been given no meaning because the reference to the date was necessary for a proper identification of the will intended.

It would seem that whenever there is a mistaken insertion with the correct disposition remaining in the will and the provisions in the will are merely uncertain as opposed to being completely inconsistent, the mistake could be corrected by construction as a patent ambiguity. Since correction by construction can be made from the will itself, omission is more difficult because of the necessity of gathering extrinsic evidence to prove

63. [1901] P. 190. *Cf.* Goods of Duane, 2 Sw. Tr. 590, 164 Eng. Rep. 1127 (P. 1862) where the drafter of the will failed to cross out standard printed terms on a form will for soldiers. The written terms of the will were inconsistent with the printed terms. The court omitted the printed terms. Although this case can possibly be properly considered as a mistaken insertion case, it is sui generis. American courts probably could have corrected the inconsistency as a patent ambiguity by merely giving preference to the written provisions rather than the printed provisions. Construction would be an easier method of correction for situations similar to *Goods of Duane* for the same reason as in *Goods of Schott;* and, the risk of intestacy because of uncertainty in the intent seems slight.

64. With the words "of the said" included, the will would have read, ". . . stand possessed of the nett ——— of the said proceeds. . . .," while without those words the will would have read, ". . . stand possessed of the nett ——— proceeds. . . ."

that words were inserted by mistake. Therefore, in such cases there appears to have been little reason for American lawyers to request omission. However, this situation would seem to be extremely rare.

The cases of *Goods of Boehm*[65] and *Goods of Walkley*[66] exemplify situations in which omission would be the only method of correction because evidence that a word was inserted by mistake, necessary for correction, is inadmissible in a construction proceeding.[67] In *Goods of Walkley* the testator owned houses at 103, 105, and 107 Elthorne-road which were all devised by the testator to different persons in the original draft of the will. In the final draft, a clerk inadvertently inserted the number 103 twice, but made no mention of number 105. The probate court omitted one number 103, leaving a blank. Although the final draft had been read to the testator, the court apparently felt that it was not properly read. In addition to the evidence of a mistake, the fact that the original draft was also read by the testator no doubt justified the court's conclusion concerning the insufficiency as to the reading of the final draft. In the absence of evidence indicating which number 103 was inserted by mistake, a court would not have been able to determine whether the testator intended each devisee to receive a house or which devisee was intended to receive number 103 and which devisee was to receive number 105. The same difficulty would normally be present whenever there is a mistaken insertion creating two completely inconsistent provisions in the will. Therefore, correction by construction would not be possible.

In *Goods of Boehm* the testator sent instructions for the preparation of his will to a friend who gave them to the testator's solicitor who gave them to a conveyancing counsel for the purpose of preparing a draft will. The friend, solicitor, and conveyancing counsel stated in affidavits that the instruction directed equal gifts of £10,000 be bequeathed to each of the testator's two unmarried daughters. By inadvertence, the conveyancing counsel inserted the name of one daughter in both bequests;[68]

65. [1891] P. 247.
66. 1 R. 480 (1893).
67. See note 40 *supra* and accompanying text.
68. Although it is frequently stated that a testator is bound by the acts of his attorney, this is true only when the attorney is not mistaken as to the testator's intent. An intentional mistaken insertion, resuling from a misunderstanding of the testator's intent, from a clerical error, or from an error as to facts which the attorney assumes, can be corrected. Of course, it is essential that the testator has not read the will in such a manner as to know and approve the mistake. Waite v. Frisbie, 45 Minn. 361, 47 N.W. 1069 (1891), *aff'd*, 48 Minn. 420, 51 N.W. 217 (1892); Brisco v. Hamilton, [1902] P. 234 (attorney assumed testatrix owned only ½ of the property); Morrell v. Morrell, 7 P.D. 68 (1882) (clerical insertion of the word "forty"); Goods of Oswald, L.R. 3 P. & D. 162 (1874) (without knowledge that the lost document disposed of only a portion of the testator's property, attorney inserted revocation clause of all previous

as a result, there were two gifts of £10,000 to one daughter. Although the will was never read to the testator, a summary, which accurately included a bequest for each daughter, was read to the testator. The probate court omitted one of the names in the will, leaving a blank. Although no information has been found as to the ultimate distribution of the estate, it seems reasonable to surmise that each daughter received £10,000.[69] If omission had not been made,[70] one daughter would have received a windfall of £10,000 while the other daughter would have received nothing. *Goods of Boehm* can be distinguished from *Goods of Walkley* on the basis that in the former the mistake created only an uncertainty rather than two completely inconsistent dispositions as in *Goods of Walkley*.[71] However, because evidence that a word was inserted by mistake was necessary for correction, omission would be the only method of correction in both cases.

In the foregoing cases, with the exception of the mistaken reference cases, the instructions for the will constituted crucial evidence that the inconsistency in the will was caused by a mistaken insertion. When the mistake or inconsistency is indicated by the will and the instructions have not been in the hands of a person who could benefit thereby, reliance upon the instructions seems justified.[72] In the mistaken reference cases the testimony of the attorney was relied upon to prove the nature of the mistake. Since the existence of a mistake was apparent without such evidence and the mistaken reference could be inferred from the existence of the mistake, the admission of such evidence seems quite proper.

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wills). In the *Waite* case, the will was denied probate because the attorney had inserted a clause which failed to effectuate the testator's intent, and the clause had not been read to the testator. Unless the attorney misunderstood the testator's intent, the will should have been probated because a testator is bound by the legal effect of language used by his attorney.

69. Since *Goods of Boehm* was a consent decree and since each daughter probably would have received £10,000 in a construction proceeding, the only reasonable conclusion is that each daughter received £10,000. See J. Warren, *Interpretation of Wills—Recent Developments*, 49 HARV. L. REV. 689, 712-14 (1936) where the writer discusses the facts which would justify such a result in a construction proceeding.

70. The action was not contested in either *Goods of Boehm* or *Goods of Walkley*. Since latent mistakes can be corrected even though the action is contested, this factor should not affect the result.

71. In both cases the provision was inconsistent with the testator's testamentary intent. However, this inconsistency was not apparent in *Goods of Boehm* until extrinsic evidence was admitted.

72. The admission of the instructions for the will in order to omit a patent mistaken insertion is analogous to their admission to clarify a latent ambiguity. See Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422 (1885); Covert v. Sebern, 73 Iowa 564, 35 N.W. 636 (1887); Bond v. Riley, 317 Mo. 594, 296 S.W. 401 (1927).

B. Mistaken Insertions—Latent

A latent mistaken insertion is one which does not appear on the face of the will. Such mistakes should be dichotomized according to whether the mistaken insertion results in a misdescription of a beneficiary or of property disposed of by the will, or in a non-misdescription. As indicated supra, some misdescriptions are referred to as latent ambiguities in construction proceedings. In such cases, the existence of the mistake is clear when the court attempts to make the disposition of the testator's estate. The English probate courts will admit extrinsic evidence to prove that part of the description was inserted by mistake.[73] But, in the misdescription cases which do not involve latent ambiguities and in the non-misdescription cases, extrinsic evidence must be relied upon to establish the existence of a mistake; therefore, it would seem proper to require safeguards securing the reliability of the evidence which forms the basis for making an omission. Such safeguards were present in the English cases where omission was made.[74]

Mistaken insertions which cause misdescriptions that are latent ambiguities can be corrected in a construction proceeding because evidence to prove a word had been inserted by mistake would not be necessary for clarification of the ambiguity. As the testamentary intent is sufficiently certain for correction of such misdescriptions in a construction proceeding, the admission of extrinsic evidence in a will contest to prove that part of the description was inserted by mistake seems clearly justified.[75]

The following misdescription cases which involve latent ambiguities indicate some of the possible problems when omission is requested and also the scope of evidence admissible to solve them. In *Gregson v. Taylor*[76] the will included a legacy of £5,000 to Adelaide Maud Ashwin, the wife of F. M. B. Ashwin, which was a correct disposition under the facts. However, a codicil contained a bequest "To Maud Adelaide Ash-

73. *In re* Clark, 101 L.J.P. (n.s.) 27 (1932); Gregson v. Taylor, [1917] P. 256; Brisco v. Hamilton, [1902] P. 234.

74. Fulton v. Andrew, L.R. 7 H.L. 448 (1875); Vaughan v. Clerk, 87 L.T.R. (n.s.) 144 (P. 1902); Morrell v. Morrell, 7 P.D. 68 (1882); Goods of Oswald, L.R. 3 P. & D. 162 (1874). See pp. 577-79 *infra*. Omission was denied in the following cases: *In re* Horrocks, Taylor v. Kershaw, [1939] P. 198 (C.A.); Garnett-Botfield v. Garnett-Botfield, [1901] P. 335; Harter v. Harter, L.R. 3 P. & D. 11 (1873); Atter v. Atkinson, L.R. 1 P. & D. 665 (1869); Guardhouse v. Blackburn, L.R. 1 P. & D. 108 (1866). The strict rule with respect to the effect of the reading of the will by the testator was expressed in the last three cases and was the determining fact in the *Harter* and *Atter* cases. Since the *Fulton* case later removed the conclusive nature of that rule, omission would probably be granted now in the fact situations represented by the *Harter* and *Atter* cases.

75. Since construction will still be necessary even though omission is made, omission will be of no benefit except in the states which strictly apply the single plain meaning rule.

76. [1917] P. 256.

win (daughter of Francis Manley Bird Ashwin) the sum of 4,000 l. . . ." Ashwin's wife was named Adelaide Maud, and Ashwin did not have a daughter. The plaintiff, a residuary legatee, asked for omission of the entire clause, while the defendant beneficiary, Adelaide, asked only for omission of the words in parenthesis, but conceded that she would have preferred to allow the construction court to rectify the mistake. Evidence indicated that although the testator usually called the defendant "Dolly" and often reversed the given and middle names of the defendant, the testator knew that the defendant was the wife rather than the daughter of Ashwin. It was questionable from the evidence whether the bequest in the codicil was intended as an addition to or as a revocation of the legacy in the will. The codicil was read to the testator by the solicitor. The solicitor testified that he inserted the words "daughter of Francis Manley Bird Ashwin," mistakenly assuming that Maud Adelaide was probably the daughter of Adelaide Maud.

Since the misdescription of the name of the defendant was not inserted by mistake, the court clearly could not omit the entire clause as requested by the plaintiff. Thus, the only question was whether the court should omit the words in parenthesis or allow the construction court to rectify the mistake. The court assumed that the reading was not conclusive, but denied omission for two reasons: first, there was doubt as to whether or not the codicil provision was to be an addition to or revocation of the will provision; and, second, the defendant stated that she preferred that the issue be left to the construction court. This decision seems erroneous. Whether or not the codicil provision was intended as an addition or revocation was a construction issue as to the meaning of the words and was, therefore, irrelevant in a will contest. And, as the existence of a mistake pertaining to the words in parenthesis seemed sufficiently proved, those words should have been omitted regardless of the preference of the defendant.

The *Gregson* case could have been corrected with greater ease by construction because evidence that the words "daughter of Francis Manley Bird Ashwin" were inserted by mistake would not have been necessary, and because construction was essential regardless of omission due to the misdescription of the intended legatee. As Ashwin did not have a daughter named Maud Adelaide, correction by construction would not be prevented by the single plain meaning rule in the states where it is strictly applied.[77] It would seem that correction by construction as a latent ambiguity is a simpler method than correction by omission in most misdescription cases because of the necessity of gathering evidence for

77. See note 25 *supra*.

purposes of omission. In addition, evidence that a word was mistakenly inserted would not be available in many cases. However, in states where the single plain meaning rule is strictly applied, omission might be the only method of correction.

The case of *In re Clark*[78] indicates the necessity of distinguishing between evidence of a mistaken insertion and evidence concerning the meaning of the testator's words. The testator bequeathed property to the "grandchildren of my uncle George Dennis Armock." George was the cousin of the testator, rather than his uncle. Although the court omitted the word "uncle," the evidence seemed to indicate that the testator usually called George "uncle" and that the word "uncle" was not inserted by mistake. Omission of the word "uncle" seems to have been erroneous because the testator meant for the word "uncle" to be physically included in his will. The same result could have been reached in a construction proceeding either by giving the word "uncle" no meaning or by giving the word "uncle" the special meaning which the testator had given it.[79]

In the latent mistaken insertion cases which result either in non-misdescriptions, or in misdescriptions that are not latent ambiguities, correction can be made only by omission. Since extrinsic evidence purporting to prove that a word was inserted by mistake would be the only evidence to indicate the existence of a mistake, there are no presumptions which would allow construction. For example, a presumption that the testator intended to devise only his own property would be of no benefit for all property described in the will would belong to the testator.[80] The necessity for reliance solely on extrinsic evidence makes certainty as to the testamentary intent more difficult to attain. As a result, the English probate courts have made omissions only when the evidence of a mistake was both substantial and reliable. Since the problems are the same in both situations, a single case will serve to indicate the evidence which has been admitted and found sufficient by the English courts to prove that a latent mistaken insertion was made.

The case of *Morrell v. Morrell*[81] involved a non-misdescription[82]

78. 101 L.J.P. (n.s.) 27 (1932).

79. Evans v. Ex'r of Hooper, 3 N.J. Eq. 204 (1835); Moseley v. Goodman, 138 Tenn. 1, 195 S.W. 590 (1917).

80. See note 29 *supra* and accompanying text.

81. 7 P.D. 68 (1882). See also Vaughan v. Clerk, 87 L.T.R. (n.s.) 144 (1902) (insertion of the word "real" before the word "property"); Goods of Oswald, L.R. 3 P. & D. 162 (1874) (insertion of a revocation clause); Guardhouse v. Blackburn, L.R. 1 P. & D. 108 (1866) (insertion of the words "therein and"). Although omission was denied in the *Guardhouse* case, the denial was based upon the strict rule as to the effect of the testator's reading of the will, which rule was changed in Fulton v. Andrew, L.R. 7 H.L. 448 (1875).

82. See note 39 *supra* and accompanying text.

resulting from a mistaken insertion.[83] The instructions given by the testator to the solicitor indicated that the testator intended to give all his securities in a corporation, amounting to 400 shares, equally to the plaintiffs. The solicitor sent the instructions to a conveyancer who mistakenly inserted in the will the word "forty" before the word "shares."[84] As a result, the other 360 shares passed to the defendants, the residuary legatees. The solicitor, not knowing the total number of shares, recopied the mistaken provision in the will. The widow of the testator and a friend, neither of whom were parties to the action, testified that the testator always spoke of all the shares as being intended for the plaintiffs.[85] The solicitor also testified to the error. The testimony of the widow, friend, and solicitor, the collusion which otherwise would have to be implied between the solicitor, conveyancer, widow, friend and plaintiffs, and the non-reading of the will were sufficient circumstances for the court to accept the instructions as evidence of the existence of a mistake and thus to omit the word "forty."

The English court relied very heavily on instructions by the testator in the *Morrell* case. However, the admission of those instructions must be distinguished from the admission of instructions in the misdescription cases which involved latent ambiguities because in the latter the existence of the mistake was either apparent or indicated when disposition was attempted.[86] The reliability of the instructions which proved the mistake

83. Fulton v. Andrew, L.R. 7 H.L. 448 (1875) illustrates a misdescription case which does not involve a latent ambiguity. The contestants of the will alleged that the residuary clause had been inserted by mistake. By the residuary clause, the propounders were made both the residuary legatees and the executors of the will. The propounders were friends of the testator but were each given specific bequests in another part of the will. As the will had been prepared by one of the propounders, the burden of proof was on the propounders as to any objection to the due execution of the will. Since the propounders were attempting to prove that no mistake existed and since the propounders had custody of the testator's instructions, there could be little doubt as to the validity of such instructions if the instructions cast doubt on the case presented by the propounders. There were two sets of instructions given to one of the propounders by the testator. Both sets created doubt as to whether the testator intended the propounders to take as residuary legatees or as trustees for others. Since the jury found that the residuary clause was inserted by mistake, apparently relying upon the instructions to the will, the court omitted that clause. This case represents an unusual situation because the burden of proof was not on the party trying to prove the existence of a mistake but upon the party trying to prove the non-existence of a mistake. This circumstance was particularly significant because it provided the safeguard which secured the reliability of the evidence introduced to prove the existence of a mistake. A similar situation was presented in Atter v. Atkinson, L.R. 1 P. & D. 665 (1869).

84. See note 68 *supra*.

85. Extrinsic evidence of declarations of testamentary intent should never be the sole basis for establishing the existence of a mistaken insertion in either a non-misdescription case or a misdescription case which does not involve a latent ambiguity because of its unreliability. However, such evidence seems sufficiently reliable to lend weight to other evidence of a mistake.

86. *Cf.* note 72 *supra* and accompanying text.

in the *Morrell* case was secured by the fact that the instructions were examined by other persons. The absence of such circumstances would probably render instructions unreliable in both the misdescription cases that do not involve latent ambiguities and in the non-misdescription cases.

CONCLUSION

American courts have corrected mistaken insertions in wills by construction but not by omission. English courts, however, have used both methods. As some mistaken insertions cannot be corrected by construction, but can be corrected by omission, the failure of the American courts to make omissions evoked an examination of the probate theory applicable in the United States. As a result of this examination, the conclusion has been reached that omission is sound in theory and consistent with both the language and the underlying theory of probate statutes.

An inquiry into the extent to which construction could be used as a method to correct mistaken insertions in a will indicated that, with a few rare exceptions, construction is an alternative remedy only when the mistake results in a misdescription which is a latent ambiguity. In the other misdescription cases and in the non-misdescription cases, omission is the only method of correction because extrinsic evidence would be necessary to prove that a word had been inserted by mistake. Such extrinsic evidence is inadmissible in construction proceedings. In such cases the necessary evidence which could be admitted is fairly difficult to acquire because reliance must be placed entirely on extrinsic evidence to prove the existence of a mistake. In addition, omission is the only method of correction in those misdescription cases in which some states would deny the existence of a latent ambiguity because of a strict application of the single plain meaning rule as well as in the patent mistaken insertion cases which involve two inconsistent provisions. But, in the latter cases the necessary evidence would seem to be much easier to acquire.[87]

The explanation for the absence of American cases allowing omission when construction is not an available remedy can only be speculative. Omission has perhaps been made in some cases which have not been reported because the parties did not appeal the decision. Although it is possible that cases in which the only method of correction is omission are not occurring in the United States, this possibility fails to explain the many cases in which the single plain meaning rule has been applied,

87. As mentioned earlier, such cases can be adequately corrected by construction except when the single plain meaning rule is applied denying the existence of any ambiguity. In the latter cases as well as the infrequent other cases in which the necessary evidence is available, omission should be requested.

unless the unlikely assumption is made that all such cases resulted from mistakes in expression rather than mistaken insertions. In these latter cases lawyers seem to have been unaware of the availability of omission as a method of correction.

The failure to request the omission of words inserted in a will by mistake frequently appears to have caused the testator's testamentary intent to be defeated. As the probate objective is to achieve the testamentary intent whenever possible, the legal profession in the United States should, whenever possible, utilize omission to achieve the probate objective.

THE ROLE OF THE COURTS IN THE APPLICATION OF THE REQUIREMENT OF "RESIDENCE" FOR NATURALIZATION

The Immigration and Nationality Act of 1952 requires aliens seeking naturalization to have "resided continuously" within the United States for five years before they are naturalized.[1] The duty to apply this concept of "continuous residence" to the facts as they arise falls to the judiciary, since citizenship, with its accompanying benefits, is a privilege made available by statute and bestowed by court action with the advice of the Immigration and Naturalization Service. The recommendation of the Service may or may not be followed. When an alien contests an adverse recommendation of the Immigration Service, a trial follows, with the Service and the applicant as adversary parties. The ultimate determination of when citizenship should be bestowed rests with the judiciary.

The legislative inclusion of a requirement of five years of "continuous residence" has been viewed as a delegation to the courts of the function of determining in each case whether a petitioner's acts and state of mind during this period are of the sort which satisfy the broad statutory policy of protecting the interests of United States citizens in the "Americanization" of future naturalized citizens.

In 1952, Congress codified all prior acts concerning immigration and naturalization, and added some new provisions, in enacting the Immigration and Nationality Act. The Act retained the old provisions stating that continuous absence from the country for over a year, unless within a specific exception, "shall break the continuity of such residence" as a

1. 66 Stat. 242, 8 U.S.C. § 1427(a) (1952).