ENGLAND.

ERROR FROM THE COURT OF KING'S BENCH.

DOE, *d.* OXENDEN—*Plaintiff in Error.*
SIR ARTHUR CHICHESTER—*Defendant in Error.*

Feb. 22, 25; June 12, 1816.

EXTRINSIC OR PAROL EVIDENCE NOT ADMISSIBLE TO ENLARGE THE EFFECT OF THE TERMS OF A WILL.

WHERE lands *at* or *of* any particular place are devised, parol or extrinsic evidence is not admissible, to show that the devisor included under the description, and intended to pass, other lands not at that particular place.

And therefore where one having lands in the manor of Ashton, in Ashton parish, and also other lands in several of the neighbouring parishes, made his will, and devised lands under the description and name of "my estate of Ashton," —and parol or extrinsic evidence was offered to show that the testator in his life-time was accustomed to designate the whole of the lands derived from his mother, including not only the estate at Ashton but also the lands in the neighbouring parishes, by the general name of his "Ashton "estate,"—the House of Lords, concurring in the unanimous opinion of the Judges, held that the evidence had been properly rejected.

Ejectment.

THIS was an action of ejectment brought in the Court of King's Bench to recover possession of certain lands and hereditaments in the parishes of Crediton, Sandford, Netherex, and Cadbury, in the county of Devon, which the lessor of the Plaintiff claimed under the will of the late Sir John Chichester, as constituting part of the premises devised to him, under the description and by the name of

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the devisor's "*estate of Ashton*," in the county of Devon; and the question turned upon this, whether parol or extrinsic evidence was admissible to show that the devisor, under the description "my estate "of Ashton," intended to include other lands, &c. not in Ashton.

The extrinsic evidence rejected below.

The cause was tried at the Assizes for the county of Devon in August, 1811, before Baron Graham, who rejected the extrinsic evidence, and a verdict was given for the Defendant. Whereupon a bill of exceptions was tendered, and duly sealed and signed. The evidence, as appearing on the bill of exceptions, was as follows:

Bill of Exceptions. Evidence.

It was proved for the Plaintiff, that "Sir John "Chichester, Baronet (since deceased), was seized "in his demesne as of fee, as well of the tenements "in the declaration mentioned, and of the manor of "Ashton, and certain other tenements and heredi-"taments, situate in the parish of Ashton, in the "said county of Devon, all which he derived from "his mother, as of divers other lands and tenements "which he derived from his father, called the "Youlston estate, that the said Sir John Chichester "being so seized on the third day of September, in "the year 1808, made and published his last will "and testament, in writing, duly executed so as to

Will, devising the Ashton estate to the lessor of the Plaintiff.

"pass real estates, in the terms following: '*I give "'my estate of Ashton, in the county of Devon-"'shire, to George Chichester Oxenden, second "'son of Sir Henry Oxenden, Baronet, of Broome, "'in the county of Kent; I give my house in Sey-"'mour Place (for which I have given a memo-

" ' *randum of agreement to purchase, and which is* Feb. 22, 25: June 12, 1816.
" ' *to be paid for out of timber which I have or-*
" ' *dered to be cut down) to the Reverend John*
" ' *Sanford, of Sherwell, in Devonshire;*' and that
" the said Sir John Chichester afterwards, and be-
" fore the said time when, &c. died so seized, with-
" out altering or revoking his said will. And it was
" further proved that the said tenements, in the said
" declaration mentioned, consist of the manor of
" Stowford, in the county of Devon, and of the
" tithes impropriate of the parish of Netherex, in
" the county of Devon, and two estates called Great
" and Little Bowley, in the parish of Cadbury, in
" the said county of Devon; that of the manor of
" Stowford one part lies in the parish of Crediton,
" in the said county of Devon; and the other part
" in the parish of Sandford, in the same county, the
" manor itself being distant from the parish of Ash-
" ton about twelve or thirteen miles; that the pa-
" rish of Netherex is also eleven or twelve miles,
" and the parish of Cadbury fifteen miles, distant
" from the parish of Ashton. And it was also
" proved that the estate which the said Sir John
" Chichester so derived from his mother, and of
" which he was so seized at the time of making his
" said will, consisted as well of the tenements above
" particularly described, as of the manor of Ashton,
" the barton of Ashton, and other lands, lying with-
" in the parish of Ashton, and also of the manor of
" George Teign, which is situate in the said parish
" of Ashton. And it was further proved, (lease
" entry and ouster).—And in order to show that by

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Evidence which was offered to show that the testator included under the description of "Ashton estate" lands not in Ashton.

" the words '*my estate of Ashton*,' used in the said " will of the said Sir John Chichester, the said Sir " John Chichester intended to dispose of the whole " of the estate which he derived from his mother, " hereinbefore described, the counsel for the plain- " tiff proposed and offered to prove and give in evi- " dence, by John Sanford, who wrote the said will " of the said Sir John Chichester, that at the time " of making the same, the said Sir John directed " him to make a memorandum, to guard against " accidents, to give George Oxenden (meaning the " said George Chichester Oxenden) his, the said Sir " John's, Ashton estate; and also to prove and give " in evidence, by the said John Sanford and Thomas " Hole, Clerk, who had occasionally audited the ac- " counts of the said Sir John, for twenty-four or " twenty-five years previous to his decease, that the " said Sir John, in his life-time, used, in speaking " of his property which he had derived from his fa- " ther, to call it his *Youlston estate;* and that in de- " scribing the estate derived by him from his mo- " ther, he used to designate that by the general " name of his *Ashton estate,* or Ashton property; " and particularly, on one occasion, directed that " the timber should not be cut down on his mother's " property, the Ashton estate, but on his father's " property. And the counsel for the Plaintiff, for " the purpose last aforesaid, produced, and offered to " give in evidence, a series of annual accounts, deli- " vered to the said Sir John Chichester by John " Cleave and John Smith, who were successively " two of his stewards. These accounts commenced

" with the year 1785, and the form of each of them
" was very nearly the same. The following is a de-
" scription of the form of one of the said accounts.
" On the outside was endorsed, '*J. Cleave's account*
" '*for Ashton estate, from January the* 1*st*, 1799,
" '*to January the* 1*st*, 1800.' The first page there-
" of was thus headed, '*J. Cleave's account for Sir*
" '*John Chichester, Baronet, for Ashton estate,*
" '*from January the* 1*st*, 1799, *to January the* 1*st*,
" '1800.' In the first page was contained a list of
" various payments made by the said John Cleave,
" among which was the following: '*Paid a year's*
" '*annuity to Broad Clist poor, to Christmas* 1799,
" '23*l.* 11*s.*' which said parish of Broad Clist was
" wholly distinct from the estates derived by the
" said Sir John from his mother, but the annuity
" was charged on part of the said estate. The se-
" cond and third pages were entitled, '*Receipt of*
" '*rack rents*,' and contained an account of the
" rents of the several premises composing the estate,
" derived by the said Sir John Chichester from his
" mother, except the conventionary rents of the
" three manors in separate sums, but added up at
" the end in one general total. The fourth page
" contained a list of rents, entitled '*Conventionary*
" '*rents of the manor of Ashton.*' The fifth page
" contained a list of two other sets of conventionary
" rents, the one entitled '*Conventionary rents of*
" '*the manor of George Teign*,' and the other en-
" titled '*Conventionary rents of the manor of Stow-*
" '*ford.*' The last page of the said account was en-
" titled '*Account stated*,' and is as follows:

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ACCOUNT STATED.

"J. Cleave, Dr.	£	s.	d.	"J. Cleave, Cr.	£	s.	d.
"To receipt of rack "rents	1042	12	2½	"By payment	708	7	0
"To receipt of conventionary rents "of Ashton Manor	18	15	2	"By balance due "from J. Cleave ..	470	0	4½
"To receipt of George "Teign Manor....	5	6	0				
"To receipt of Stow-ford Manor	9	11	6				
"To balance of last "account.....	102	2	6				
	£1178	7	4½		£1178	7	4½

"And underneath is the following receipt, the signature to which is in the hand-writing of said Sir John Chichester.

"*April* 1, 1800, *examined this account and re-*
"*ceived the vouchers thereof; and due from the*
"*said John Cleave, on the balance thereof, the sum*
"*of* 470*l.* 0*s.* 4½*d.*

"JOHN CHICHESTER."

Judgment in K. B. for Deft. Error brought.

Judgment having been given for the Defendant, the Plaintiff brought his Writ of Error returnable in the House of Lords, and assigned for error, in addition to the common errors, the rejection of the evidence set out in the bill of exceptions, to show the intent of the testator to pass the whole of his maternal property under the description of his Ashton Estate; and the Defendant rejoined *in nullo est erratum.*

Hearing in the House of Lords, Feb. 1816.

The cause came on for hearing in the House of Lords, on February 22, 1816, (the Judges attending.)

Heywood, Sergt. (for Plt. in Error.) If it had

not been for a case decided in C. B., there would be little difficulty here. The rule in Bacon's Maxims, *Ambiguitas verborum latens verificatione suppletur*, &c., "a latent ambiguity may be explained by evidence," never appeared to have been trenched upon till that case in C. B. The only restriction is that no parol evidence can be admitted to contradict what appears on the face of the instrument. If it does not contradict it, it may be received. The evidence here is merely to show what is comprised in the words. There is no apparent ambiguity in the words Ashton Estate, and it may include lands connected with it, though not lying in Ashton parish. The words are my estate of Ashton in the county of Devon, &c. Estate may mean the interest in the land, or the land itself, or both; so that the word, when used, must be subject to explanation. There is no particular locality annexed to the word OF in Johnson's Dictionary; it is stated as meaning *concerning*, *belonging to*, &c.; nor does the word Ashton imply any particular locality: suppose it had been purchased from a person of the name of Ashton. The words themselves here are clear: the only question is on what they attach. An estate may be devised by a nickname, *Tuttesham v. Roberts*, Cro. Jac. 21.—*Wyndham v. Wyndham*, Ander. 58. Godbolt, 16. But there is another case, which carries the doctrine for which we contend much further than the present case; that of *Dormer v. Dormer*, Finch, 432, where a testator seized of real estates in Hampshire and Sussex, formerly called the Banisters, *Idsworth* in Hampshire being the ancient seat of the

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B. Max. Rule 23.

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family, usually comprehended the estates in both counties under that name, and devised his estate *at Idsworth* for payment of debts and portions. The Court held that the whole estates in Hampshire and Sussex were liable for payment of the debts and portions. This was so much stronger than the present case that I might rest here; but then in C. B. there has been a decision contrary to what we contend for, and which seems to be the first of the kind. In *Doe, d. Oxenden, v. Chichester*, 3 Taunt. 147., the Chief Justice of C. B. laid down a new rule of law. In giving his opinion he said: "On the whole I think we should go further in "receiving this evidence than any case has yet "done." If *Dormer v. Dormer* had been there cited, he would have thought differently. (*Lord Eldon* (C.) Has any one looked at the Register Book to see how far this report corresponds with it?) No. The rule he says is, "that evidence "cannot be received if the will has an effective "operation without it." I say there is no such rule, and I could cite thirty cases against it. There is hardly a volume of Vesey without a dozen of them. The Chief Justice said:—"I need not par-"ticularize the cases of devises, where there were "two persons of the same name, and where the "name by which the property was devised applied "equally to two estates. Such was the case in "P. Williams, of a devise to *Gertrude Yard-*"*ley*, by the name of *Catherine Earnley*. And the

Beaumont v. Fell. 2 P. Wms. 140.

"case in Ambler, of legacies to *John* and *Benedict*,

Dowsett v. Sweet, Amb. 175.

"sons of *John Sweet*, who had two sons, the name "of the one *Benedict*, but the name of the other

" *James.* The evidence was received. It is not " expressly said in any of these cases, that it was " necessary to receive the evidence in order to give " effect to the will, which could not operate with- " out such evidence. But although this is not said, " yet the rule seems to hold." I do not dispute that there are two classes of cases, and that in one of them parol evidence is not admissible, where the will has an effective operation without it. But then, where the words are capable of two meanings, both of them giving effect to the will, the question is which meaning is to take place; and what I complain of is the application of the rule to these cases. The present case is quite clear of locality. Though there were lands in four different parishes, if he used to call them the Ashton estate, the whole would pass. They may perhaps say that *of* is equivalent to *at*: suppose so for the sake of argument; yet after the case of Dormer in Finch, even the word *at* does not exclude evidence to show that lands in different counties were comprised. And see whether *at* is always a word of locality; for if it has two meanings, that must be given to it which best corresponds with the intent. Now suppose the testator had looked at Johnson's Dictionary, he would have found that *at* meant *near*, and using it in that sense the whole would be included. But, however, that point is decided by the case in Finch. The next case is that of *Whitbread v. May*, 2 Bos. Pull. 593., where one devised his estate *at* Lushill, in Wilts, and *Hearne*, in Kent. The testator had lands in other parishes in Kent, as well as in the parish of Hearne, all which he had purchased by

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one contract from one person, and was accustomed to call his "Hearne estate," or Hearne Bay estate;" and the question was whether these facts should be admitted in evidence, to show that he intended to pass the lands in the other parishes, as well as those in Hearne. There was a great deal of doubt about it, and the Court was equally divided, though judgment was *pro formâ* given for the Plaintiff. The matter went no further, and seems to have been compromised. But the Court was at any rate equally divided, and if the case of Dormer had been cited, the judgment would have been for us. There is a class of cases where such evidence has been admitted, because necessary to give effect to the will, as in a case in which *Sawyer* was written for *Swopper*, where it was referred to the Master to inquire who was meant. So in *Day v. Trigg*, 1 P. Wms. 286., where a testator devised his freehold houses in a particular place, and had no freehold but some leasehold houses there; and upon evidence that he meant the leasehold houses, they were held to pass. But if the testator had had freehold houses there, no evidence of intention to pass the leasehold would have been admitted. In *Doe, d. Cook et Ux. v. Danvers*, 7 East. 299. Lord Ellenborough said, that it must be taken that the testator meant her customary land, having no other description of land in the manor. And so in *Lane v. Earl Stanhope*, 6. T. R. 345. 352.—And *Turner v. Husler*, 1 Bro. Ch. Ca. 78. But what we combat is the generality of the rule, and we are ready to point out a series of cases where evidence was admitted, when the question was whether the

Sawyer instead of Swopper, Masters v. Masters. 1 P. Wms. 420, 425.

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will should operate in one way or in another, as in *Doe, d. Freeland, v. Burt*, 1 T. R. 701. and *Doe, d. Clement, v. Collings*, 2 T. R. 498. and (anonymous), 1 P. Wms. 267. There is a long series of Chancery cases of election, where such evidence has been admitted; as in *Pulteney v. Lord Darlington*, 1 Bro. Ch. Ca. 224, cited in *Druce v. Denison*, 6 Ves. 385. So in a case of devise of real estate, where the will might have effect without the evidence, it was still admitted, to show that a certain estate tail was included, *Finch v. Finch*, 4 Bro. Ch. Ca. 48. And see also *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. (*Lord Eldon* (C.) A case came before Lord Kenyon, when M. R. where one having, besides personal property strictly his own, other personal property which he had a power to dispose of by deed or will, bequeathed all his personal estate, &c. Evidence was at first admitted that by *all* he meant both his own, and that which was the subject of the power. But it was afterwards rejected.) That was in the execution of a power, which is a different thing. (*Lord Eldon* (C.) It would affect you in this way, when you speak of a latent ambiguity *that* is raised by the evidence which removes the doubt. Now there the evidence was that he considered his own property only as his personal estate; and *Lord Kenyon* said that this was not ambiguous, and in common parlance it perhaps was not, but the words might be understood in another sense, and were clearer than " my estate of Ashton.") But there the property was not held in his own right, but in right of his wife, and at any rate the subsequent cases overturned the authority of that case.

Qr. Andrews v. Lemon.

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In *Druce v. Denison*, 6 Ves. 385. Lord Eldon says, p. 402: "Parol evidence is admissible upon a "latent not a patent ambiguity, to rebut equities "grounded on presumption, and perhaps to sup- "port the presumption to oust an implication, and "to explain what is parcel of the premises granted "or conveyed." After that case and that of *Pulteney v. Lord Darlington*, we conceived that the matter had been settled, and that these must outweigh the authority of that one decision. It was stated before that, in all cases of election, evidence was admitted to show what subjects the words were to operate upon, though they might operate without such evidence. (*Lord Eldon* (C.) I thought our rules as to election had been settled. It must appear on the face of the will that the testator proposes that there should be an election, and as to what subjects.) In cases of election, a latent ambiguity in the will may be explained, even when the will might take effect without, as in *Finch v. Finch*, 4 Bro. Ch. Ca. 48; and *Rutter v. Maclean*, 4 Ves. 531. Almost half of the volumes of Vesey were cases of wills, where no such rule ever appeared, as that no evidence could be admitted unless the will was inoperative without it. No such rule was ever heard of till the case of *Doe, d. Chichester, v. Oxenden*, in C. B.

Finch, v. Finch, 1 Ves. 534.

The same rules applied as well to persons as to things, *Dowset* or *Dorset, v. Sweet*, Amb. 175.—*Harris v. Bishop of Lincoln*, 2 P. Wms. 125. In the former case, legacies were given to John and Benedict, sons of John Sweet. There was no John, but James, and evidence was admitted to show that

James was meant. This is in point; though it is true if there were two Johns the bequest would have been void for the uncertainty, unless the evidence were admitted. So where there is a devise to R. B. and the father and son are so named, the elder shall take; but evidence may be given to show that the son was meant: *Lepiot v. Brown*, 8 Vin. 197. So in *Hampshire v. Pearce*, 2 Ves. 216. where there was a bequest to Sir John Strange's four children, &c.; the four might take, and yet evidence was admitted to show that all the children were meant. Then the rule is that, where there is a latent ambiguity, evidence will be admitted to explain it, and the question is not whether the will can have any operation without the evidence.

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Lepiot, v. Brown, 1 Salk. 7. 6 Mod. 199.

Gaselee (for Plt. in Error). In every case of latent ambiguity, you must have the evidence before the ambiguity appears. Where a testator bequeathed "the house I live in," *Doe, d. Clements, v. Collings*, 2 T. R. 498. evidence was admitted to show what he occupied along with it; and the stables, coal-pen, &c. were held to pass, though he used these premises for the purposes of his trade, as well as the convenience of his house, and they stood over the way; and an indictment for burglary could not be sustained upon the ground of their forming part of the dwelling house; and see also the case of *Pole v. Lord Somers*, 6 Ves. 309. Now what is the evidence here? The declaration of the testator to the person who made his will, as to what he wished to have done. There is no question of locality, and it seems clear that the evidence may

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be let in to show what is or is not Ashton. Declarations at the time of making the will may be given in evidence, though declarations made before cannot be admitted, and so it is allowed by Lord Kenyon and Lawrence, J. in *Thomas, d. Evans, v. Thomas*, 6 T. R. 671, 677, 678. There are many Equity cases in answer to the one mentioned by one of your Lordships, and among others, *Hinchliffe, v. Hinchliffe*, 3 Ves. 516. and *Pole v. Somers*, 6 Ves. 309., in both which the evidence was admitted. To these may be added the case of *Druce v. Denison*, 6 Ves. 385., in which two points were established: 1st, That papers in testator's own handwriting relative to the estates devised may be given in evidence: 2d, That his declarations and actions may be admitted in evidence, to show that in bequeathing all his personal property he meant to dispose of what was not strictly his own. What may be the effect of the evidence is another question, as there are cases to show that a power cannot be bequeathed without distinct reference to it in the will. The only case to impugn that of *Dormer, v. Dormer*, is *Doe, d. Chichester, v. Oxenden*, in C. B. We shall hear of others, but they are all built on that, such as *Doe v. Greening*, 3 Maul. Sel. 171., and a subsequent case decided on the same ground: but Dormer's case was not cited to the Court. It was there said that no evidence of this description had ever been admitted, where the word was *at*. But the case of Dormer shows the contrary, and at any rate the word here is not *at* but *of*. Suppose the testator had devised his Youlston estate to A. and his Ashton estate to B. which

Finch. 432.

in his view constituted the whole property, would evidence not be admitted to prevent an intestacy as to what was strictly in neither Youlston nor Ashton? The term *of* may mean any thing, and parol evidence must be admitted to show its particular application. It is conceded that lands in the manor of Ashton would be comprised, but how can the line be drawn between manor and parish without parol evidence? It is too narrow a rule to say that no evidence shall be admitted unless the will be inoperative without it. Suppose a devise to John Thomas, and testator has two sons of that name, one natural, the other legitimate. The legitimate son might take, yet evidence would be let in to show that testator meant the other.

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Mr. Sergeant Pell (for Deft. in error). The question ultimately will be whether under the word *Ashton* estate, the manor of Stowford, &c. in other parishes passed. I do not impugn the rule stated from Lord Bacon's maxims; but before that can be brought in aid, your Lordships must be satisfied that there is a latent ambiguity, and when parol evidence is offered to show a doubt, there must be further parol evidence to clear up the doubt which has been raised. They offer to show that, besides the property in Ashton parish, the testator had other property which he sometimes included under the denomination of his Ashton estate, and they said that it necessarily followed that such other property passed under this devise. That however is by no means a necessary consequence, and therefore the collateral evidence, if admitted, would not clear

Wyndham, v. Wyndham, And. 58. Godbolt. 16.

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up the doubt. A great part of the cases cited relative to questions of presumption, fraud, satisfaction, and election, do not appear to touch the point. But one or two of them make for us. In the case from Godbolt, it is remarkable that Anderson, in giving judgment, states as the reason why the words were extended in that case, that otherwise the will would not be operative as to that portion. The case of Dormer was that of an entire estate called the *Banisters*. The testator changed that name, and called it *Idsworth*. The present however is not a case of an entire estate. There are cases in which Courts have looked at the state of the testator's property to see what passed by the will, such as *Pole v. Somers*.—*Druce v. Denison*, and others, and I do not controvert them. But the moment the nature of the property is ascertained, there is an end of surmise; and to admit evidence that something else was meant, would be to do away the effect of the statute under which property of this description passes. A great deal may be found for us in Cheney's case, 5 Rep. 68.—Suppose the heir at law wished to dispose of the manor of Stowford, would he have any more to do than to show this will to prove that it did not pass under it? Even the word *all* is not to be found here. In *Doe v. Greening*, the word was *at*—here it is *of*. But that case is of importance for us, in as much as Justice Dampier there expressed his concurrence in the judgment of the Court of C. B. in *Doe v. Oxenden*. Justice Lawrence at first received the evidence, but there was a motion for a new trial, on the ground that it ought not to have been received, or that if to be received

Pole, v. Somers, 6 Ves. 309.—Druce, v. Denison, 6 Ves. 385.

Doe v. Greening, 3 Maul. Sel. 171.

Doe v. Oxenden, 3 Taunt. 147.

it did not prove the point. Lawrence, (J.) then changed his opinion; and the Chief Justice (Mansfield), eminently distinguished for his knowledge of law and equity, delivered the unanimous opinion of the Court that the evidence ought not to be admitted, and the greatest inconvenience would follow if the principle of that decision were overturned.

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Casberd (for Def. in Error). The property is described as consisting of different estates in four different parishes. The paternal property had an appropriate designation of its own; the maternal had no particular designation of its own; and the question is, whether evidence shall be admitted to show that the whole passed by a new designation affixed to it by the testator himself. This does not purport to be a devise of the whole maternal property, and it is submitted that it is not competent by evidence so to enlarge it. If it had been "my estate *at*," instead of "my estate *of*" Ashton, by the modern decisions it is clear the whole would not pass. But we are pressed by the case in Finch. Taking it for granted that it is accurately reported, I submit it is not now law. If it is, then *Doe v. Greening* is not law. It was held there that, as the words had a precise meaning and were sufficient to satisfy the will, it should only operate on the particular subject of the devise; so that the case of Dormer is not law. But then it is said that this is distinguishable from *Doe v. Greening*, as the word here is not *at*, but *of*; and that therefore this is not a local description. But it is admitted, on the authority of Johnson's Dictionary, that *of* means *concerning*, *belonging to*. Then suppose the words here had been

Dormer v. Dormer, Finch. 432.

Doe v. Greening, 3 Maul. Sel. 171.

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"belonging to Ashton," that would be as complete a local description as if it were *at* Ashton. There is then a property designated in the will itself by which the terms of the will are satisfied. There is no ambiguity on the face of the will, because then the ambiguity would be patent and not latent, and where the ambiguity in the will is patent, no evidence can be admitted: Cheney's case, 5 Rep. 68. The case might be rested here. If there is a patent ambiguity the evidence cannot be received, and if there is no patent ambiguity there is a property to satisfy the terms of the will. The evidence is offered to raise the ambiguity, and then to get rid of it; but I am in doubt whether it is to explain a latent ambiguity, or to enlarge what is expressed. I submit, however, that where there is property to answer the terms of the will it is not competent by evidence to enlarge it. Against this they cite *Doe, d. Clements, v. Collings*, 2. T. R. 498:—But that case when examined does not bear them out. The Court there said that there was a distinction between house and messuage, so that it appears to have been a question of construction on the face of the will. I submit then, on two grounds, that this evidence ought not to be received: 1st, unless it be absolutely necessary to receive it in order to make the will operative at all; 2d, because, if received, the intention of the testator would be collected, not from the will, but from evidence *dehors*. As to the first ground, the principle was recognised in *Pyot v. Pyot*, 1 Ves. 355. and in *Ulrich v. Litchfield*, 2. Atk. 373, and in *Beaumont v. Fell*, 2 P. Wms. 140, where there was a bequest to "Catherine

"Earnly," and it being clear that there was no such person as *Catherine Earnley*, evidence was received that the testator meant *Gertrude Yardley*, and the reason was stated at the end of the report, that the will would be so far inoperative without it. So in *Day v. Trigg*, 1 P. Wms. 286, where one devised his freehold houses, &c., having some leasehold but not freehold houses, the word freehold was rejected rather than the will should be void. That is the principle on which the cases proceed: and *Rose v. Bartlett*, Cro. Car. 292.—*Dowsett v. Sweet*, Amb. 175.—and *Wyndham v. Wyndham*, Ander. 58. were all decided on this principle. The conclusion then is that, if there are any lands capable of passing by the terms of the will itself, it is not competent by parol evidence to enlarge the words; as there is no necessity in the case, which is the only ground for the admission of parol evidence. As to the other ground, in Cheney's case, 5 Rep. 68. the object was to introduce extraneous matter, but the Court expressed itself decidedly against it. There is another case which has not been as yet referred to, *Doe, d. Brown, v. Brown*, 11 East. 441. where it was contended that extrinsic evidence ought to be admitted to prove the intent of a testator to include freehold property under a description of all his copyhold estates. Lord Ellenborough said (p. 450), "It would be going further than any "case which we are aware of has yet gone, in ad- "mitting evidence of intent from extraneous cir- "cumstances to extend plain and unequivocal "words in a will." *Brown v. Selwyn*, Ca. Temp. Talb. 240. was decided on the same principle.

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These cases establish the principle that, where the words are clear, and there is property to answer the description, it is not competent to enlarge them by parol evidence. The cases cited on the other side on questions of election, presumption, and satisfaction, are all inapplicable. The inconvenience that would result from a contrary rule has been already mentioned. The maternal property had no joint or definite name by which the whole was known, and under these circumstances the will was made. Suppose then that all the maternal property, except the estate at Ashton, went to the heir at law as undisposed of, and there had been no question about it, and suppose the heir at law were desirous to sell it, no conveyancer would venture a doubt that more than the property at Ashton passed by the devise. The present case differs from the cases of latent ambiguity, such as two sons named John, or two estates of the same name. But here I do not see how the phantom is to be raised before it is destroyed. There are no two estates at Ashton here. Besides, this is a question between an heir at law and devisee; and it is a rule of law that an heir at law shall not be disinherited except by express words or necessary implication.

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Heywood, Sergt. (in reply). If subjects were known under one general name, they would all pass under that name though in different parts of the kingdom, and however distant from each other. I do not know that I cited any cases as to fraud, presumption, and satisfaction; but I did cite several cases of election to prove that there was no such

restriction as that now contended for, as to the admissibility of parol evidence where there is a latent ambiguity, even in a Court of Equity. The case from Godbolt shows that estates may pass under any general name; and as to the remark on the case of Dormer, that it was a case of an entire estate, this too is the case of an entire estate. But Mr. C. says that the case of Dormer, which appears to be the same in the Register's book as in the report, is not law, having been over-ruled in *Doe v. Greening*. That was not a case of latent ambiguity but of construction, and has nothing to do with the present case. The word Ashton is not a specific description of any property. There is a manor, a barton, and a parish of Ashton, and there is nothing specific till the evidence is admitted. In Cheney's case the general doctrine is well stated, but it does not make for their argument. Mr. C. says that this was not a devise of the whole of the maternal property, but I do not see why the whole may not pass under the name of the Ashton estate. Such was the testator's intention, which cannot be carried into effect unless the decision is for us. I do not admit that *at* has the same meaning as *of*, because *at* is local; but, even if it were *at* here, the question has never been fully decided. The Court were equally divided in *Whitbread v. May*, and the case of Dormer would bear me out even if the word were *at*. The question in *Doe v. Collings* was not merely a question of construction. Mr. C. contends for the rule that no evidence can be admitted where the will can have any operation without it. But I have cited cases

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Wyndham v. Wyndham, Godbolt, 16. And. 58. 3 Maul. Sel. 171.

5 Rep. 68.

Whitbread v. May, 2 Bos. Pul. 593.

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to show that there is no such restriction. The case of *Pyot v. Pyot*, 1 Ves. 335. does not at all affect the point, and the case of *Ulrich v. Litchfield* has been often over-ruled. I do not quarrel with the rule that evidence shall not be admitted to contradict the instrument. The object in the case of Beaumont and Fell, 2 P. Wms. 140. was to get rid of the Christian and surname; that case was a great deal stronger than the present, and the principle must have been that, if the testator did not err in the person but in the name only, the person shall take. But I have found no rule that evidence shall not be admitted where the will can possibly operate without it, except in the case of *Doe v. Oxenden.* I cited the cases of *Harris v. Bishop of Lincoln*, and *Day v. Trigg*, and admitted that where part of the description must be rejected the rule takes place, as the admission would be to contradict the will. The case of *Wyndham v. Wyndham* falls within that exception. As to the observation that the effect of our doctrine would be that the intent of the testator would be collected not from the will but from evidence *dehors*, I do not contend that where there are legal technical words evidence is to be admitted to alter their meaning. But *Ashton* is no technical, but a popular description; and Lord Kenyon in the case of *Lane v. Earl Stanhope*, 6 T. R. 345-352. says, "Where certain words have obtained a precise "technical meaning we ought not to give them a "different meaning; but if there be no such ap- "propriate meaning, &c., we ought to construe the "words so as to give effect to the intent." The case of *Brown v. Selwyn*, Ca. Temp. Talb. 240. has no

2 Atk. 373.

3 Taunt. 147.

application here, as the evidence was there offered to contradict the will. Is it clear, if the evidence should not be received, that the will may not be void for uncertainty? And if so, it ought to be received even on the rule in *Doe v. Oxenden.* The intent to devise the whole is clear, and if one may give his estate any name he pleases and devise it by that name, the judgment must be for us.

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Lord Eldon (C.) The case which your Lordships have just heard is of too much importance for you to proceed to judgment upon without the deliberate advice of the Judges; and I mean to conclude the few words which I now offer with a question, the answer to which will, I trust, bring that advice fully before you. In the mean time I shall endeavour to clear the question of such cases as one hears most of, not at law but in equity; and to begin with the case of Dormer, I have now before me all that is necessary to prove what was the meaning of that case; not only a copy of the Register's book relative to that case, but also Lord Nottingham's manuscript notes of what he himself conceived his decision to be.

Dormer v. Dormer, Finch, 432.

The report of that case stated that Dormer, the testator, was possessed of personal estate of considerable value, and entitled to a considerable real estate in Bucks, and also of estates in Hampshire and Sussex, formerly the Banisters. But *Idsworth* in Hampshire, being the ancient seat of the family, he usually comprehended the whole of the Hampshire and Sussex estates under that name. He made his will in these words:—after some expressions of

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piety, he says: "as to my temporal estate it is my "will that after my mother's decease the interest of "my estate at Idsworth"—and then in a parenthesis "(intending the whole Banisters) shall go "towards payment of my debts, and afterwards "towards raising my children's portions in manner "following. First, I bequeath my eldest daughter "Mary, 1500*l.* *item* to my two daughters, Margaret "and Elizabeth, 1500*l.* to be divided between them. "And if it shall please God that one of them die "(meaning before twenty-one years or marriage) "then the survivor to have 1000*l.*, and if both die "(meaning as aforesaid) then it is my desire that "500*l.* part of the said 1500*l.* be given to my said "daughter; 500*l.* to my son Robert; 500*l.* to my "son William, and if it please God my daughter "Mary die (meaning before twenty-one or marriage) "then her portion to be equally divided amongst "my surviving children." And then followed the material words, which were wanting in the printed Report, by which he devised the whole Banisters, or the estates in Hampshire and Sussex, to his son Robert, the debts and portions being first paid. The decree states "upon reading the depositions, &c.;" these were merely that the testator was of sound mind, memory, and understanding, and no other depositions were mentioned; and then it was held that the whole of the Banisters were by the will made liable to the debts and portions. Lord Northingham, in his notes written for his own use, states the points ruled in the case; and, as far as concerns the present case, the decision is—that where a testator devises his estate at H. for payment of debts and

The reporter seems to have copied the will from the bill; and the words in parentheses were understood by the judges to be the surmise of the party, and not words of the original will.

portions, and devises Blackacre to his son Robert, *his debts and portions being first paid*, Blackacre is made liable to the debts and portions, though not in H., and that was the circumstance which made it liable; so that this case of Dormer in Finch is no authority at all for the plaintiff.

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Your Lordships have heard cases cited as to presumption, satisfaction and election, and so forth. It is true that it is a rule that where a testator gives a legacy to his creditor equal to, or greater than, the debt, the presumption is that it is meant as a satisfaction of the debt. So where a person is bound by settlement to give a portion, and gives such a portion by will, it shall be presumed *primâ facie* to be intended in satisfaction of the obligation. But evidence is admissible to rebut the presumption. That however is not admitted to alter the legal effect of the terms of the will, but only to show whether what is given by the will is not a satisfaction of that which is claimed by some other title. With respect to election, I decided the case of Druce and Denison, and stated that the subject as to which the election is to be made must be clearly described in the will. I there too stated my opinion of the decision in *Pulteney v. Lord Darlington*. But, with that case and the other authorities before me, I thought it right to decide as I did, subject to any review in case it should be deemed fit to attempt to shake these authorities, unless the parties felt that there was some weight in another observation, that the paper there in dispute was of such a testamentary species that it would be received in the proper Court as part of the will; and if so, there would be

Druce v. Denison, 6 Ves. 385.

Pulteney v. Darlington, 2 Ves. Junr. 544.

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Andrews v. Lemon, by Kenyon, M. R.

an end of all question. The parties seem to have thought that there was some weight in this last observation, and the matter was no more heard of. But as to that decision of Lord Thurlow, speaking with the utmost deference, I doubted its soundness, and I have Lord Loughborough with me. And as to the case before Lord Kenyon, the name of which, I think, was Andrews and Lemon, where a testator bequeathed all his personal property (he having personal property of his own, and also personal property not so strictly his own, but which he had a power to dispose of by deed or will) for purposes for which his own was insufficient, Lord Kenyon sent it to the Master to inquire whether by personal property he meant his own strictly, or intended to include both. But when the evidence was taken, he was so much struck with his own decision that he said, "though the evidence has been taken I "shall not now admit one word of it:" it being necessary for the general interests of mankind that persons should in their wills state clearly what they mean. So far as to cases in equity. No doubt where there is a latent ambiguity it may be explained by evidence, as where a testator gives to his son John 20*l.* for instance. There is no apparent ambiguity there. But if he has two sons of the name of John, that ambiguity may be taken away by verification of the fact. But here it is "my "estate *of* Ashton;" whether *of* is equivalent to *at* will be for your Lordships to determine. But suppose this to be "my estate of Devon," would it be competent to admit evidence to show that the testator meant to include lands in Dorset on the one

side, and Cornwall on the other? If then a devise of my estate of Devon would not let in evidence to show that lands in the counties of Dorset and Cornwall were included, why should a devise of "my estate of Ashton" let in evidence to show that lands were included which were not in the parish of Ashton. But the difficulty is how far, where there is a local description of lands, you can extend that to what the description naturally comprehends. I say nothing on the evidence itself—only that the effect of it may be looked at thus far, to see how far it may be dangerous to admit such evidence. But that is not now the question. The question which I submit to your Lordships, as proper to be put to the Judges, is this: "whether the evidence "tendered is such as according to law ought to be "admitted for the purpose for which it is offered."

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Question to the Judges.

Gibbs (Ch. J.) (delivering the opinion of all the Judges). This case arose upon an action of ejectment, brought to recover possession of lands and hereditaments, claimed under the will of the late Sir John Chichester, as devised, under the name and description of the devisor's "estate of Ashton." The ejectment was tried before Baron Graham, when certain evidence was offered on the part of the plaintiff which the Judge thought inadmissible; and thereupon a bill of exceptions was tendered, and sealed and signed by Baron Graham; and in that bill of exceptions the evidence is stated upon which the question arises.

Judgment, June 12, 1816.

The will of Sir Arthur Chichester runs in these words: "I give my estate of Ashton, in the county Will.

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" of Devonshire, to George Chichester Oxenden, " second son of Sir Henry Oxenden, Baronet, of " Broome, in the County of Kent: I give my house " in Seymour Place, for which I have given a " memorandum of agreement to purchase, and " which is to be paid for out of timber which I " have ordered to be cut down, to the Rev. John " Sanford, of Sherwell, in Devonshire."

The ejectment was brought to recover lands situate in the county of Devon, but not in Ashton; and it was insisted that under these words, " my estate of " Ashton," the testator intended to comprehend these lands, though not in Ashton, and that they passed under the will of the devisor. And evidence was tendered to show that the testator, in conversation and otherwise, comprehended under the name and description of his estate of Ashton, not only his lands in Ashton, but other lands, or the whole of the estate which he derived from his mother, and that he spoke of his paternal estate as his Youlston estate. And the question submitted was, whether extrinsic evidence could be received to explain the devise, and to show that it included lands not situate at Ashton; for we are all agreed that there is no distinction between *of* and *at*, and that it makes no difference whether the words are " my estate *of* " Ashton," or " my estate *at* Ashton."

Whether *of* or *at* Ashton makes no difference.

I do not state the particulars of the evidence, as the question is, whether any evidence at all can be admitted to explain the bequest. We are all agreed, as I have stated, that " my estate *of* Ashton" and " my estate *at* Ashton," are words of the same import, and the question then is, when lands at a par-

Where lands at or of a parti-

ticular place are devised, whether extrinsic evidence may be received to show that the devisor included lands out of that place; and we are all of opinion that such evidence is inadmissible.

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The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know only of one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances. There, from the necessity of the case, extrinsic evidence is admitted to explain the ambiguity; for example, where a testator devises his estate of Blackacre, and has two estates called Blackacre, evidence must be admitted to show which of the Blackacres is meant; so if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence must be received to show which of them the testator intended. And so also if one devises to his nephew William Smith, and has no nephew answering the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will, and it is only in such a case that extrinsic evidence can be received. It is of great importance that the admission of such extrinsic evidence should be avoided where it can be done, that a purchaser or an heir at law may be able to judge from the instrument itself what lands are or are not affected by it.

cular place are devised, extrinsic evidence is not to be admitted to show that the devisor meant to include lands not in that place.

Extrinsic evidence to explain a will admissible only where an ambiguity is raised by extrinsic circumtances.

And then such evidence is admissible only because it is necessary in order to give effect to the will.

Here the devise is of all the devisor's estate at Ashton; for there is no difference between *of* and

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at, and he has an estate at Ashton which satisfies the description. It is true he has other lands which came to him along with his estate of Ashton; but they are not therefore comprised in the words "my "estate of Ashton." If a testator should devise his lands of or in Devonshire or Somersetshire, it would be impossible to say that you ought to receive evidence that his intention was to devise lands out of these counties; and for the same reason, when the testator here describes the lands as his estate of Ashton, you cannot receive extrinsic evidence to extend this to other lands not of Ashton.

Dormer v. Dormer, Finch, 432. The reporter has confounded the facts of that case with the surmise of the parties.

We were pressed a good deal by the case of Dormer in Finch, where it was stated to have been determined that by a devise of lands at Idesworth, lands out of Idesworth were also intended and included in the devise. There is some obscurity in the case as reported. The statement appears to have been transcribed from the bill, and the reporter has confounded the surmise of the parties with the facts of the case. The facts in substance are these; Dormer died possessed of personal estate of considerable value, and seized of real estate in Buckinghamshire, and also, of real estates in Hampshire and Sussex, formerly called the Banisters, and Idesworth, the family-seat in Hampshire, was part of the Banisters estate. By his will he directed that the rents of his estate at Idesworth should go to pay debts and raise children's portions. In Finch it is stated thus: "It is my will, that after my mother's "decease, the interest of my estate at Idesworth "(intending the whole Banisters) shall go towards "payment of my debts, and afterwards towards

Facts and grounds of decision of the case of Dormer in Finch, 432.

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"raising my children's portions, &c." The words *intending the whole Banisters*, the statement being taken from the bill, are only the suggestion of the party. The fact is merely that he directed that the interest of his estate at Idesworth should go towards payment of debts and portions. In a subsequent part of the will he directs that his son Robert shall have the Banisters, the debts and portions being first paid. It was certainly a question in that case, whether the whole Banisters estates were affected by the debts and portions; and the object of the bill was so to charge them. The answer was, that, under the will, the estate at Idesworth only could be affected by the debts and portions, while on the other hand it was insisted that it was the testator's intention to include the whole Banisters. To make that case applicable to the present however, it must appear that extrinsic evidence was received to show the intention. But, instead of that, the contrary appears; for the evidence of the only two witnesses examined in that case was confined to the sanity of the testator at the time of making his will. The Lord Chanchellor does indeed determine that the whole Banisters were affected; not because of evidence admitted to show that it was the testator's intention, nor because it appeared in any way to be his meaning to include the whole under these words "my estate at Idesworth," but because in another part of the will the testator gives the whole of the Banisters to Robert his son, or brother, *after the payment of the debts and portions*, which showed the intention of the testator, that the whole Banisters should be charged. So far then as that case is an authority, it amounts

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merely to this, that if one part of a will charges one estate with payment of debts and portions, and another part charges another estate, then both are charged. The testator there by one clause charged his estate at Idesworth, and by another clause charged the whole of the Banisters.

Having removed that case out of the way, we are all of opinion, that there is nothing to impugn the general rule, that, unless in cases where there is a latent ambiguity, parol or extrinsic evidence is not admissible to explain a will.

Lord Eldon (C.) When this case was argued at your Lordships' bar it was contended for the plaintiff, that the extrinsic evidence ought to have been received; and that if it had been received the verdict would have been clearly for him: and for the defendant it was contended that the evidence ought not to have been received, and was properly rejected; and that, though it had been received, it did not follow that the verdict ought to have been against him.

Whether in case the evidence had been received the verdict ought to have been the one way, or whether it ought to have been the other way, are questions with which your Lordships need not trouble yourselves, provided you concur in the opinion delivered by the Judges. Speaking for myself, I have only to say that such is clearly my individual opinion, and that, upon the question that this judgment be reversed, I shall vote that it be affirmed.

Judgment *affirmed*.

Agents for Plaintiff in error, HARMAN AND NEWBY.
Agents for Defendant in error, ANSTICE AND COX.