2-1939

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CONSTRUCTION OF WRITTEN INSTRUMENTS

By RICHARD R. POWELL*

In addressing you on the Construction of Written Instruments, I am dealing with one of the oldest processes in human life. Since the art of writing had its most primitive beginning, man has devoted much of his life to the ascertaining of the ideas earlier recorded on stone, on wax, on papyrus or on some printed page. Writings of a religious character have been, and are being, combed over and over in the effort to derive therefrom the last item of light as to the truth sought to be revealed thereby. Writings of a secular character have been similarly treated in the efforts of scholars of literature and of philosophy to penetrate the veils established by the writings of men like Plato, Virgil, Shakespeare, Milton and Kant. Perhaps some now before me sat in Harvard College at the feet of Professor Kittredge and marvelled at how much of fragrance, how much of language history, how much of meaning could be unwrapped from the twirls of a single written phrase from Hamlet.

As men of law our lives are largely occupied with this same process. Constantly it is our task to construe the contracts, deeds or wills drawn by others, or to determine the

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scope and applicability of some statute. When not thus construing the work of others we spend much time in drafting instruments of a like character for the puzzlement of our brethren and our successors. The art of drafting cannot exist save in one skillful in the process of construction. The importance of this process of construction has grown tremendously in the past two decades due to the rapid increase both in the number of our statutes and in the frequency with which existing statutes affect the problems of current life. In 1930, Max Radin of the School of Jurisprudence at the University of California said this:

"Anglo-American law is in a fair way of becoming statutory, not by a great act of summation like the Bürgerliches Gesetzbuch or the Swiss Code, but piecemeal by the relentless annual or biennial grinding of more than fifty legislative machines." [43 Harv. L. Rev. 863 (1930).]

The accelerating character of the increase in problems of statutory construction is inescapably demonstrated by an examination of the four Decennial Digests published by the West Publishing Company. Each of these digests covers a ten year period, as you know. The first covers the period of 1897-1906, the fourth the ten years ending in 1936. Each digest has a segment dealing with the topic of statutory construction. For the earliest of these four decades we find forty-four pages of the short case summaries on statutory construction; for the second decade, ninety-seven pages; for the third decade, one hundred thirty-four pages; for the last decade, two hundred forty-six pages! This experience of the country as a whole is duplicated in this State of Indiana. In the last published volume of the reports of your highest court (Vol. 211) there are at least eighteen cases in which the opinions center on a problem of statutory construction. If each of you now before me would add together those hours in the past seven days which have been spent either in seeking to know the meaning of contracts, wills, deeds or statutes drawn by others, or in the preparation of like instruments which will require construction in the future, I venture the
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guess that, in a majority of your experiences, the total would constitute a major fraction of your working hours. Large as this fraction is, the probabilities are that it will daily become greater. More than ever before,—and wisely too—people regulate their affairs of moment by a written document. Those who have accumulated wealth to leave on death have come to realize the wisdom of a will. No Federal agency for the rewarding of "plowed-in" crops of legislation has yet been established. So, while you cannot be asked as yet for the unreasonable act of faith that would be involved in believing that what I have to say is important, I am compelled to recognize the vital importance of the topic upon which you have asked me to speak.

Two matters of a preliminary character require brief presentation. In the first place, it is necessary that we speak a common language. I do not mean to suggest that the differing dialects of Manhattan and Indianapolis create difficulties in our mutual understanding. I am rather stressing the importance of your knowing exactly the sense in which the word "construction" is to be used by me throughout these lectures. In the second place it is necessary that we examine the differing types of written instruments which the lawyer and the judge are required to construe, and to set forth those factors as to each type which give peculiarities or uniqueness to the process of the construction of instruments of that type.

First then let us consider the inclusiveness of the word "construction." Every written instrument is the attempted recordation of a series of ideas theretofore had by some definite individual. Each of these ideas is recorded at varying length, sometimes occupying a paragraph, sometimes a sentence, and occasionally a phrase or word only. Obviously the first task, then, is to squeeze out from each of these segregated paragraphs, sentences, phrases or words, just as near an approximation to the idea sought to be embodied therein, as is obtainable. This initial process of deriving ideas from the symbols used to denote ideas is often spoken of as "interpretation." But after this process has been com-
pleted, it then becomes necessary to assemble the ideas thus separately derived into a working and consistent whole. Perhaps some of you are familiar with the task of putting together a garage or a house for which some concern has furnished the necessary part, supposedly all cut to measure. This second step in the handling of a written instrument has many similarities to that task of the assembly of a prefabricated garage. Here and there new cutting and fitting is required. Now and then a piece is found which is excess baggage. Now and then a piece is not found which is most necessary. This fitting together of the separate pieces was thus illuminatingly described by Mr. Justice Holmes writing nearly forty years ago:

"A word generally has several meanings even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it there has a shade of significance more refined than any given in the word book . . . So when you let whatever galvanic current may come from the rest of the instrument run through the particular sentence, you still are doing the same thing." [12 Harv. L. Rev. 417 (1899).]

Sometimes this second step alone is spoken of as "construction." In such usage the words "interpretation" and "construction" are used to denote the two successive steps in a larger process; construction begins, whenever necessary, only after interpretation has been completed. It is my conviction that this differentiation is no material help to careful thinking and is too refined for practical helpfulness. In discarding this differentiation I am following the example of John Chipman Gray, of Albert Kales, of George Bogert and of Lewis Simes. During the two and one-half years in which I have been drafting the chapters on the construction of written instruments for the Restatement of the Law of Property, I have found no necessity for, or helpfulness in, the making of a distinction between "interpretation" and "construction." Either word can properly be used to denote the two-step process of first deriving the separate ideas sought to be com-
municated by the draftsman of the instrument, and, second, of grinding and burnishing these component parts so that they become units in a coherent entity. In these lectures I shall use the term “construction” in this comprehensive sense.

Before we leave this concept of “construction” the relationship between the process of “construction” and the determination of the effectiveness of the instrument construed requires our attention. When, as lawyers we speak of bringing a “proceeding to obtain the construction of a will” we are thinking of a proceeding in which the Court will declare not only what plan of disposition was desired by the testator but also what part of that plan is lawful under the applicable rule against perpetuities or other similar rule established for the protection of society. It is, of course, wholly true that after the composite idea of the draftsman of an instrument has been as fully apprehended as human ingenuity, operating within the established restrictions set by the rules of evidence, permits, it is still necessary to determine the effectiveness of the command embodied in the construed statute or of the dispositive provision found in the construed conveyance. As to statutes there are constitutional restrictions which must not be disregarded. As to wills and declarations of trust there are the rules against perpetuities and accumulations and other similar rules fixing the outer limits within which only the instrument can have effect. It is folly to suggest, and more folly to believe that courts shut their eyes to the consequences of validity or invalidity between which they are in fact choosing when they engage in the process of construction. Thus the rules as to effectiveness provide a frame for the process of construction, and like the frames of other pictures, exert a distinctly observable influence upon that which is framed. To the extent that this frame alters the shades or tints as we look at the central problems of construction, I shall include in these lectures on construction a consideration of the rules determining the effectiveness of instruments.

Thus the term “construction,” for the purposes of these lectures not only includes the two steps of, first, examining
the written language symbols for the ascertainment of their symbolism, and, second, putting together the separate symbolisms into a coherent entity, but also requires due consideration of the occasionally threatening sword of Damocles to be found in the rules fixing limits for the effectiveness of written instruments.

Now that we have an agreed meaning for the word "construction," I desire next to discuss with you those factors which cause the problem of construction to be different according to the type of written instrument presented for construction. During the course of our three days together we shall consider, with varying degrees of detail, nine different types of written instruments. These are wills, inter vivos declarations of trust, inter vivos conveyances not involving a trust, contracts, state statutes, Federal statutes, state constitutions, the Federal Constitution and treaties of the United States. There is a real danger in considering such divergent types of instruments in any single discussion. A disregarding of their essential differences could be a most fertile source of unsound conclusions. Since it is my hope that the legal techniques of all of us will be enriched by the cross-fertilization of these often separately pigeonholed bodies of law, it is obviously my duty to set out the danger signs which will keep us all within the limits of safety, in the drawing of generalizations.

A major line of demarcation must be noted between written instruments which are "public" rather than "private" in function. Constitutions, statutes and treaties are of the former type while wills, deeds and contracts are of the latter type. When a will or a deed or a contract is construed, rights are recognized and denied within the circle of a relatively small group. It is true that a judicially made construction constitutes a precedent, but the infinite number of possible variations in wording and circumstances, which gives more than a scintilla of truth to the phrase that "No will has a brother," can prevent this precedent from having substantial after effects, if the conviction is formed that such an effect is one which should be avoided. When, on the other hand, a
statute, constitution or treaty is construed, the future effects of this construction are likely to be more important than the immediate outcome of the litigation in which the problem arises. Thus in construing a written instrument having a public function, the process of construction must occur in a fashion consonant with the intended permanence and the contemplated generality of application of the rule which is reached.

Within the class of written instruments which have been grouped as "public" in function certain similarities and differences deserve attention. All of them are alike in that commonly they are formulated and worded by a group other than the group whose act makes them binding. This is most readily seen in the case of a constitution or a treaty. In the Summer of 1938 a constitutional convention labored in the State of New York drafting extensive proposed changes in the fundamental law of that State. A little more than a week ago the electorate chose six out of nine parts of the proposal which henceforth are to be in effect. This is the usual process throughout our States and it was the procedure followed in the drafting of the original Federal Constitution. Treaties are negotiated by gentlemen of the State Department but become effective by act of the Senate. Federal statutes, particularly those of large importance, are commonly drafted under the auspices of a committee chosen to study and to report upon the subject matter involved. Actually the drafting is frequently done by one or two or a small group of such committee. It has been truly said:

"Theoretically the legislative power is exerted by the informed agreement of the majority. In actual practice, however, the legislative power is exercised only by a small group of influential members, ordinarily the sponsors of the act, the committee members and the party leaders."

The chief difference between Federal and State legislation in this regard, is that, as to State action, it is more difficult to trace the sources of proposed legislation to the person or group responsible for its text. The same system of doing most of the legislative work in committees is followed, but
wholly inadequate records are kept of these highly important steps in the embryology of our law. Thus treaties, constitutions and statutes are not couched in words which were chosen by those whose assent give them validity, but are in language selected by other persons whose guiding purposes are often wholly unknown and unapproved by those whose assent make them binding. A striking illustration of this occurred in the State of New York. As a consultant for the Law Revision Commission of the State of New York I drafted the statute which now appears as § 66-a of the Real Property Law of that State. It provides as follows:

“When a limitation, if contained in a will, would create a tenancy in common of legal or equitable interests with implied cross remainders between the tenants in common, then the same limitation, if contained in a deed, shall have the same effect.”

At a session of the Law Revision Commission I explained the purpose and scope of this very unimportant statute. The Law Revision Commission approved my purpose and the text and wrote a brief note explaining the objective of the statute and sent this proposed statute and note to the legislature. A member of that body became the sponsor of the bill. While the bill was pending an inquiring member of the committee to which the bill had been referred met another legislator who was a lawyer and said: “Tom, what’s this bill mean about cross-remainders?” The answer came back: “Jack, I wouldn’t know a cross-remainder if I met one on the street!” The bill was passed despite this legislative unawareness of its import. Every volume of the Session Laws of this or any other State bears eloquent and frequent witness to like acts of faith. Even when the text of a bill has been read and reasonably grasped by the legislators who vote for it, the fact remains that few, if any, of them participated in the actual selection of the words in which it is couched. I do not need to remind this gathering of the extent to which the final revised draft of a contract retains the imprint of the ideas of the man who drew the first draft of such contract. Thus it may be fairly said that treaties, constitutions and statutes
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commonly represent the ideas of persons more remote than those who vote their adoption. This has high significance on problems of construction and will receive further discussion tomorrow in connection with our effort to determine what is meant by, and how we ascertain, the "intent of the legislature."

Despite the similarity between written instruments which are "public" in function, statutes and constitutions have one essential difference important to our present topic. A statute is designed to accomplish immediate ends within a relatively restricted field of operation. The enacting body meets with recurrent regularity and can readily speak anew if the prior utterance, as construed, fails to attain the desired end. Constitutions, on the other hand, establish the general outlines of a frame of government and are not subject to easy modification when a construction has been made which is ill-suited to the common welfare. Thus it is at least arguable that in construing a constitution, one is not restricted to what the framers thereof thought they were saying, nor even to what they would then have said, if the present problem had been suggested to them for decision, but rather that one should ask what would men of the present, having a caliber and interest in public weal comparable to these framers, now say upon the problem now faced. Whether one does or does not go that far in liberality of construing a constitution it is certain that a constitution deserves greater liberality in its construction than does a statute.

Of the nine varieties of written instruments to be considered in these lectures, four fall into the major division of those which are "private" in function. These are wills, inter vivos declarations of trust, inter vivos conveyances not involving a trust and contracts. The first two of these four are to be sharply set off from the latter two. Typically a will or an inter vivos declaration of trust is the voluntary, uncompensated distribution of his wealth by a conveyor. The instrument purports to set forth the ideas and desires of one person. In construing such an instrument a lawyer comes the nearest to having a problem comparable to the task of the theologian.
in interpreting the Scriptures or of the literary scholar in understanding the writings of Milton or of Shakespeare. Some one has spoken and we must now envisage what was in the mind of that one when he spoke. As Dean Gavit of the School of Law of the University of Indiana has so persuasively written:

“No one can show that he has properly relied upon the objectivity of what the testator said, or that he is materially harmed if a subjective standard is used. He is a volunteer; the donee of a gift.” [Gavit—Indiana Law § 38].

In fact Dean Gavit’s book on the Indiana Law of Future Interests, Descent and Wills, published four years ago does so excellent a job in differentiating between the construction of wills and deeds that I feel safe in assuming that none of you is unfamiliar therewith. The part to which I am now referring is in his Sections 33 to 41 inclusive. When the conveyance is a will or a voluntary declaration of trust, the element of bargain is lacking and the ultimate goal of the process of construction, as applied to such an instrument is to ascertain the actual desires of the testator or settlor and to effectuate these desires in so far as they do not conflict with rules established for the safeguarding of the welfare of society.

One factor, however, slightly complicates the seeming simplicity of this picture. Wills or declarations of trust are not always penned by the testator or settlor. Especially when substantial property is involved, their wording is normally selected by a lawyer and typed by his stenographer. The interposition of this filter may have either one of two consequences. The lawyer-filter may have the consequences of a light-filter in photography by which the picture is enhanced in both clarity and beauty. But alas, the lawyer-filter may also be like the filter of the bacteriologist, eliminating the vital ingredient from the substance which comes through. The presence of this word-man between the brain of the conveyor and the symbols presented for construction makes it necessary sometimes to query the accuracy of the instru-
ment as a recordation of the mind of the conveyor. The interposition of a ghost-writer, whether it be for a speech in the Congress of the United States or in the preparation of a will, has its risks.

In the remaining two types of written instruments namely contracts and inter vivos conveyances not involving a trust, a new element is in the picture. Two or more persons have dealt with each other and have concluded a bargain. Their communications to each other and the written embodiment of their transaction must be viewed not from the viewpoint of the utterer alone but from the viewpoint of the listener as well. A word, a phrase, a sentence must be examined to determine not only the idea which set it in motion but also the picture which it caused to arise when heard or read. This element of objectivity requires a stress not justified in connection with a donative instrument such as a will.

Thus in our subsequent discussions of construction when we bring together on one point cases involving variant types of written instruments, we must ever be alert to note whether some one of these essential differences between the types of instruments involved vitiates the soundness of the conclusion reached. The construction of an instrument is, and should be, determined in part by the public or private character of the instrument, by the degree of permanence and the breath of applicability contemplated for it and by the donative or paid-for character of the disposition made thereby.

In order to bring these lectures within the reasonable confines of your patience, I shall concentrate the discussion chiefly upon written instruments of two types. The first type consists of dispositions of property made without consideration and taking the form of a will or of an inter vivos declaration of trust. The second type consists of statutes. Excursions into the problems of construction raised by other varieties of written instruments will be restricted to instances where I believe some illumination can be thus derived for the narrower field to which your attention is primarily directed.

In thus introducing my subject, defining the term construction as herein employed, pointing out to you factors which
need to be borne in mind throughout the balance of our time together because they individualize the problems arising as to distinct types of instruments, I have consumed some thirty minutes. In the remaining time at our joint disposal I shall center my discussion about four foci.

**First:** the requirement that the written instrument or instruments in question be read as an *entirety*, rather than seriatim by clauses.

**Second:** the utilization of facts extrinsic to the text of a will or of a voluntary inter vivos declaration of trust, in determining its meaning.

**Third:** the utilization of facts extrinsic to the text of a statute in determining its meaning.

**Fourth:** the diagnosis and resolution of problems of construction frequently litigated as to future interests in wills and voluntary inter vivos declarations of trust.

**First:**

*The requirement that the written instrument or instruments be read as an entirety, rather than seriatim by clauses.*

In the year 1933 the Legislature of Indiana renovated the taxation statutes of this state. Legislation on the subject of taxation is seldom accepted gracefully by the persons into whose pockets it delves and these statutes proved to be a rather fertile source of litigation. I desire to refer to four of the resultant opinions in presenting to you the existent rules as to the treating of any given piece of legislation as an entirety.

By the Gross Income Tax Statute (Laws 1933, c. 50, § 3) an income tax was levied at the rate of one-fourth of one per cent upon certain types of income and at the rate of one per cent upon other types of income. Naturally there was a great preference among taxpayers for inclusion in the categories paying one-fourth of one per cent. Three of the clauses of Section 3 gave rise to most of the resultant controversies.
Clause (a) provided for the lower rate of tax

"Upon the entire gross income of every person engaged in the business of manufacturing, compounding or preparing for sale, profit or use, any article or articles, substance or substances, commodity or commodities; . . . ."

Clause (c) provided for the higher rate of tax

"Upon the entire gross income of every person engaged in the business of retailing of any tangible commodity or commodities [with an exception not now material]"

Clause (f) provided for the higher rate of tax in all cases not specifically covered by other Clauses.

The Indiana Creosoting Co. had its office and plant at Bloomington, Indiana and there creosoted ties and timber for the Chicago, Indianapolis & Louisville Railway Company. For the first two quarters of 1934 it paid the tax at the rate of one-quarter of one per cent, claiming to be engaged in the business defined in Clause (a) as "manufacturing, compounding or preparing." The State Department of the Treasury assessed a deficiency tax claiming the applicability of Clause (f). The case under the name, Indiana Creosoting Co. v. McNutt, came to the Supreme Court of the State and is reported in 210 Ind. 656 (Dec. 23, 1936). After dismissing other claims of the taxpayer, in which we now have no interest, the Court came to the question of the statutory construction of the clauses in Section 3. Judge Hughes writing for the Court said (at p. 667):

"If we were to consider the word 'prepare' alone and unconnected with the words 'manufacturing' and 'compounding' there might be some reason for the appellant's construction of this part of Section 3-a. We think, however, that all of the language must be construed together to determine the meaning of Section 3-a. The meaning of a word used in a statute must be construed with reference to all other words used therein and with which it is associated. It is a rule of statutory construction that effect must be given to the whole statute and every part thereof. We think the words 'manufactured,' 'compounded,' and 'prepared,' as used in the statute must be construed in
connection with each other. They are all qualified by the words 'for sale, profit or use' and form a classification as being taxable at one-fourth of one per cent. We do not think that the appellant's business comes within the meaning of the words 'engaged in the business of manufacturing, compounding or preparing for sale, profit or use any article . . .' so that the gross income would be taxed at one-fourth of one per cent. The work done in creosoting the ties is nothing more than a service rendered for the purpose of preserving them and can not be placed in the classification of manufacturing, compounding, or preparing for sale, profit, or use of any article, any more than could the painting of a house, buggy, or wagon. The service of all is for the same purpose—preservation of the material, the only difference being the method of the work and the material used."

Hence the court sustained the imposition of the one per cent tax on the ground that the company came within the catch-all Clause (f).

At about the same time the Supreme Court decided Dept. of the Treasury v. Ridgely, 211 Ind. 9 at 16-19 (Rehearing denied Jan. 12, 1937). A druggist in Gary did a rather large business in the filling and re-filling of physician's prescriptions. He claimed to be taxable on his gross income under Section 3-a urging that this work was "compounding or preparing for sale." It clearly was. But the State very properly chose to read Clause (c) and urged that the druggist's work was the "business of retailing" a tangible commodity. It clearly was. A situation had now arisen in which the income of this druggist was within the provisions of two clauses when those clauses were read literally. Yet obviously only one could be held applicable. Which should it be and upon what basis is the choice to be made? Let us see how Judge Roll, writing for the Court handled this problem:

"But granting that in this case the prescription business, in each instance, involved the act of compounding, is that fact decisive of the question here presented, in favor of appellees? We do not think so. Appellees in their brief set out the definition of the word 'compound' as defined by Webster's New International Dictionary as follows. (And we accept this definition for the purpose of this discussion.)

"'(1) To put together, as elements, ingredients or parts, to form a whole, to combine, to unite."
If we should accept appellees' application, that all income derived from the sale of merchandise, that involve the element of 'compounding' then it would follow that the greater part of the soda fountain business would come under this classification, for the serving of ice cream sodas, sundaes of different varieties and many other combinations involve the putting together of different ingredients or parts to form a whole. Likewise bakeries who make bread, pies, cakes, and etc., to sell at retail would come within this group. Also groceries, who mix and prepare the coffee, tea, spices, vinegar, extracts and a countless number of articles for sale at retail would come within this classification. All of these involve the act of putting together, mixing different ingredients to form a whole, but yet this fact does not take away from such business the principal characteristic or attribute of retail sale. The fact remains that the article compounded is sold to the individual for final consumption at a price to cover the cost of the different elements, plus the expense of preparing the article for sale.

"We think section three and the subsections thereof, classifying income derived from different business, should receive a practical and workable construction. . . . The business of compounding is used immediately after the word manufacturing, and in the same section with that of mining, the production of oil, natural gas, and the felling of timber, which gives us some light as to the meaning and construction the legislature intended to give it. Does it seem reasonable to say that the legislature intended to tax the gross income derived from the sale of any article that involved the act of compounding, at the rate of one-fourth of one per cent, without considering the character of his business or any other fact or circumstance connected therewith. That would be unreasonable. The partnership mentioned herein was engaged in the retail business."

So this court resolved the undoubted conflict between the literal meanings of the two Clauses by reading each in the light of the other and finding in the provision of Clause (c) for retailing a necessary qualification upon and exception to the "compounding" provision of Clause (a). Reading the Section as a whole the apparent inclusiveness of one clause is cut down to permit reasonable efficacy to a later clause thereof. This is eminently good sense as well as a sound application of the rules of statutory construction. It is worthy of note that in 1937 your legislature revised Section 3 so as to eliminate the further necessity for meeting those
problems of construction which had theretofore caused trouble [Laws 1937, c. 117].

In the same year of 1933 the statute levying a tax on intangibles was enacted [Laws 1933, c. 81], and the constitutionality of the statute was challenged upon many grounds in the leading case of Lutz v. Arnold, reported in 208 Ind. 480 at 489-491, 500 (1935). Two of its points are important to our present theme. The statute's constitutionality was challenged on the ground that it levied a property tax and not an excise tax. Section 2 [Burns, § 64-902] provided:

"On and after the passage of this act, every person residing in and/or domiciled in this state, shall pay a tax to the State of Indiana at the rate and in the manner provided in this act, for the right to exercise any one or more of the following privileges:"

Judge Hughes, writing for the Court said:

"The declaration in a statute that the tax is of a particular nature, while not conclusive, is very important and must be given consideration in construing the statute."

He quoted with approval a still stronger statement from a decision by the Supreme Judicial Court of Massachusetts declaring that:

"The declared purpose of the act is to be accepted as true unless incompatible with its meaning and effect."

So we find that a doubt as to the purpose and effect of a statute left in the mind after reading its commands, should be resolved so as not to conflict with a prior clause declaring the legislature's purpose in making the enactment. All parts of the statute are to be read as an entirety in deriving its net effects and mode of operation.

But the constitutionality of this statute was further challenged on the ground that the "classification as provided for in said act is arbitrary and unreasonable" since there is no
real or natural reason why banks, trust companies, building and loan companies and certain other corporations should be excluded from its provisions as they are. The Court promptly answered this contention with these words:

“This contention cannot be sustained for the reason that chapters 82 and 83 both have to do with taxation and take care of the situation complained of. Chapters 81, 82 and 83 must be construed together as parts of one body of law and as together expressing the legislative will. These three chapters were enacted by the same legislature and approved on the same day. * * * As said in the case of State ex rel. Baker v. Grange (1928) 200 Ind. 506, 509, 165 N.E. 239:

‘Statutes which relate to the same thing, or to the same subject, person or object are in pari materia and it is presumed that such acts are imbued with the same spirit and actuated by the same policy, . . . and they should be construed together as if parts of the same act, . . . to determine their affect . . . This applies with peculiar force to statutes passed at the same session of the legislature . . .’

“So construing the three chapters, we find that the objections raised as to the classification cannot be sustained.”

Herein we see an extension of the doctrine of reading a single statute as an entirety. Not only must that be done, but we must go further and read this statute as one unit in the series of separate statutes constituting the execution of one general program.

The same statute was again before your highest Court in Zoercher v. Indiana Assoc. Telephone Corp., 211 Ind. 447 (1937). In Section 2 of which I quoted the introductory clauses a few moments ago, one of the “privileges” to which the tax in terms applied was the “signing, executing and issuing of intangibles.” In 1936 the Telephone Corporation issued $3,000,000 of bonds. The State Board of Tax Commissioners held that the corporation had exercised its taxed privilege and imposed a tax. The corporation paid and sued for the return of the sum paid. Section 2 explicitly included the act of issuing bonds as one of the privileges taxed by the statute when exercised. The Court admitted this, saying:
"If this subsection stood alone, the appellants would have strong reason for the contention, but it does not stand alone and it must be construed with all the other provisions of said Sec. 2 and with all other sections of the act. The whole act must be construed together in order to determine the meaning of the act and the intent of the legislature."

The Court asserted that a statute may properly be construed in a manner which the "exact and literal meaning [of its words] would not warrant." It quoted a standard textbook to this effect:

"'Not only may the meaning of words be restricted by the subject matter of an act or to avoid repugnance with other parts, but for like reasons they may be expanded. The application of the words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute.'"

It concluded:

"The intent of the legislature should be given effect, though the strict letter of the statute may not be followed."

Upon this basis of doctrine the Court proceeded with its examination of the statute as a whole and found that in the five clauses subsequent to the one here in litigation the tax clearly was payable by the holder of the intangible and that this intent so permeated the entire statute that the clause on the "signing, executing and issuing of intangibles" must be restricted within similar limits. So that clause was held not to tax the original issuer of bonds, although this injected an exception or modification of the express language found in the statute.

In the four cases on statutory construction thus far considered we find a unanimity in judicial attitudes. There is to be no close inspection of a statute, clause by clause, in the effort to find inconsistency between successive provisions. Rather there is to be broad examination of the whole statute, extending even to other statutes enacted as a part of the same general program, in an effort to see the statutory plan
as a whole, and seeming conflicts between the literal terms of the separate parts are to be so resolved as to attain a workable and coherent whole. I submit that is good sense and represents as sound and as forward looking an attitude as can be found in the decisions of any jurisdiction.

Let us now turn our attention to the comparable problem in written instruments of a private character. Sindlinger v. Department of Financial Institutions reported in 210 Ind. 83 (1936) is worthy of our careful examination. The Union Trust Company of South Bend became insolvent and was taken over for liquidation in July, 1933 by the appropriate State agency. In 1929, as a means of competing with local building and loan associations, the bank had resolved to establish a "Savings Investment Department" and to pay 5\% interest upon deposits there received. The deposit book set forth "rules and regulations as to these deposits."

In this printed matter appeared this provision:

"It [the bank] will keep these loans and securities together with the uninvested cash belonging to this department separate from all of the other assets belonging to the Company, and will treat them as a special fund which, though owned by the Company, is set aside to determine the order of payment of these savings investments."

Upon liquidation the depositors in this Department claimed priority on the ground that these funds were received by the bank as trustee rather than as an ordinary bank deposit.

The Court properly treated the rules as set forth in the pass book as the contract between the bank and their depositors in this Department and declared:

"For the purpose of construing and determining the meaning and purpose of the contract it must be considered in its entirety."

Looking first to the other parts of the rules the Court found no difficulty in finding the manifest intention to create a trust relationship. It then took up the provision in rule 3 that the assets after deposit are to be "owned by the company." This had been argued to be inconsistent with the existence of
the trust relationship. The Court's handling of this matter is worth quoting:

"When construed with all of the other provisions of the contract we think this language is susceptible of such a construction as to be in harmony therewith. In the very nature of the undertaking and plan devised it was necessary for the trust company to take all of the mortgages, loans and securities in its name. * * *

"A literal or technical construction of an isolated or special clause should not be indulged to defeat the true meaning of a contract. The true meaning of a contract is to be ascertained from a consideration of all its provisions in order to carry out the true intention of the parties gathered from the whole instrument. . . . To give such a construction to rule three, as the appellee would have us do, would do violence to the true meaning of the same and this we can not do. . . . From all the facts in the instant case it clearly appears that a trust relationship was intended to be created and this intention can not be stricken down by any legal refinement of language."

The similarity between this opinion and those previously considered as to statutes is too clear to require emphasis. But the end is not yet. Let us look at some of the Indiana decisions on conveyances of land where the claim of repugnancy has been advanced. First I ask your attention to Snodgrass v. Brandenburg, reported in 164 Ind. 59 (1905). The will of William Snodgrass was quite brief. Its relevant clauses were as follows:

"'(2) I bequeath my entire estate, both real and personal, to my beloved wife, Sarah Snodgrass. (3) I request that as soon as convenient after my death, that my wife shall sell the personal property sufficient to pay my entire indebtedness. (4) I request that at the death of my wife, that my estate that I am now seized of, be equally divided between my children, to wit, John C., Mary A., Cora M., and Dora Snodgrass.'"

The Court thus expressed its ratio decidendi:

"'When the conclusion is finally reached, after an inspection of the four corners of the will, that it was the intent of the testator to vest a fee in the first instance, then any subsequent attempt to impose a legal estate thereon must necessarily fail, as inconsistent with the estate first
devised. In this case the second clause, standing alone, plainly indicates, as a matter of interpretation, that it was the testator's purpose to devise a fee to his wife. A case might be conceived of, however, where, notwithstanding such language, there was a subsequent provision so cogent as to lead the court to conclude that it was the intention of the testator to limit the interest of the first taker to a life estate.

"In the final disposition of this case we start with the proposition that clause two was sufficient, when standing alone, clearly to evince the intent of the testator to devise a fee. * * *

"In the will under consideration the testator requested that at the death of his wife his estate should be divided. At the utmost, the fourth clause of the will only served to create a doubt as to whether it was the testator's intention to limit the second clause, and in such circumstances the subsequent clause is ineffectual."

In an opinion written to sustain the denial of a petition for a rehearing, the precatory character of the ultimate limitation in favor of the children was asserted and stressed. Despite this possible alibi, the fact remains that the successive parts of this will were not regarded as giving equal light as to the dispositions made thereby. The Court read the first sentence, drew a conclusion as to the extent of the interest created by that sentence alone and then read on to see whether its already drawn conclusion was overturned by what it later found. Juries are not supposed to draw any conclusion until they have before them all the evidence. Courts do not construe statutes sentence by sentence but as a whole. But here, in the case of this will, the Court illustrates the unfortunate method of piece-meal construction, reading and construing its clauses seriatim rather than as an entirety.

Two later decisions in the lower courts of this state illustrate the lamentable results which follow this policy of construction. In Hume v. McHaffie reported in 40 Ind. App. 703 (1907) the will read as follows:

"I give and bequeath unto my wife Nancy L. Cosner all of my real estate including my residence in Stilesville and all of my household goods and personal property * * * after the decease of my wife Nancy L. Cosner I will that all the real and personal property belonging to her at the time of her decease to be equally divided among my
three children Emma McHaffie, Nettie Snoddy and Otis Samuel Cosner.

The Court talked about looking at the will as an entirety but then said:

"Where real estate is devised in fee simple in one clause of the will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt about a subsequent clause, nor by any inference therefrom, or by any subsequent words that are not as clear and decisive as the words of the clause giving the estate in fee simple; and where a devise is plainly given in fee it will not be presumed that the testator meant by any subsequent words to reduce the estate to one for life, unless the language employed so indicates such intention, and is as clear and in as strong terms as that devising the estate in fee simple."

Upon this basis the wife was found to have complete ownership and the children of the testator to have nothing. The dissenting judge pointed out the unsoundness of the case in this language:

"It is the rule of construction that all that is said upon a single subject must be considered together. The words of the devise to the wife do not stand alone. They are a part of the same item, the same clause, the same sentence, and they are to be considered with the remainder of the sentence to ascertain the purpose of the testator. * * * The word "will" means to give, devise and bequeath by a last will or testament, and cannot, in the connection in which it is used, be considered as a request."

The second of these lower court opinions which I desire to present to you is Ewart v. Ewart reported in 70 Ind. App. 167 (1919). A paragraph of the will gave described land to a son David Ewart:

"'to have and to hold forever with the power to sell the same and invest the proceeds in such other property, real or personal, as he may deem best,' subject to the life estate of testator's wife, Thalia T. Ewart, 'and after the death of my dear son, David, I will and bequeath the real estate herein in this item to my grandchildren, Verney Ewart, Alaska Ewart, Lloyd Ewart and Emerson Ewart, equally and should my son David Ewart sell the real estate in this item bequeathed, he shall
be deemed a trustee of the fund therefrom derived to this extent, that on his death whatever of the same is remaining shall descend to my grandchildren as herein provided, to wit: Verney Ewart, Alaska Ewart, Lloyd Ewart and Emerson Ewart.’”

The son David was held to acquire unqualified ownership of the described land, and the Court embodied its reasoning in this sentence:

“It is a well-established rule, that, where an estate is given to a person generally, or indefinitely, with power of disposition, it carries a fee, and the devise over is repugnant and void.”

No later case in your Supreme Court, which I have found, squarely repudiates this method of construction. It is true that later cases have sought to avoid applying this rule of repugnancy, by finding that the first person was not really, in terms, given a fee simple, as in Keplinger v. Keplinger, 185 Ind. 81 (1916) and in Oliphant v. Pumphrey, 193 Ind. 656 (1923). The line of authority represented by the Snodgrass case, by the Hume case and by the Ewart case is out of accord with the reasoning used by your Supreme Court in the statutory construction cases and in the contract case of the bank which I have cited to you. It represents a piece-meal process of construction unfortunately given a degree of mistaken respectability by Chancellor Kent over a century ago (4 Kent’s Com. 270). It is explained as Dean Gavit has said [p. 108] by the doctrine of repugnancy. But no repugnancy exists until the Court decides to pause for rest and to draw a conclusion while short of the end of the instrument in question. In other words the repugnancy is the product of the court’s disregard of its own generally accepted rule of construction, to read the instrument as a coherent whole. So read, there is no good reason for invalidating the executory interest limited after a prior fee and such executory interest should be equally valid without regard to whether the prior fee owner is given a power of disposition. Such a power lessens the value of an executory interest subject to destruction by its exercise but is in no way “repugnant” to the validity of such interest.
So in conclusion as to my first topic, I commend to you the sound policies of your decisions as to the construction of statutes as an entirety, taking into full account all of the provisions of the same or related enactments; I commend also to you the similar policies pursued by your courts as to contracts; I point out to you the failure to apply this same policy in the cases of deeds and wills said to involve a repugnancy and I urge that this is one particular in which the rules now applied in your State to the construction of deeds and wills require correction by the utilization of those other but closely related bodies of authority. In the Restatement of the Law of Property we have thus expressed the rule generally prevailing in the United States:

"The meaning expressed by the language employed in a conveyance is to be derived from reading such conveyance as an entirety. Each sentence or paragraph is a single element in one whole. It is reasonable to infer that their complementary or modifying force upon each other was intended by the conveyor and this inference must be given effect by the construer. When the clauses or paragraphs, read seriatim, involve repugnancies but, read as mutually modifying one another permit a construction as a consistent whole, the latter construction is adopted. So also the meaning of each clause or part of the instrument is to be determined in the light of all aid as to the intended meanings of words or phrases derivable from their uses elsewhere in the same instrument, or derivable from other dispositions contained in the instrument." [Tent. Dr. No. 7, § 242, Comment c.]

SECOND:

The utilization of materials extrinsic to a will or to a voluntary inter vivos declaration of trust in the ascertainment of meaning.

In the latter half of what I have thus far said I have been stressing the propriety and necessity of utilizing all that can be found within the four corners of a written instrument in the process of construing that instrument. But often this is not enough. In fact I shall seek to convince you that this is never or at least, seldom ever, enough. While we have been discussing the interplay and possible mutual modification of the
words and phrases found within a written instrument we have been operating upon an assumption, namely that we knew what each of these words and phrases meant when viewed separately. How true is that assumption?

Let us approach the problem from yet another angle. The decisions of this State, as in every other State, are replete with affirmations of the controlling force of the "intention of the testator" or of the "intention of the Legislature." Probably no volume of the reports of this State lacks assertions of both these rules. But these assertions leave us still seeking an answer as to the practically more important question—what are the channels of evidence by which one can establish this all controlling "intent". Are we always or only sometimes restricted to what we can derive from the language of the instrument? Can we resort only sometimes or always to the circumstances of the formulation of the instrument? Our task for the balance of today is to seek the answers to these questions in so far as they relate to wills or to voluntary inter vivos declarations of trust. The examination of a series of Indiana decisions will give us the basis for common thinking.

_Hertford v. Harned_, reported in 185 Ind. 213 was decided in 1916. The testatrix was Matilda Wilson whose home was in Daviess County. Her will was drawn by a lawyer in Evansville while she was a patient in a hospital at the latter town. In the will appeared this clause:

"I hereby give and bequeath to Mrs. Irma Hertford my stock in the Washington National Bank amounting to One Thousand Dollars . . . ."

After other specific gifts as to which no questions arose, there was a residuary clause to Annie Harned, a sister of testatrix. There was a stipulation of facts, with a proviso that _so far as these were admissible in evidence_, the same should be deemed to be true. From this stipulation it appeared that testatrix inherited 20 shares of stock in the named bank from her father; that each share had a par value
of $100; that she sold 10 of these shares; that by virtue of a stock dividend her remaining ten shares were doubled into twenty; that when the will was made each of these twenty shares had a par value of $100 and a sale value of $250; that her will was drawn at a place distant from her home, and from the named bank, by a lawyer who had had no contacts with her, or with the named bank. The controversy was, of course, as to whether all, or part only, of this bank stock passed under the clause giving

"my stock in the Washington National Bank amounting to One Thousand Dollars."

The trial court gave 10 shares to the specific legatee under this clause and the balance to Annie Harned as a residuary taker. The Supreme Court thus explained its reversal of the trial court:

"While courts of equity are invested with the power of reforming written contracts for mutual mistake and of making them conform to the intent of the contracting parties, they are not clothed with like authority over wills, nor have they the rightful power to admit extrinsic evidence to add to, eliminate, or vary the terms of a will as written. * * * Since, however, it is the object in construing wills to give effect to the testator's lawful intentions expressed in the will, and since the law prescribes no technical rule of accuracy either in the description of the gift or of the donee, extrinsic evidence is admissible to show the circumstances surrounding the testator when the will was made, and thus furnish the court engaged in the task of ascertaining the intent the same light, as near as possible, as that enjoyed by the writer of the instrument. * * *

"It often happens that the language of a will, on the face thereof, is sufficiently clear to denote the testator's purpose; yet, when read in the light of evidence relating to the property owned by him, and the objects of his bounty, when the will was executed, there develops such lack of harmony between the language employed and the surrounding facts as to render the testator's intention obscure. To remove such latent ambiguity the court may properly inquire into every other material extrinsic fact to which the will certainly refers, and the relation of the testator to such facts, to the end that the court may discover the purpose of the testator in the language actually used in the will. * * *
"We are of the opinion that extraneous facts were admissible in evidence to remove the latent ambiguity."

The Court cited as supporting authority the case of *Patch v. White*, 117 U. S. 210 (1886) where a will devised to a named person "lot numbered six in square four hundred and three." On proof that testator did not own the lot so described but did own "lot numbered three in square four hundred and six," the latter lot passed by the terms of this will clause. It quoted with approval this part of the Court's opinion in that case:

"'The testator, evidently by mistake, put "three" for "six" and "six" for "three," a sort of mis-speech to which the human mind is perversely addicted. 'It is done every day even by painstaking people.'"

The result of this bank stock case is clearly sound. What guidance in principle does it afford which can be used for the prediction of future results? It clearly recognizes the propriety of resort to extrinsic factors where latent ambiguity is found to exist. So much is incontestable. But what established the existence of the latent ambiguity? Was it not established solely by the resort to extrinsic factors? Before any further generalization is attempted let us examine further cases.

*Clark v. Allen*, reported in 189 Ind. 601 was finally decided by the denial of a rehearing in 1920. Levi McKaig left a very simple will contained in two sentences:

"I give and bequeath to my sister, Martha Watts, the north half of the southwest quarter of section sixteen, in Noble Township, Cass county, Indiana, to have and to hold the same for and during her life. On her death I direct that the said land be sold by my executor and the proceeds thereof be equally divided between the children then living of my brothers, John F. McKaig and Watson C. McKaig."

The life tenant is dead and the question is before the court as to those entitled to the remainder. It was in terms given "to the children of my brothers John and Watson." Evidence was introduced that testator had three brothers,
John, Watson and Robert; that Watson, mentioned in the will, had never married and was middle aged when the will was executed; that testator was, "to some extent, ill-humored towards Watson, but was both friendly and interested in the children of both John and Robert; that testator had spoken both before and after the execution of the will, of his testamentary provision for the children of Robert; that the scrivener of the will wrote "Watson" in the will by mistake where testator desired "Robert" to appear. This evidence was weighed by the trial court and the children of Robert were excluded from their claimed share. All the property went to the children of John. This result was affirmed.

Clearly the language of the instrument was completely unambiguous. A mistake may have been made in writing the will. Evidence tending to establish this mistake was received. The text of the will was given effect as it was written. Whether this occurred because the fact of mistake was insufficiently evidenced, or because such mistake is irremediable by extrinsic evidence cannot be determined from this case alone.

*Haines v. Indiana Trust Co.* is reported in 75 Ind. App. 651 and was decided in 1921. Kate Brown of Marion County created a trust for the benefit of her brother David Morris and one provision in this trust directed the trustee "to pay the funeral expenses and any doctor bills incurred during the last illness of said brother." The sole question before the court was whether this clause permitted the trustee to pay a bill of $2175 for nursing the brother during the twenty months prior to his death. The Court said:

". . . the court may inquire into the situation and circumstances of the testator, and his family, of his property, and his legatees, and the like, for the purpose of aiding in the construction of the will. [many citations] * * *

"We cite this long list of authorities * * * for the reason that we view the * * * circumstances in this case as of controlling force in determining the intention of the testatrix and the meaning of the ambiguous expression involved."
The Court then recounted the age and aloneness and financial situation of the brother, his known ill health, the expressed intent of testatrix to provide for all his other needs. Upon this background it found that "doctor bills" meant bills for doctoring and that doctoring included the continued performance of the doctor's directions during the doctor's absence and hence included nursing by the doctor's delegate. This result seems to have been required by the words of the will when read in the light of the circumstances of the instrument's formulation. But was there ambiguity in the language before these circumstances were presented and understood? If I tell you this is a check paying my "doctor bills" would any one of you have a momentary vision of a nurse's crisp uniform? The ambiguity existed because the court enabled itself to see the language of the will from the armchair of the testatrix.

_Mundhenk v. Bierie_ is reported in 81 Ind. App. 85 having been decided in 1922. The opinion was written by the same judge—Judge Nichols—who wrote in the case of the doctor bills, and no change in the personnel of the judges on the Appellate bench had occurred between the two cases. John Bierie of Wells County died in 1917. After other dispositions to his wife and to one other daughter, his will contained this clause:

"To my daughters Ella and Lizzie I bequeath jointly" certain described land containing eighty acres.

Lizzie died and Ella claims the whole by survivorship thus seeking to exclude the heir of Lizzie. A proceeding to quiet title with a cross complaint for partition made the construction of this will clause imperative. Did it mean to create a _joint tenancy_ or a tenancy in common? The cross complaint alleged that testator and the one who wrote the will were both farmers and wholly unacquainted with legal terms; that both testator and the scrivener believed that "jointly" would create a tenancy in common, that the leaving of the property in one tract was solely the product of difficulty in dividing it into
two parts of equal value. A demurrer to this cross complaint raised the question as to the materiality and admissibility of such facts. The Court sustained this demurrer, saying:

"It is well established that extrinsic evidence cannot be received to vary the terms or provisions of a will where there is no ambiguity."

The word "jointly" was held unambiguously to denote a joint tenancy and hence to exclude inquiry into extrinsic facts. It is interesting to contrast the certainty of this Court as to this meaning of the phrase with the holding of the Supreme Court of Illinois in *Mustain v. Gardner* [203 Ill. 284 (1903)] that this word "jointly" is not even strong enough to overcome a rebuttable statutory preference, such as is embodied in your statute, Burns § 56-111, for the tenancy in common construction. How can we know that there is an ambiguity? Must we wait until the court tells us before we can be sure? Will the court "peek" behind the language into the circumstances in every case, and having done so emerge sometimes with the conclusion there is an ambiguity so we all must join in the peeking and sometimes with the conclusion that "peeking" is forbidden? This handling of the process of construction makes it difficult for lawyers properly to perform their function of predicting and causes unnecessary litigation and expense to clients.

Let us look at one more case, reported under the name of *Rodarmel v. Gwinnup* in 92 Ind. App. 684 (1931). By the time of the decision of this case the personnel of the court had changed somewhat but the opinion is by Judge Enloe, who was on that bench at the time of both the prior decisions, and three other judges concurred in all three opinions. William Meredith died in Daviess County in 1926 without close relatives and leaving a very large estate. A clause of his will gave the bulk of his estate "to my first cousins and my second cousins living at my death." The kinsfolk of the deceased divided into five groups differentiated by their ancestry. Taking all first cousins there were found to be fifteen, and taking all second cousins there were 136! In a
proceeding for partition, one of these five groups of cousins, known as the Meredith heirs, claimed that the testator meant *them only* when he wrote the words "first and second cousins." They offered evidence to sustain this contention which the trial court received. The evidence was sufficiently persuasive to cause the trial judge to make a finding of fact in the following words:

"William R. Meredith, intended and believed, at the time of the execution of his will that the children of the brother and sister of his father, William S. Meredith, who were living at his death, were the persons who would be the devisees and legatees under the will, as the ones included in the language, 'my first cousins living at my death,' that the testator, William R. Meredith, intended and believed, at the time of the execution of his will, that the children living at his death, who were the children of the children of the brother and sister of his father, William S. Meredith, were the persons who would be the devisees and legatees under his will as the persons included in the language, 'my second cousins living at my death.'"

The Appellate Court quoted with approval the following passage from Schouler on Wills: [Vol. II, p. 975 (6th ed.)]:

"The real inquiry is not what the testator intended to express but what the words do express, the object of construction being to ascertain the intention expressed in the will, his intention existing in his mind not controlling . . . ."

It also quoted from the opinion in the earlier Indiana decision of *Daugherty v. Rogers* [119 Ind. 254 (1889)] where the Supreme Court had said:

"However clearly an intention not expressed in the will may be proved by extrinsic evidence, the rule of law requiring wills to be in writing stands as an insuperable barrier against carrying the intention thus proved into execution. The maintenance of this rule in its integrity . . . as a matter of transcendent importance, and, in no jurisdiction, has the doctrine which denies the right to add anything to a will by parol been adhered to more steadily than by this court."

That last quotation was taken from an opinion written by your Supreme Court in 1889 before it had decided the "bank
stock” case of 1916 but it was quoted by your Appellate Court after that same court had read-in a nurse into the phrase “doctor bill.”

This consideration of cases at length must not continue, but I must mention briefly three holdings of your Supreme Court made within the past four years. *Shandy v. Bell*, 207 Ind. 215 (1934) reaffirmed the doctrine that an easement by necessity is to be read into a deed wholly silent on the subject, whenever such easement is reasonably necessary for the fair enjoyment of the claiming tenement. *Hutchinsons’ Estate v. Arnt*, 210 Ind. 509 (1936) substantially broadened the expressed scope of a power given to testator’s widow to encroach on the corpus, because of the light thrown on the problem of intention by an inquiry into the facts of the family of the testator and the conditions of life to which the testator and his second wife were accustomed at the time of the drafting of the will. In *Sample v. Butler University*, 211 Ind. 122 (1937) the property given by the mutual wills of a husband and wife was described as the property “which I may own at the time of my death.” Two questions were raised. First, did this clause by its restrictive language permit the man (who had survived his wife) freely to convey away anything he chose of the property derived from his wife? Second, did this cause by its unqualified form subject to the will, property of this man which he did not derive from the wife? In both particulars the Court construed the language in a manner inconsistent with the literal reading of the will clause. The circumstances of the formulation of the wills were said to justify these departures from the language as written.

Where then does this survey of the decisions of Indiana leave us? It is clear that your Courts frequently do construe a will in the light of the circumstances of its formulation. It is not clear as to when resort to this extrinsic evidence is permitted. We are told it can occur only when the text reveals a latent rather than a patent ambiguity. We are told further that no resort to extrinsic evidence is proper when the text reveals a “plain meaning” even though the plain
meaning so revealed is admittedly not the real intent of the conveyor. Right in these two positions lies your difficulty. The decisions of Indiana reveal an intermittent effort to retain two doctrines which have been extensively abandoned elsewhere in this country. The allowance of extrinsic evidence to clear up a “latent ambiguity” but the refusal to allow such evidence for the clarification of a “patent ambiguity” has been condemned by such writers as Wigmore [§§ 2461, 2472 ff.], Schouler [§ 1926] and Page [§ 1419], has been repudiated in many states of this Union and serves no purpose save to inject a distinction which increases the necessity for mental gymnastics by the judge anxious to decide cases in accordance with his conscience. Similarly the so-called “plain meaning rule” affords what sounds like a sensible restriction upon resort to extrinsic facts until one sees it in actual operation.

Mr. Justice Holmes in *Towne v. Eisner* [245 U. S. 418 (1918)] truly said:

“A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.”

In the Restatement of the Law of Property [Tent. Dr. No. 7, § 241, Comment a] with the unanimous approval of all my Advisers, I wrote this:

“Language consists of words which are mere symbols of ideas. The ideas of the conveyor and the symbols selected by him for their expression are determined by the circumstances of the conveyor at the time of the conveyance and by his experiences prior thereto. Consequently any ascertainment of the meaning of language requires consideration of the atmosphere in which the conveyance originated, and an ascertainment of the associations or connections understood by the conveyor to exist between the terms of the conveyance and the various possible objects in the external world. By this process selected symbols which imperfectly symbolize the conveyor’s idea are made more understandable and the danger that a selected symbol will call up in the mind of the construer a different idea from that which the conveyor intended to symbolize, is lessened. Language is capable of a clear meaning only when read in the light of the circumstances of its employment.
"In the case of a deed or will, as in the case of any writing, this process is always necessary. * * * The policies embodied in the Statute of Frauds and in the Statute of Wills, and the necessities implicit in an orderly and expeditious administration of justice, require that inquiries as to the meaning of language be kept within reasonable limits. Normally facts outside an instrument cannot be used to contradict a meaning clearly expressed by the ordinary usage of the words employed. Seldom indeed is evidence receivable to support a claim that the conveyor did not mean what he has said. However, it can be shown that his usage of words was different from the ordinary usage, * * *. Evidence of this sort is easily fabricated and hence a trier of fact must be cautious in giving credence to evidence offered to establish such a departure from ordinary usage of language."

This embodies the prevailing law of this country. Chief Justice Rugg, writing in Massachusetts in 1919 [Mullaney v. Monahan, 232 Mass. 279] said:

"The fundamental object is to ascertain the real purpose of the testator, from all the sentences and words he has used, giving them as far as possible their natural meaning and common signification, but reading them in the light of their context, of the knowledge of material surrounding facts possessed by the testator at the time he executed the instrument, and of the subject matter and the persons to whom his language is to be applied . . . ."

Similar emphasis upon the vital necessity of reading any words, no matter how plain they may seem, from the armchair of the person of whose thoughts they are the symbols, can be found in the opinions of the Illinois, Iowa, Massachusetts, Nebraska, Pennsylvania, and many other states [Peet v. Peet, 229 Ill. 341 (1907); Estate of Clifton, 207 Iowa 71 (1928); Bramley v. White, 281 Mass. 343 (1933); Mohr v. Harder, 103 Neb 545 (1919); Meyers Estate, 289 Pa. 407 (1927).]

If it is true, as I believe it is, that no language has any meaning unless and until you are able to envisage the atmosphere surrounding the speaker when he spoke, then the process of construction requires complete freedom in the offering and reception of any evidence calculated to give the court an awareness of what the conveyor did mean by the
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words he has written. But it is objected—this denies the policy of the statute requiring that a will be written. Nothing is farther from the truth. It merely insists that the reader of the required writing shall bring to its reading the best possible equipment enabling him to recapture from the written word the ideas which the writer had at their selection. Furthermore, Dean Gavit, in his book to which I have before referred, demonstrates the very great limits to which we all allow departure from the written will by proof of facts extrinsic to the instrument. The limits of such departures are not set by statute but by judicial decision that the departure better serves justice than arid adherence to the letter of what is written. Thus fraud, duress or mistake in the execution of a will excludes the *animus testandi*. The fact of fraud or of undue influence vitiates a gift made in no uncertain terms by a will. But as Dean Gavit says:

"*Note well,* that is because we accept the parol evidence and not the written evidence in the instrument." [§ 35]

The requirement of a writing for a will is no more entitled to unqualified acceptance than is that other part of the law which admits parol evidence to nullify, modify or to replace part of the language in the writing. Both of these elements are equally parts of our substantive law.

If the review of the Indiana cases which we have made together this afternoon has served the purpose which I have hoped it would, you now need little persuasion on the following propositions:

*First*: the distinction between "latent" and "patent" ambiguities is not useful and should be discarded.

*Second*: the "plain meaning rule" does not in fact decide cases, but rather conceals the processes actually followed by the courts of this and other states in the construing of wills.

*Third*: language is so colored by the circumstances of its formulation that the exclusion of otherwise admissible evidence as to such circumstances is not justified.

This will not clog the processes of justice by opening the
flood gates to large new bodies of evidence on issues now excluded from litigation. It has not so worked in the states which have adopted the suggested attitude. In the ordinary case there will be no facts which, if produced, would affect the rights of any party. In response to Mr. Justice Holmes' comment that a word is not a crystal, Max Radin of California rejoined that neither was it a portmanteau. This is true and in this truth we find the practical safeguard in the proposed rule. Only within very narrow limits is there any hope of persuading a court to depart from what is written. It is not usual for a person to mean the opposite of what he writes. Frequently he expresses himself awkwardly and incompletely. Whenever anyone believes he has facts which show that the written word is contrary to, or an awkward, or incomplete expression he must be privileged to present them, without requiring him first to get those facts insurreptitiously to make the Court recognize the existence of that phantom, an ambiguity. The reception of such evidence does not necessarily mean that the instrument will be construed otherwise than it would have been without it. The question of the sufficiency of the evidence remains after its admissibility has been granted.

If there is still among us a doubting Thomas who hesitates to discard the glittering bauble of the "plain meaning rule" in the construing of wills and similar dispositive instruments, may I extend a special invitation to that gentleman to be present on the morrow when I shall discuss the similar problem in connection with statutes.