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WILLARD T. BARBOUR

The faculty of the Yale Law School has once more suffered a very heavy loss. Professor Willard T. Barbour died of pneumonia on March 2, 1920. Professor Barbour entered upon his duties at Yale last September, having been chosen to fill the Southmayd Professorship and to give courses in equity and legal history. In the short period since then he had already won the love and respect of his students and his fellow teachers. His exceptional educational training, his assured loyalty to this school, his strong common sense, his almost boyish enthusiasm, and his gifted and winning personality had already made certain a successful and productive career at Yale.

Professor Barbour graduated from the University of Michigan, receiving the degree of B.A. in 1905 and the degree of LL.B. in 1908. Later he spent three years at Oxford, doing original research in the field of legal history under Sir Paul Vinogradoff. This resulted in

right is enforced, wherever the stockholder has placed the assets. The reason given may be that the one corporation has been left a mere "shell," or is a "dummy," or has been "literally swallowed whole." But the fact is that the legal entity fiction will be disregarded when necessary to enforce the stockholder's duty according to his true contract. However to go farther and disregard the corporate entity seemingly at will would be an unjustifiable blow at the basis of corporation law. It is submitted that it would tend toward accuracy of thought and justice to recognize more frankly the exact relations of the parties.

EVIDENCE OF INTENTION AS REBUTTING WAYS OF NECESSITY

Can the presumption of a grant, or of a reservation, of an easement of necessity be rebutted by proof of an oral agreement of the parties to the contrary? In giving effect to a written instrument, even where a writing is required by law, oral conversations are admissible to "rebut an equity."[1] This old and very ambiguous doctrine, though sometimes construed to relate merely to constructive or resulting trusts,[2] has nevertheless been extended to a rather miscellaneous group of legal presumptions.[3] Clearly, however, not all legal presumptions may be overriden by this kind of evidence.[4] Upon what principles are conclusions arising out of the application of legal presumptions to written instruments admitted to or excluded from the protection of the "parol evidence" rule?

In the case of *Orpin v. Morrison*,[5] a deed was delivered embracing land so situated as to give rise, under ordinary circumstances, to a way of necessity across the land of the grantor. In litigation involving the existence of this "right of way," the alleged servient owner introduced without objection evidence of an oral understanding that no such easement should be granted. Subsequently the court was requested to rule that this evidence could not be considered. It was held that the evidence, once admitted, was relevant to prove the actual intentions of the parties as a means of rebutting the presumption.

It seems clear, notwithstanding a contrary intimation in the opinion,[6] that we have here no middle ground between the absolute irrelevancy and the absolute admissibility of the evidence in question and that the latter, if objectionable at all, could not possibly be cured by the failure to object to its introduction. We need not enter into the by no means

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[1] 1 Jarman, *Wills* (6th ed. Sweet, 1910) 497; Thayer, *Preliminary Treatise on Evidence* (1898) 437-441; 4 Wigmore, *Evidence* (1904) sec. 2475; *Langham v. Sanford* (1811, Eng. Ch.) 17 Ves. 435.

[2] *Hughes v. Wilkinson* (1860) 35 Ala. 453, 463.

[3] Thayer, *op. cit.*, 437 ff.

[4] *Hall v. Hill* (1841, Ir.) 1 Dr. & War. 94.

[5] (1918) 230 Mass. 529, 120 N. E. 183.

[6] *Ibid.*, 532.

settled controversy whether there exists a technical rule of evidence applicable to oral conversations when offered for strictly interpretative purposes.[7] However this may be, the rule which prohibits the use of such evidence to contradict or supplement a writing is generally recognized as one of substantive law.[8] In the present case, where the question was merely one of rebutting a legal presumption, the problem was manifestly one of contradiction and not of interpretation. The sole inquiry is, therefore, whether the legal conclusion thus contradicted was or was not within the protection of the parol evidence rule. If so, the conversation offered in contradiction was as irrelevant as if in direct conflict with the specific language of the instrument. If not, the conversation was not merely relevant, but perfectly good evidence within a well-established rule.[9]

How should the issue of relevancy thus raised be decided? If it was correctly resolved in favor of the proof of the oral conversations, this must be, as recognized in the principal case,[10] by virtue of the actual state of mind common to the parties as disclosed by the evidence, and not by reason of the oral agreement as an objectively operative fact. Under the statute of frauds[11] the latter could not operate independently of the deed to create or prevent the creation of an easement. Could it be said that the deed was executed with reference to the oral agreement, just as it must be presumed to have been executed with reference to the physical situation and condition of the property? To assert this would be virtually to incorporate the oral agreement bodily into the deed in a manner which bears not the slightest resemblance to an interpretation of the document. To prevent such a proceeding is the very purpose of the parol evidence rule.[12]

We are left then with the question as to the relevancy of the subjective state of mind of the parties as a fact overriding the legal presumption of a way of necessity. Is this a contradiction of the "instrument" which is protected against contradiction by the parol evidence rule?

Clearly the "instrument" within the meaning of this rule is much more than the mere succession of written words on the face of the document. No one would contend, for example, that the principles of syntax and the fixed canons of verbal usage are not within the protection of the rule to the same extent as the words themselves. Furthermore it is well settled that genuine, as distinguished from artificial, rules of construction applicable to particular parts of the

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[7] See Thayer, *op. cit.*, ch. x; 4 Wigmore, *op. cit.*, sec. 2471; Holmes, *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417.

[8] Thayer, *op. cit.*, 391-392; *Mears v. Smith* (1908) 199 Mass. 322, 85 N. E. 165; *Moody v. McCown* (1865) 39 Ala. 586.

[9] See note 1, *supra*.

[10] *Orpin v. Morrison, supra*, 532.

[11] Mass. Rev. Laws, 1902, ch. 127, sec. 3.

[12] See *Doe v. Hubbard* (1850) 15 Q. B. 227, 243.

writing are essential elements of the instrument within the meaning of the rule.[18] This is undoubtedly equally true of many rules of presumption for ascertaining the interrelation of different provisions of the document, or the relative efficacy of different elements in the text in overriding apparent contradictions. Thus it is incredible that the presumption that monuments control distances in the specification of a boundary could be rebutted by proof of an oral understanding to the contrary, or that in the case of a bilateral contract embodied in a writing complete on its face, the condition implied in law of contemporaneous performance or readiness to perform could be excluded by proof of an oral agreement that the reciprocal promises should be strictly independent.

In fact the parol evidence rule would be devoid of meaning unless it were held to debar an interference, by direct proof of actual intention, with the legal consequences arising from the language of the instrument by a genuine process of interpretation. All these legal consequences, however, ensue only by the extrinsic operation of law, having for its purpose the giving effect to the instrument as a complete and exclusive expression of intention. These legal effects are not, and can not be, set forth with completeness in the text of the document. The law is as truly construing the instrument as such, when it finds an expression of intention in the general scheme of the document as when it finds such an expression incorporated in an express provision.

In the case of a way of necessity, however, the legal presumption is founded, not directly upon the express language or the structure of the document, but upon the immediate physical consequences of the grant which may or may not be ascertained without resort to extrinsic proof. It may be suggested that we have in such a case no longer a process of interpretation or construction, and that consequently a presumption thus founded is in no sense a part of the instrument within the protection of the parol evidence rule. But words in instruments of grant are always used with a view to producing physical effects through the changes in the legal relationship involved. How, then, can the value of these words be appraised as an expression of probable intention unless we look to the direct physical consequences thus produced, within the range of the probable contemplation of the parties? To examine the situation outside the deed to ascertain the change which the deed has effected is not to discard the instrument but to seek a more complete rational understanding of it as something dynamically operative rather than a mere series of formal expressions. If, therefore, such an examination discloses as a direct consequence of the grant a parcel deprived of direct access, and if the law finds in this situation a rational basis for an inference of intention sufficiently cogent to give rise to a presumption of a way of necessity, is not this

[18] *Hall v. Hill, supra;* 2 Taylor, *Evidence* (9th ed. 1897) sec. 1231.

legal conclusion well within the range of a genuinely interpretative process of inference, which starts with the language of the document and which adheres throughout to the purpose of appraising this language as an expression of probable intention?[14]

The presumption of a way of necessity is founded upon the elementary principle that the grant of a thing carries with it whatever is reasonably necessary to its enjoyment.[15] It has therefore vastly greater genuinely probative force than those legal conclusions which are admittedly subject, under the authorities, to rebuttal by direct evidences of actual intention. Thus conclusions based upon technically equitable considerations are thus rebuttable,[16] but these by their very nature exclude the element of probable intention. The implied warranty of title in the law of sales has been held to be within the same rule,[17] but this is by the better opinion, deemed to proceed upon an essentially quasi-contractual disregard of probable intention. So too statutory presumptions, such as that of the inadvertence of the omission of a lineal descendant from a will, are within the rule,[18] but these manifestly ride rough-shod over truly interpretative considerations. There remains the "artificial" class of presumptions, such as courts of equity have sometimes adopted, often borrowing them from the civil law, as makeshifts for the solution of difficulties created by the absence of genuine probative data.[19] Whether a repeated testamentary gift was intended to be cumulative or substitutional,[20] whether an executor

[14] "The deed of the grantor as much creates the way of necessity as it does the way by grant; the only difference between the two is that one is granted in express words, and the other only by implication." *Nichols v. Luce* (1834, Mass.) 24 Pick. 102, 104.

[15] *Schmidt v. Quinn* (1884) 136 Mass. 575 ("a right of way is presumed to be granted; otherwise the grant would be practically useless."); *Doten v. Bartlett* (1910) 107 Me. 351, 78 Atl. 456 ("it is not to be presumed that the parties intended the grantee to have no beneficial enjoyment of the estate."); *Higbee Fishing Club v. Atlantic City Electric Co.* (1911) 78 N. J. Eq. 434, 79 Atl. 326 ("In such a case the right of way is a necessary incident to the grant, for without it the grant would be useless; the grant is necessarily for the beneficial use of the grantee and the way is necessary to the use."); *Collins v. Prentice* (1842) 15 Conn. 39.

[16] *Mann v. Executors* (1814, N. Y.) 1 Johns. Ch. 231; *Faylor v. Faylor* (1902) 136 Calif. 92, 68 Pac. 482 (resulting trust); *Thurston v. Arnold* (1876) 43 Iowa, 43 (equitable rule that time is not of the essence of the contract).

[17] *Miller v. Van Tassel* (1864) 24 Calif. 458.

[18] *In re Atwood's Estate* (1896) 14 Utah, 1, 45 Pac. 1036; *Buckley v. Gerard* (1877) 123 Mass. 8.

[19] "The anomalous case of what are called 'presumptions' of law are, in reality, rules of construction derived from the civil law, which, having obtained a lodgment in English law, but being disapproved of, have been allowed to retain their own antidote in the shape of the capability of being rebutted by parol evidence, which (in common, however, with other rules of construction) they possessed in the system from which they were originally derived." Hawkins, *Wills* (2d Am. ed. 1885) ix.

[20] *Trimmer v. Bayne* (1802, Eng. Ch.) 7 Ves. 508.

given a specific legacy was thereby intended to be excluded from the residue,[21] whether a bequest by a debtor to his creditor was intended as a payment of the debt,[22]—these are all questions upon which the intrinsic bases for inference of intention are meagre and nicely balanced.[23] The presumptions applied to their solution being artificial and exotic, it is not surprising that, at a time when the parol evidence rule was still in a rudimentary stage, rebuttal by direct proof of subjective intention was admitted.

It must be conceded, under the authorities, that evidence of the prospective use of the granted premises is admissible to show whether, in view of such prospective use, an existing mode of access is sufficient to prevent the operation of the presumption.[24] This, however, is suggestive of the usual case of bringing the subjective intention to the relief of an intrinsically ambiguous situation, rather than a use of the evidence in the rebuttal of the legal presumption.

In the law of conveyancing, in which the statute of frauds and the parol evidence rule coöperate to produce a system of transfers in permanent and accessible form, and in which the systems of recording render the results of an examination of the record both indispensable and decisive in important real estate transactions, it is of especial importance that legal principles should be applicable to matters of record with a minimum of resort to transient and untrustworthy evidences of subjective intention. The relaxation of the parol evidence rule in the principal case, though supported by some authority,[25] is believed to be contrary both to immediate practical considerations and to sound principle.

INJURY BY VOLUNTARY ACT OF COËMPLOYEE UNDER WORKMEN'S COMPENSATION ACTS

The decision of the Connecticut Supreme Court of Errors in the case of *Marchiatello v. Lynch Realty Company* (1919, Conn.) 108 Atl. 799,

[21] *Ulrich v. Litchfield* (1742, Eng. Ch.) 2 Atk. 372.

[22] *Wallace v. Pomfret* (1805, Eng. Ch.) 11 Ves. 542. But see *Hall v. Hill, supra,* 122, 123.

[23] "It (the testator's mere extrinsic intention) comes in as a mere incident to the 'equity,' as a ground of relief against the operation of a rule which refuses its proper construction to the document." Thayer, *op. cit.,* 439.

[24] *Feoffees v. Proprietors* (1899) 174 Mass. 572, 55 N. E. 462; *Hildreth v. Googins* (1898) 91 Me. 227, 39 Atl. 550; *Myers v. Dunn* (1881) 49 Conn. 71; *Kingsley v. Gouldsborough Co.* (1894) 86 Me. 279, 29 Atl. 1074.

[25] *Golden v. Rupard* (1904) 25 Ky. L. Rep. 2125, 80 S. W. 162, erroneously relying upon *Lebus v. Boston* (1899) 107 Ky. 98, 52 S. W. 956, in which, however, the oral agreement offered operated as an admission of the existence of access at the time of the grant. See *Jann v. Standard Cement Co.* (1913) 54 Ind. App. 221, 222, 102 N. E. 872, 874; *contra, Kruegel v. Nitschmann* (1897) 15 Tex. Civ. App. 641, 40 S. W. 68.