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Torts: Disobedience of a Statute--Presumption of Negligence

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is so clear and unambiguous that only one intent is reasonably inferable from it.[7] Some authorities go even farther and say parol evidence is always admissible to help explain the intent of the writer.[8] "The distinction between words which are plain on the face of a writing and words which are ambiguous on the face of a writing is based upon the groundless supposition that there is an absolute meaning of words and that people ordinarily correctly use those perfect words."[9]

What was the intention of Morris in setting out the terms of his wife's will in his letter? The language of the letter might be construed in two ways: (1) Morris promised not to revoke his will providing his wife's will left her entire estate to him for life. This would make the terms of the will, as recited in the letter, an essential condition of the contract, and therefore parol evidence would be inadmissible to correct the mistaken recital. (2) Morris promised not to revoke his will providing his wife did not revoke the will she executed on September 14, 1942. Under the latter construction, the recital of the terms of the will was merely for the purpose of identifying it. Parol evidence would be admissible to correct such a recital. Proof of a partial error in description does not destroy the memorandum if the description which remains after discounting the erroneous part is sufficient to identify the subject matter.[10] Here, since the will is described by date of execution as well as by a purported recital of its terms, the recital could be shown to be mistaken and yet contain enough description to be sufficient as a memorandum. In other words, the recital is not an essential term of the contract and could therefore be treated as surplusage.

The majority held without discussion that the language of Morris's letter was clear and unambiguous and admitted of but one construction, namely, that the terms of the will were set out as terms of the contract.[11]

The minority contended a mistake in description was proven by the attorney's parol testimony; and that the testimony was admissible for this purpose; and for the purpose of showing performance of the contract by Yetta, the promisee.[12]

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TORTS: DISOBEDIENCE OF A STATUTE—PRESUMPTION OF NEGLIGENCE.—In the recent case of *Parmalee* v. *Bartolomei*[1] the court held that "an act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted it is conclusive." Plaintiff was driving a truck down hill on a narrow road. Defendant was ascending the hill with his truck. Plaintiff stopped when he saw, from a distance of 200 yards, that defendant was

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[7]In re Smith's Will, 254 N. Y. 283, 172 N. E. 499 (1930); Marks v. Cowdin, 226 N. Y. 138, 123 N. E. 139 (1919); cf. Calif. Code Civ. Proc., sec. 861; Shean v. Weeks, 176 Cal. 592, 169 Pac. 231 (1917).

[8]McBaine, "The Rule Against Disturbing Plain Meaning of Writings," 31 Cal. L. Rev. 145 (1943); 9 Wigmore, "Evidence," secs. 2400, 2413, 2430, 2454 (3d ed., 1940).

[9]McBaine, "The Rule Against Disturbing Plain Meaning of Writings," *supra*, page 148.

[10]Mansfield v. N. Y. C. & H. R. R. Co., 102 N. Y. 205, 6 N. E. 386 (1886); Burr v. The Broadway Insurance Co., 16 N. Y. 267 (1857); Gardner v. Heyer, 2 Paige 11 (N. Y., 1829).

[11]In re Levin's Estate, *supra*, page 879.

[12]In re Levin's Estate, *supra*, page 881.

[1]106 A. C. A. 100, 234 P. 2d 1019 (1951).

looking off to the side of the road. Defendant then ran into plaintiff. Defendant contended that plaintiff was guilty of contributory negligence as a matter of law in that, since plaintiff was the driver of the descending vehicle on a road on which two vehicles could not pass, he should have yielded the right of way to defendant as required by statute.[2] The trial judge, who also was the trier of fact, found that plaintiff was not negligent: that plaintiff did not use excessive speed, he was looking where he was going, and he "was using due and proper care."

California has predicated civil liability upon three theories where violations of statutes or ordinances have been involved:[3]

1. The violation is to be treated as so much evidence of negligence.[4]
2. The violation is negligence per se.[5]
3. The violation raises a presumption of negligence.[6]

The standard of the reasonable man may be established by the Legislature where it enacts statutes primarily of a criminal nature.[7] It is in these situations that the policy and the rule of the Legislature takes precedence over the foresight of the reasonable man, and so takes the question of negligence out of the hands of the jury.[8] To predicate negligence upon the violation, the party invoking the statute must show that he was within the class to be protected and that the kind of evil sought to be avoided has occurred.[9]

The court said, in the instant case, that a violation of a statute is only a presumption of negligence, rebuttable by evidence of excuse or justification.[10] As the court stated in the *Satterlee* case "it is a question of fact whether the violation is excusable

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[2]Cal. Vehicle Code, sec. 527.

[3]Note 35, Cal. Law. Rev., 464 (1947).

[4]Henderson v. Northam, 176 Cal. 493, 168 P. 1944 (1917): ". . . failure to perform a duty imposed by statute is evidence of negligence." However, improper or illegal it may have been in the abstract, an action for damages cannot be founded upon it."

[5]Alechoff v. Los Angeles Gas & Electric Corporation, 84 Cal. App. 33, 257 Pac. 569: "Under ordinance it was clearly the duty of the defendant to regulate the magnitude of any fire it contemplated starting so as to control and extinguish it within the time limit prescribed by law. Having failed to do this it was negligence . . . It is an axiomatic truth, that every person while violating an express statute is a wrongdoer, and as such is ex necessitate negligent in the eye of the law." Accord: Fouch v. Werner, 99 Cal. App. 557 (1929); Siemers v. Eisin, 54 Cal. 418 (1880); Muir v. Chesney Bros., 64 Cal. App. 2d 55, 148 P. 2d 138 (1944); Connard v. Pacific Electric Railway Company, 14 Cal. 2d 375, 94 P. 2d 567 (1939).

[6]Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P. 2d 279: "The presumption of negligence arising from performance of an act in violation of a statute or ordinance is not conclusive, but may be rebutted by showing that the act was justifiable or excusable under the circumstances." Accord: Roth v. Bankston, 101 Cal. App. 274, 281, 283, 281 P. 1081 (1929), "violation of an ordinance is presumptively an act of negligence and conclusively so until rebutted by evidence that it was justifiable or excusable under the circumstances"; Jolley v. Clemens, 28 Cal. App. 2d 55, 82 P. 2d 51; Prescott v. Orange, 56 Cal. App. 2d 295, 152 P. 2d 234; Wilkerson v. Brown, 84 Cal. App. 401, 190 P. 2d 958 (1948); Tossman v. Newman, 37 A. C. 523, 233 P. 2d 1 (1951); Gallichotte v. California Mut. Assn., 4 Cal. App. 2d, 41 P. 2d 349 (1935); Mora v. Tavilla, 186 Cal. 199, 199 P. 17 (1921).

[7]Prosser on "Torts," p. 264, "the standard of conduct required of the reasonable man may be prescribed by legislative enactment." Restatement, Torts, sec. 285, "The standard of the reasonable man (a) may be established by a legislative enactment."

[8]Ezra R. Thayer, "Public Wrong and Private Action," 27 Harv. L. Rev. 317 (1913): "When such a prohibition has been violated and the very evil aimed at by the law has been brought about, approval of the wrong doer's conduct by the court is not consistent with proper respect for another branch of the government." Accord note, 13 Cal. L. R. 428.

[9]Prosser on "Torts," p. 264 et seq. See, also, Justice Traynor, Satterlee case, 29 Cal. 2d 581, 595.

[10]234 P. 2d at 1020.

or justifiable, and furthermore, it is a question for the trier of fact to decide.[11] Herein lies the difficulty of using the formula of presumptive negligence.[12] Since the Legislature has set up the standard, to allow the jury to consider under what circumstances one may violate the prescribed standard of conduct not only shows a disrespect for the legislative authority but also defeats the object of such legislation. The net result is that leaving the matter to the jury is tantamount to allowing the courts in a given instance to overrule the Legislature by allowing laymen, in effect, to interpret the law, a task which is formidable enough for the trained legal mind. Justice Traynor said in the Satterlee case, "The conduct of the parties must be measured by that standard (legislative) and the jury is not free to determine what a reasonably prudent person would have done."[13]

In *Berkovitz* v. *American River Gravel Company*,[14] the court, citing Shearman & Redfield, states that the excuse or justification must be a sufficient defense to an action for the penalty imposed by the law, in which case, the law is not really violated.

In our system of government we recognize the principle of separation of powers and in keeping with that principle, once the standard is fixed by the Legislature, and assuming its constitutional validity, the courts have no power to interfere.[15] Once the Legislature has set the standard, the question of justification should not be a matter for the jury to decide.[16] On the other hand, the excuse or justification may be such that in the instance the statute or ordinance may not apply at all. In that case the

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[11]Satterlee v. Orange Glenn School District (*supra*, note 6): "Whether the violation is excusable or justifiable are questions of fact except in a case where the court is impelled to say that from the facts reasonable men can draw only the inference that the negligence of the violator contributed to the accident." Accord: Wilkerson v. Brown (cited *supra*, note 5); see, also, Jolley v. Clemens (*supra*, note 5); 14 Cal. Juris., negligence, sec. 68, p. 638.

[12]See Justice Traynor's opinion in the Satterlee case (cited *supra*, note 6): The vice of such statement is that it leaves to the jury the determination of the effect of a statute, a question of law that properly belongs to the court. Presumptions are used in ascertaining what the facts are, not in determining what the law is (see Wigmore, Evidence, 3d, sec. 2490)." *Cf.* "Public Wrong and Private Action," (*supra*, note 8).

[13](*Supra*, note 6). Justice Traynor, p. 593: "I cannot agree, however, with the doctrine set forth in the majority opinion that an act or failure to act in violation of a statute like the Vehicle Code is merely 'presumptive evidence of negligence,' which may be rebutted by showing that the act or omission was justifiable or excusable under the circumstances, with the excuse or justification a question of fact for the jury. This doctrine is in effect a modified form of the doctrine that the violation of a statute is in (herein used to include an ordinance) is merely evidence of negligence . . . Since it is a question of fact for the jury whether the excuse or justification is sufficient, the result is that one violating the statute need only offer proof that he acted as a reasonably prudent person under the circumstance, and the jury is then free to conclude therefrom that he was justified in violating the statute unless 'reasonable men can draw but one inference . . . pointing unerringly to . . . negligence'."

[14](Cites Shearman & Redfield on Negligence, 6th ed., sec. 467), 191 Cal. 195, 215 P. 675 (1923). See, also, Restatement, Torts, 286, comment c. See Justice Traynor in the Satterlee case, p. 594. (Cited *supra*, note 6.) "If there is sufficient excuse or justification, there is ordinarily no violation of a statute, and the statutory standard is inapplicable. If a statute is so drawn as not to be susceptible of such a construction, so that it would impose liability without fault, the statutory standard is ordinarily not an appropriate one in a negligence case and should be rejected by the court." Restatement, Torts, sec. 286, comment c: "If a criminal statute or ordinance prohibiting a particular act is construed to permit such an act to be done under certain conditions without criminal responsibility, such an act may be done under the same conditions without creating civil liability under the statute or ordinance." *Cf.* Justice Traynor's opinion in the Satterlee case, *supra*, note 6.

[15]*Supra*, note 8.

[16]"Courts under common law principles make the legislative standard controlling and take the formulation of standard from the jury." Justice Traynor, Seatterlee v. Orange Glenn School District, p. 595 (cited *supra*, note 6).