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INTERPRETATION OF DOCUMENTS—THE PAROL EVIDENCE RULE AND AN EXCEPTION FOR ERRONEOUS DESCRIPTION

Few doctrines are more firmly established in our law than the rule that on the question of interpretation of a legal instrument declarations of intention of the maker or makers dealing with the subject of the specific document are inadmissible.¹ Such statements, though not excluded on the ground of hearsay, being clearly admissible under the exception for Declarations Evidencing Physical or Mental Condition, are with equal clearness prohibited by the so-called Parol Evidence Rule (and in case of wills by the further consideration that their use would, in general, contravene the policy of the Statute of Wills as to oral testaments).² To this exclusionary rule there is, however, a well-recognized exception

¹ See, *e.g.*, Knowlton v. Campbell, 48 W. Va. 294, 37 S. E. 581 (1900); Ferimer v. Lewis, Hubbard & Co., 114 W. Va. 629, 173 S. E. 264 (1934).

² See 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2471. Cf. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) 444 *et seq.*

which is commonly known as Latent Ambiguity or, more accurately, as Equivocation.³

The West Virginia case of *Snider v. Robinett*⁴ is a good illustration of the nature and application of this exception. In that case a written agreement contained a provision that one of the parties was "to furnish . . . a road" leading from a designated tract of land, for the purpose of hauling certain lumber to market. There were, however, two roads to which the language might refer,⁵ and one question was whether mutual declarations of the writers' intentions were admissible to identify the particular road that the parties had in mind. The court admitted the evidence on the ground that where there is a "latent ambiguity . . . such for instance as that the terms of the writing are equally applicable to two or more objects, when only a certain one of them was meant, then prior and contemporaneous . . . collocations of the parties are admissible for the purpose of identifying the particular object intended."⁶

There is no doubt as to the authorities where as in this case the language in the writing accurately fits two or more persons or things. Courts quite generally admit direct declarations of intention in such cases for the purpose of identifying the person or thing that was meant.⁷ The reason for the exception is that the ordinary danger inherent in using "any extrinsic utterance to compete with and overthrow the words of a document which solely embodies the transaction" does not exist, to any great degree, where the writing, upon application to external facts, is found to fit two or more of them equally and accurately, *i. e.*, in case of equivocation.⁸

Where, however, the document, upon applying it to the external object or objects indicated in the writing, is found to fit two or more persons or things with substantial equality—but inaccurately—*i. e.*, where there is an Erroneous Description which is, broadly speaking, equally applicable to two or more objects, the

³ See 9 WIGMORE, EVIDENCE § 2472. As to an exception other than the ones discussed in the body of this note, see *id.* § 2475 (exception for "Rebutting an Equity".)

⁴ 78 W. Va. 88, 88 S. E. 599 (1916).

⁵ There was only one road at the time the writing was executed.

⁶ The language quoted is from the syllabus.

⁷ See, *e.g.*, to much the same effect as *Snider v. Robinett*, *Johnson v. Burns*, 39 W. Va. 658, 20 S. E. 686 (1894). For a collection of authorities see 9 WIGMORE, EVIDENCE § 2472. See also 2 JONES, EVIDENCE (4th ed. 1938) § 480.

⁸ See 9 WIGMORE, EVIDENCE §§ 2471, 2472. See also THAYER, *loc. cit. supra* n. 2.

cases are far from clear as to the admissibility of this kind of evidence for the purpose of interpreting the language used. Indeed, the leading authority on the question declares that in the United States "the question has seldom been raised, and no distinct rule can be predicated."⁹ A recent decision in point by the West Virginia Supreme Court of Appeals is therefore of particular importance, and is all the more interesting in that it is, in effect, a decision by a divided court.¹⁰

In that case a testator executed a will, the disputed portion of which read as follows (the italicized language constituting what was admittedly a misdescription¹¹):

"I will and devise to my two sons the several contiguous tracts of land constituting my home farm to be divided by a line beginning at a stake on top of what is known as the Capon Knob, a corner to the A. T. Petry and Henry Gerwig lands and running in a north east direction to a hickory in edge of field near where sled road starts off the mountain, and then in an *easterly* direction to the corner of the W. S. Teter lot on the bank of Middle Fork of Cedar Creek, the said Virgil O. Sands to have all the land lying on the *north-western* side of said line and the said Vail F. Sands to have all on the *south eastern* side thereof."

It was conceded that in locating the division line indicated in this part of the instrument the testator became confused as to the points of the compass. Accordingly certain pre-testamentary declarations of his were offered (along with other evidence) to show what he meant when he used the descriptive terms "north-western" and "south eastern." The exact tenor of these utterances is not altogether clear from the case as reported. It would seem, however, that the utterances were of the forbidden variety,¹² viz., direct declarations of intention dealing with the subject of the writing, for the syllabus contains the following statement, and only the following statement: "Oral testimony of the *declared* intention of a testator is admissible proof for the purpose of clarifying a latent ambiguity contained in the language of will."¹³

That the words of the will, when applied to the physical

⁹ 9 WIGMORE, EVIDENCE § 2474.

¹⁰ Sands v. Sands, 12 S. E. (2d) 918 (W. Va. 1941).

¹¹ The word "easterly" is italicized in the opinion of the court. Other italics ours.

¹² As to the admissibility of other interpretive evidence than direct declarations of intention, see Hardman, *A Problem in Interpretation* (1936) 42 W. VA. L. Q. 110.

¹³ Italics ours.

objects indicated in it, turn out to be erroneous description, not equivocation, seems too clear to justify discussion. Hence the evidence in question (if direct declarations of intention) cannot be admitted under the established exception, and the trial court refused to receive the evidence. But the Supreme Court of Appeals (Fox and Riley, J. J., concurring as to result but excluding the disputed evidence from their conclusions) admitted the declarations, without citation of authority. Apparently therefore the case must be regarded as sanctioning the admissibility of this class of declarations in cases of erroneous description. Every reason that can be adduced in behalf of the settled exception, except precedent and certainty, applies with equal force to a misdescription which fits "equally"¹⁴ but inaccurately two or more external objects. And the court, though adhering to the language technique of established doctrine, evidently recognizes the cogency of this argument.¹⁵ It is another striking example of the time-honored common-law method of putting new wine in old bottles. Judicial legislation, yes, but interstitial.¹⁶

The case is an illuminating illustration of the judicial tendency in recent years to liberalize the rules that deal with the admissibility of interpretive evidence. Courts should be, and to an increasingly greater extent are, extremely reluctant to exclude logically relevant evidence unless there is a very strong reason for so doing. Hence the court would seem to be on sound ground in extending the established exception to include erroneous description, or, more accurately, in sanctioning a new exception. *Ubi eodem ratio ibi idem jus.*

Thomas P. Hardman.

¹⁴ "Equally", *i.e.*, in a substantial sense.

¹⁵ For a collection of authorities supporting the position taken in the principal case, see 9 WIGMORE, EVIDENCE § 2474.

¹⁶ "Judges do and must legislate, but they can do so only interstitially: they are confined from molar to molecular motion." Holmes, J., in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).