34(L) 2/17/64

Memorandum 64-8

Subject: Study No. 34(L) - Uniform Rules of Evidence (Article III. Presumptions)

C.C.P. § 1963-37

That a trustee or other person, whose duty it was to convey real property to a particular person has actually conveyed to him, when such presumption is necessary to perfect title of such person or his successor in interest.

Class: Thayer presumption.

This presumption has rarely been invoked in the California cases. In the two situations in which it has been cited the court merely made reference to the presumption for additional support while actually deciding the case on other grounds.

In Van Fossen v. Yager, 65 C.A.2d 591, 151 P.2d 16 (1944), a son sued the beneficiary of his brother's will to establish his right to succeed to his brother's interest in certain real property. The proper had originally been left in equal undivided shares to three brothers by their mother, upon the oral agreement that the two older brothers would occupy the premises until the death of the survivor, and then that the younger brother would get full title. The question of mutuality was raised by the beneficiary under the last brother's will. He claimed that there was no showing that the surviving younger brother had made a will leaving his share to the others, and therefore that the agreement had not been fulfilled. The court specifically found that, although no such will was proven, such proof was unnecessary because the agreement

neither contemplated nor required a formal will by this younger son. However, the court went on to state ". . . in the absence of such evidence, if any presumption is to be indulged it should be that plaintiff did execute such instrument if it was part of the oral agreement." (C.C.P. 1963-37) The court seems to be concluding that we should presume he acted properly.

In Kohler v. Bristow, 131 C.A.2d 692, 281 P.2d 352, the question before the court was title to certain property based either on a deed from trustees or adverse possession. The trustees' deed was attacked on the ground that only two of the three trustees signed, and that one of the signers was himself a beneficiary. The trial court made its finding only on the adverse possession ground, and the court upheld the decision on this ground alone. But, in discussing the deed the court looked at the fact that all trustees were also beneficiaries and then refers to the presumption, apparently to indicate that we should presume the trustees acted in accordance with their duty.

The presumption would seem to be in furtherance of the general policy of finally quieting title to real property by permitting a person to obtain absolute title to property which should have been conveyed to him where the actual written instrument for some reason cannot be proved. Further, it is in line with those presumptions in C.C.P. 1963 which attribute proper conduct to individuals and officials. This general policy is enunciated in the California law as a Maxim of Jurisprudence. Cal. Civ. Code § 3529 provides: "That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." In the instant case we assume that

the trustee has not violated his fiduciary duty. However, the fact that one was in the position of trustee should not have any greater weight than facts actually showing non-performance of the duty. The policy that one acts properly is adequately served by assuming that the trustee performed his duty where no contrary evidence is elicited. There would appear to be no compelling reason to shift the burden of proof and therefore it is recommended that this be classified as a Thayer presumption.

C.C.P. § 1963-38

The uninterrupted use by the public of land for a burial ground for five years, with the consent of the owner, and without a reservation of his rights is presumptive evidence of his intention to dedicate it to the public for that purpose.

Class: Repeal presumption and re-enact provision as substantive law.

There appears to be no California case in which the result was in any way affected by this presumption. In the only case in which it is even referred to, Hornblower v. Masonic Cemetery Assn., 191 Cal. 83, 214 Pac. 987 (1923) the citation of the presumption was used merely to support an obvious statement in the case that the land in question (cemetery property which had been used for burial) was dedicated to cemetery purposes. The case involved a since superseded statute allowing discretionary removal of a cemetery under certain conditions. The case turned on the interference with the property rights of the owner of a plot and held that the cemetery was enjoined from removal of remains buried therein. It is not relevant to the decision on how to categorize the presumption involved herein.

A careful analysis of the wording of this presumption indicates that it would be virtually impossible for a property owner to rebut the presumption, as it is now worded, with any kind of affirmative evidence. To invoke the presumption one must show uninterrupted use by the public for a period of five years, with the consent of the owner and without reservation of his rights. It seems inconceivable that an owner could be faced with the fact that he consented to the use for the requisite period without any reservation of his rights and yet be able to submit any proof that he did not intend to dedicate. Any evidence which the owner could introduce to

show some other intent would tend to prove that the owner did in fact reserve some rights. Thus, one of the facts presumed (intent to dedicate without reserving any right) must be proved to give rise to the presumption of dedication. Therefore, it would seem proper to remove this from the presumption section altogether and to make it a point of substantive law among the Public Cemetery provisions of the Health and Safety Code (H. & S. C. §§ 8126 et.seq.).

This treatment of the presumption would make it somewhat like adverse possession in respect to the time period used (see C.C.P. § 325). However, instead of prescription this would amount to an implied or express dedication with acceptance manifested by user (see People v. Sayig, 101 Cal. App.2d 890, 896-897). Since no taxes are required on cemetery property (Cal. Const. Art. XIII § 1b) this condition for obtaining a prescriptive right would be unnecessary.

There would seem to be little difficulty in incorporating this provision into the present statutes dealing with public cemeteries. Jurisdiction would presumably be either in the City or in the Board of Supervisors of the County (H. & S.C. § 8131).

C.C.P. § 1963-39

That there was good and sufficient consideration for a written contract.

C.C. § 1614

A written instrument is presumptive evidence of consideration.

The problem of classifying this presumption is made somewhat easier by the existence of Civil Code Section 1615 which provides, "The burden of showing want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." As a matter of pleading, the cases have held that lack of consideration must be specifically pleaded. (Brooks v. Fidelity Savings & Loan Assn., 26 Cal. App.2d 114, 116, 78 P.2d 1175 (1938); Fierce v. Reed, 106 Cal. App.2d 673, 289 Pac. 855 (1930).)

The courts have generally relied upon Civil Code Section 1615, stating that the existence of the written contract itself, or the statement of consideration in the written contract creates a prima facie case sufficient to prove consideration in the absence of convincing evidence to the contrary. Simon Newman Co. v. Woods, 85 Cal. App. 360, 259 Pac. 460 (1927); Kott v. Hilton, 147 Cal. App.2d 225; Podesta v. Mehiten, 57 Cal. App.2d 66, 134 P.2d 38 (1943). The cases often reiterate that the burden is on the party assailing the contract to show want of consideration. Kennedy v. Lee, 147 Cal. 596, 82 Pac. 257 (1905); Atlas Mixed Mortar Co. v. Stein, 125 Cal. App. 31; Vanasek v. Pokonney, 73 Cal. App. 312, 238 Pac. 798 (1925).

There are a few cases in which the appellate courts have either given mere lip service to the placing of burden of proof on the party opposing the contract or have completely ignored the problem of burden of proof in

affirming a finding of no consideration by a trial court. E.g., Shields v. Shields, 200 Cal. App.2d 99, 19 Cal. Rptr. 129 (1962); Podesta v. Mehiten, 57 Cal. App.2d 66, 134 P.2d 38 (1943). A careful analysis of these cases would indicate that the appellate court was merely following the general policy that appellate courts will affirm a trial court's decision on a fact question where there is any substantial evidence to support it.

The policy underlying the presumption and Civil Code Section 1615, which shifts the burden of proof, seems clear. When parties reduce an agreement to writing an inference arises that the terms of the agreement were carefully thought out and that there was consideration for the obligation assumed therein. It is reasonable to assume that a naked promise, without consideration, to be enforced only at the will of the promiser, would not in the normal course of events be embodied in a written agreement. It should be noted in this connection that the presumption only applies to formal legal documents and not to informal writings such as letters in which such naked promises might often appear. Goltz v. First T. &. S. Bank, 86 Cal. App.2d 59, 61, 194 P.2d 135 (1948). One seeking to attack a written agreement ought therefore to be faced with the burden of overcoming the fact that consideration can be presumed from the writing itself.

Placing this presumption in the class of a Morgan presumption would make it consistent with the provisions regarding negotiable instruments in the Commercial Code Sections 1201, 3306 and 3404 which achieve the same result as a Morgan presumption by placing the burden of showing no consideration on the party seeking to challenge the instrument.

It is recommended that this presumption be made a Morgan presumption. C.C.P. § 1963(39) and C.C. § 1614 should be repealed and C.C. § 1618 should be modified to conform to the other sections that will be drafted assigning burden of proof in particular cases.

Respectfully submitted,

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