Notre Dame Law Review

Volume 12 | Issue 4 Article 8

5-1-1937

Notes

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NOTES

FRAUDS, STATUTE OF—MUTUAL PROMISES TO MARRY—AGREEMENTS NOT TO BE PERFORMED WITHIN ONE YEAR OR DURING LIFETIME.—The Supreme Court of Washington in *Brock v. Button* [1] recently considered a highly controversial question in regard to marriage contracts. Ever since the passage of the *Statute of Frauds* in England romeos, young and old, have attempted to escape their legal liabilities upon two grounds. The first is "that no agreement made in the consideration of marriage will be valid unless made in writing." Courts have regularly interpreted this clause to mean marriage settlements and not to be extended to the mutuality of the marriage promises themselves. Shunted from obtaining their goal in this manner men have relied upon another phase of the statutes of fraud, namely, "that all contracts not to be performed within one year must be in writing." Here there is a conflict of authority as to the applicability of the rule to marriage contracts. The *Restatement of the Law of Contracts* [2] sets down the general rule thus: "Any promise for which the whole consideration or part of the consideration is either marriage or a promise of marriage is within the clause, 'contracts in which the consideration is marriage, or a promise to marry, must be in writing,' except mutual promises of two persons that are exclusively engagements to marry each other.

"Mutual promises to marry, though not within the above clause are within the clause, 'bilateral contracts, so long as they are not fully performed by either party, which are not capable of performance within a year from the time of their formation must be in writing,' if they cannot be performed within a year."

In *Brock v. Button* the defendant had entered into an agreement of marriage with the plaintiff. Both were divorcees and each had children by a former marriage. Before the plaintiff had received her final decree, making them legally eligible to marry, the parties had frequently discussed their future marriage. The defendant had unmarried daughters and a son, fourteen years old. He promised the plaintiff that they would get married as soon as the son went to college. Upon trial, the plaintiff was made to testify that she had not expected the marriage to take place until the son went away to school. She testified that the son was still in high school and that he would not be ready to go to college until three years after the marriage agreement was made. The son did go to school but the defendant refused to marry the plaintiff whereupon suit was brought. The court held that since the contract was not to be performed within a year, and since the plaintiff's own testimony showed that the intention of both parties was to wait at least three years, the contract was within the *Statute of Frauds* and thereupon gave judgment to the defendant.

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1 59 Pac. (2d) 761 (Wash. 1936).

2 § 192.

Two other comparatively recent cases upon the subject are worthy of note. In *Spence v. Carter* [3] it was held that it is not essential to the validity of the marriage contract to set a specified time or place. The place was *prima facie* presumed to be the bride's home and the time was to be a reasonable time. The Court discussed the status of the marriage contract in relation to the *Statute of Frauds*. It held that a marriage contract is not within the Statute which requires contracts that are not to be performed in one year from the time of the agreement to be in writing. The court reasoned that "any contract to marry may possibly be performed within a year, and *even* 'where the terms of the contract are such that it may or may not be performed within a year, a writing is, under either view of the Statute, unnecessary.'" (Italics are mine.) Evidently the Court interpreted this statement from *Corpus Juris* to mean that a contract to marry is not to be construed as coming within the Statute. A close analysis of the statement, however, and especially when taken with the rest of the context of *Corpus Juris*, will show that the rule stated is not peculiar to marriage contracts alone, as the Court had reasoned, but is the general rule applicable to all contracts, that is, no contract need be in writing if there is a possibility that it might be performed within a year. Yet the Georgia Court is not alone in its interpretation of such contracts as an examination of earlier cases will reveal.

Before taking up the earlier cases upon the matter another recent case warrants attention. *Dyer v. Lalor* [4] serves as an intermediary between *Brock v. Button* and *Spence v. Carter*. The decision in this case favored the plaintiff, but the Court's position as to the applicability of the *Statute of Frauds* to marriage contracts was similar to *Brock v. Button*. In this case the plaintiff entered into a marriage agreement with the defendant in 1901. In 1916 they were still unmarried, and, although there was no breach, the promise was renewed. The breach finally came in 1918 when the defendant married another. The Court held that since the marriage might have taken place within a year's time the mere fact that it was not performed until many years had elapsed did not place the contract within the *Statute of Frauds*. Here the Court applied the same general rule which is true in all contract cases, namely, that where there is a possibility that a contract will be performed within a year, even though it had actually taken much longer to perform, the contract is not within the *Statute of Frauds*.

Early decisions in which the question of the applicability of the Statute to contracts to marry have been raised may be classified into those which interpreted the clause strictly and those which distinguished the case as not coming within the Statute or held that the clause should not be too rigidly enforced with respect to marriage con-

[3] 125 S. E. 883 (Ga. 1924).
[4] 109 Atl. 30 (Vt. 1930).

tracts. In *Ullman v. Meyer*[5] the Court held that where the terms of the agreement of marriage between the parties show that the marriage was not to be performed until some time after the expiration of one year, the contract was within the *Statute of Frauds*. In further discussing the problem the Court answered the objection that marriage contracts were not intended to come within the Statute but to be governed by ecclesiastical courts maintaining that the judges had always considered such contracts to be within the Statute.

Derby v. Phelps[6] presents a case where the defendant being about to enter into a profession, asked the plaintiff to receive his attentions as a suitor and, in about five years, at which time he expected to be well settled in business, to marry him. The Court held that this promise was within the *Statute of Frauds*, the same as any contract which was not to be performed within a year. The Court said: "This was an agreement, which by the terms of it was not to be performed till the expiration of about five years; hence comes within the very teeth of the Statute."

In *Paris v. Strong*[7] the Statute was held to apply to marriage contract, the Court saying: "We do not doubt but that a contract of marriage not to be performed within a year, is within the Statute, as well as a contract upon any other subject." This appears to be an expression of the rule as laid down by the majority of the Courts.

On the other hand we have cases in which the Statute was not applied, either because the factual situation was such as to take it without the Statute or because the Courts felt that the rule in regard to contracts to marry should not be strictly applied. In *Paris v. Strong* the promise proved upon trial was that the parties would marry within three years. The Court held that since the contract may have been performed within the year the Statute did not apply.

Lawrence v. Cooke,[8] however, went much further in the interpretation of the facts so as to avoid the rule. Here the parties had been going together for some time when the plaintiff remarked that she had been going with the defendant so long she felt engaged and thought that she ought to know something definite about it. Two weeks later she asked the same question saying that unless he fixed upon a time, that "she might have something definite to look forward to" she could not receive his love and affections. The defendant replied that he was not financially able to marry then but that he could marry her within four years. Upon the testimony of the plaintiff, herself, it was found that she never intended that the marriage would take place within a year and that both parties were willing to wait four years and expected

5 10 Fed. 241 (C. C. S. D. N. Y. 1882).
6 2 N. H. 515 (1822).
7 51 Ind. 339 (1875).
8 56 Me. 187 (1868).

to do so. The Court held that since the contract might have possibly been performed within a year the *Statute of Frauds* would not apply. Comparing this case with *Derby v. Phelps,* it will be seen that the factual situations are about the same. In both cases the defendant wanted to wait about four or five years before the fatal step. In *Derby v. Phelps* the defendant promised to marry in about five years. Yet the New Hampshire Court held that this was within the *Statute of Frauds.* Why could not the Court of Maine have held that *Lawrence v. Cooke* was also within the *Statute of Frauds?* The evidence in the trial, as well as the testimony of the plaintiff herself, showed that the parties had not intended the marriage to be performed until some time after a year had passed. True, the defendant may have struck a bit of fortune and have been financially able within a year; but why could not the same be true in *Derby v. Phelps?* Here the reason for the long wait was financial instability and it could be just as easily reasoned that the parties in *Derby v. Phelps* could have possibly been married within a year had the defendant attained a favorable position.

Blackburn v. Mann [9] presents a slightly varied aspect of the relationship of marriage contracts to the *Statute of Frauds.* Here the defendant agreed to marry the plaintiff and the time was indefinitely stated that "it might be a year or it might be ten." The Court held this not to be within the *Statute of Frauds* saying, "Contracts of marriage, although defined as 'civil contracts,' are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. As a general rule, it may be no accurate terms are used in making them, nor is it material any precise day be fixed, at the making of such contract, when it shall be fulfilled. Such matters are usually for future consideration, and really form no material part of the contract. The law implies, such contracts, in the absence of any special agreement, shall be performed within a reasonable time. It is a relation that affects the happiness of the parties for life, and it may be that years may elapse, after the engagement is understood, before any day is definitely agreed upon for consummation. Such contracts, until a breach is shown that terminates them, may be regarded as continuing contracts by consent of the parties, and hence are, in no just sense, within the *Statute of Frauds.*" Here the court maintained that the time of a marriage need not be stated but that the agreement will be construed to be continuing promises which are not affected by the *Statute of Frauds.*

Two courts have held that the *Statute of Frauds* do not apply to marriage contracts but were held to be peculiar in that it was subject to the jurisdiction of the ecclesiastical courts. *Brick v. Gannar* [10] main-

9 85 Ill. 222 (1877).

10 36 Hun 52 (1885).

tained that the marriage contracts were not actionable under the *Statute of Frauds* in England due to the above reason and as far as they could determine this country had never allowed the Statute to be a defense in marriage contract cases. This was followed in *Nearing v. Van Fleet.*[11] The Maryland Court reached a similar conclusion in *Lewis v. Tapman.*[12]

Having examined the cases and observing that most jurisdictions hold that contracts to marry which are not to be performed within a year, are to be in writing, it would be well to note just what the writing or memorandum should contain. The memorandum can be formal or informal, and should be signed by the parties to be charged. It should contain, with reasonable certainty, these three things: (1) The name of each party or such description as will serve to identify him; (2) The subject matter to which the contract relates; and (3) The terms and conditions of all promises constituting the contract and by whom and to whom the promise is made. The terms of a memorandum differ from a contract in that they may not be intended as the final complete statement of the contract. With these essentials written in a memorandum the contract is now without the *Statute of Frauds.*

Carl W. Doozan.

WILLS—TESTAMENTARY CAPACITY—BURDEN OF PROOF.—Before an adequate understanding can be had of the problems surrounding the burden of proving testamentary capacity in the probating of wills, some attention must be given to what is meant by "burden of proof." Much of the conflict in the cases concerning this subject is directly traceable to a failure by many courts to recognize that the term is used in two distinct senses. It is used to indicate that the risk of non-persuasion, or the burden of sustaining a particular position, is upon either the proponent or the contestant (depending on the jurisdiction) throughout the whole case, and, when used in this sense, it does not shift during the trial. The term "burden of proof" is also used to indicate that the "burden of going forward with the evidence is upon that party upon whom the burden is to establish his case until he introduces sufficient evidence to raise a presumption in his favor; and that then the burden is thrown upon the other party to go forward with the evidence in order to overcome the presumption against him," [1] and, as used in this sense, the burden does shift during the trial.[2]

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11 45 N. E. 1133 (N. Y. 1897).

12 90 Md. 294, 45 Atl. 459 (1900).

1 22 ILL. L. REV. 785.

2 Donavan v. St. Joseph's Home, 295 Ill. 125, 131, 129 N. E. 1 (1920); Carrol v. Eckley, 305 Ill. 367, 376, 137 N. E. 195 (1922); Grosh v. Acom, 325 Ill. 474, 490, 156 N. E. 485 (1927); Note, 33 HARV. L. REV. 558-560.

Professor Atkinson says that the orthodox view of the burden of proof upon the issue of mental capacity in a will contest, in the sense of risk of nonpersuasion, is on the proponent.[3] He supports this position as follows: "From the standpoint of logic, this view is supported upon the ground that testator's capacity as well as due execution are necessary for the validity of a will and that the proponent should prove both elements of his case. More elemental and convincing is the argument of policy that the law should favor the heirs at law and that he who seeks to defeat their interests should be handicapped by the burden of proof upon the issue of testamentary capacity." [4]

This position receives support from Professor Warren:[5] "The burden of establishing sanity and freedom from undue influence should be upon the proponent. A will, unlike a contract, is a unilateral transaction, upon which other parties do not act until the court passes upon it. It may well said that insanity and coercion are not affirmative defenses to be alleged and proved by the heir, but must be negatived by those who insist on the will. The slight recognition of this in undue influence by *Adams v. Cooper*, 188 Ga. 339, 343, 96 S. E. 858 (1918), is gratifying in view of the great weight of authority to the contrary. The current decisions in general fall into the common error of failing to distinguish clearly between the burden of going forward with evidence and the burden of establishing the issue."

In *Adams v. Cooper* [6] the court held that the burden of proving testamentary capacity logically should rest upon the proponent. The court said: "Upon the trial of an issue arising upon the propounding of a will and a caveat thereto, the burden, in the first instance, is upon the propounder of the alleged will to make out a prima facie case, by showing the factum of the will, and that at the time of its execution the testator apparently had sufficient mental capacity to make it, and in making it acted freely and voluntarily. When this is done, the burden of proof shifts to the caveator."

"Mental capacity of the maker is one of the statutory requisites of a valid will, and as a will is purely an unilateral act, to be passed upon by the courts before others can act on it, proof of that capacity should form a material part of the proponent's case." [7]

The burden of proof of testmentary capacity is, in many cases, placed on the contestant. In some states this is the result of statutory enactments which make the contestant the plaintiff, or which provide that the probate of a will shall be prima facie evidence of the

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3 ATKINSON, HANDBOOK OF THE LAW OF WILLS (1937) 512, 513, 514, and cases cited.

4 ATKINSON, *op. cit. supra* note 3, at 513.

5 Warren, *Progress of the Law*, 33 HARV. L. REV. 558.

6 148 Ga. 339, 96 S. E. 858 (1918).

7 23 MICH. L. REV. 422.

execution and validity of the will in case of a later contest.[8] Even in the absence of a statute, it is held in some jurisdictions that the burden of proof is on the contestant.[9]

In a great many Illinois cases,[10] according to *Britt v. Darnell*,[11] the rule has been announced that "it is incumbent on the proponent of a will to make out a prima facie case, in the first instance, by proper proof of the due execution of the will by the testator and his mental capacity; that the burden of proof is then on the contestants to prove the allegations of their bill, by a preponderance of all the evidence, that the testator was mentally incompetent. The law throws the weight of the legal presumption in favor of sanity into the scale in favor of the proponent, from which the cases hold that it necessarily results that upon the whole case the burden of proof rests upon the contestants to prove the insanity of the testator.[12]

Some courts which have failed to distinguish between the two ideas of "burden of proof" have held that after the presumption of testamentary capacity has arisen, the burden of proving nontestamentary capacity shifts to the contestant. Therefore when the situation arises in these courts where the evidence is equally balanced and equally conflicting, the contestant fails and the will is probated. "It is obvious that, as a matter of sound reasoning, the burden which shifted to contestant, as soon as the presumption arose in favor of proponent, was simply the burden of going forward with evidence of lack of testamentary capacity, the risk of nonpersuasion as to the presence of capacity still remaining upon proponent. Where all the evidence is evenly balanced, then, it must follow that proponent has failed to sustain his burden of proving testamentary capacity by a preponderance of the evidence, and the will cannot be admitted: 12 Harv. Law Rev. 508; 13 Harv. Law Rev. 518." [13]

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8 *Op. cit. supra* note 3; In re Latour's Estate, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441 (1903); Farleigh v. Kelley, 28 Mont. 421, 72 Pac. 756 (1903); Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302 (1899); Dickey v. Dickey, 66 Okla. 269, 168 Pac. 1018 (1917); Bereton v. Glazeby's Estate, 251 Mich. 234, 231 N. W. 566 (1930); Walker v. Hinckley, 270 Mich. 33, 258 N. W. 206 (1935).

9 West v. Arrington, 200 Ala. 420, 78 So. 352 (1917); Stoll v. Stoll's Ex'r, 213 Ky. 789, 281 S. W. 1028 (1926). See, also, Coman v. Lindley, 115 Kan. 802, 224 Pac. 912 (1924).

10 Entwistle v. Meikle, 180 Ill. 9, 54 N. E. 217 (1899); Baker v. Baker, 202 Ill. 595, 67 N. E. 410 (1903); Todd v. Todd, 221 Ill. 410, 77 N. E. 680 (1906); Chaney v. Baker, 304 Ill. 362, 136 N. E. 804 (1922); Williams v. Ragland, 307 Ill. 386, 138 N. E. 599 (1923).

11 146 N. E. 516, 315 Ill. 385 (1925).

12 See 20 ILL. L. REV. 313, in which following statement appears: "The Illinois court in placing the burden on the contestant has explained that this was due to the presumption of sanity; but it seems wrong to speak of presumptions here. The will has been probated and unless the contestant proves the insanity alleged, the will will stand, not because of a presumption, but simply because no ground for setting it aside has been shown."

13 *Op. cit. supra* note 1.

The line of decisions placing the burden of proof on the contestant has a strong supporter in Maryland:[14] "The presumption of the law is in favor of testamentary capacity, and the right of testamentary disposition of property, which includes the right of revocation, ought not to be imperiled by inconclusive or uncertain testimony."

Professor Atkinson supports what he calls the "orthodox" point of view. However, he recognizes that the contrary viewpoint, *viz.*, that of placing the burden upon the contestant, is not devoid of good reason. He writes:[15] "The only sound reason for placing the risk of nonpersuasion upon contestant is that a fair division of the burdens calls for regarding incapacity of testator as a matter of defense. Courts generally consider mental incapacity in this light so far as deeds and contracts are concerned, and an increasing number of holdings are to the same effect in criminal cases. After all, the matter is not one which can be solved on a mechanical basis. Ultimately the apportionment of the burden depends upon whether the court desires to favor the heirs, or the devisees and legatees. The court's intuitive judgment, rather than any logical principle, will be the determining factor. There is nothing inherently unsound in placing the burden upon the contestant if this conclusion is reached upon a frank recognition of desire to favor testacy. However, the orthodox view seems to be the better doctrine."

Similar reasoning is found in a Note in the *Illinois Law Review*:[16] "There are numerous criticisms of the decisions that hold that the final burden is upon the contestant, because it is said the proponent asserts that there is a valid will and, having the affirmative, he ought to have the final burden of proof. The answer would seem to be that, after all, the distribution of burdens of proof and the recognition of presumptions are only means of securing the fair trial of disputes and to fairly apportion the tasks involved in suits. Which party should as a matter of practical convenience bear a certain burden may be a difficult question, and one view will be no more correct than another; instead both views are correct. A court may be justified in feeling that wills are too easily overthrown on grounds of insanity of the testator, and feel that more cases would be decided right if the contestant had to prove the alleged insanity. It is a matter for the policy of each jurisdiction to determine, though uniformity is desirable."

Therefore, it may be said, that barring those cases which were decided upon mistaken conception of the term "burden of proof," there are two distinct lines of decisions, contrary to each other, concerning the burden of proof of testamentary capacity, and neither point of

14 Home of the Aged of the Methodist Episcopal Church of Baltimore City v. Bantz, 107 Md. 543, 69 Atl. 376 (1908).

15 *Op. cit. supra* note 3, at 514.

16 20 ILL. L. REV. 313.