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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol18/iss3/7

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MARRIAGE AS PART PERFORMANCE IN RELATION TO THE STATUTE OF FRAUDS*

The English Statute of Frauds (1677) provides that no action shall be brought whereby to charge any person upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized. The statute further states, with reference to marriage, that no action shall be brought whereby to charge any person on any agreement made in consideration of marriage, unless the agreement or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.¹

This general rule, that contracts made in consideration of marriage must be in some form of writing and signed by the parties, has been followed, in a general way, by the courts since the passage of the statute. However, there are some exceptions and limitations to this general rule, that need some explanation. It is the purpose of this note to deal with this phase of the subject, part performance as related to contracts in consideration of marriage.

PROMISES TO MARRY

In order to clear the subject of some apparently allied matters, let us give some consideration to promises to marry. As an historical development this subject is most interesting. In the earliest case that came up under the fourth section of the statute of frauds,² where the question of a promise to marry

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¹This is the second of a series of studies on the Statute of Frauds, the first appearing in the January issue.

was considered, the court held that a promise to marry came within the statute, being "as much a catching promise as any that the act intended to prevent." This holding was in these words: "Action sur case where the defendant promised the plaintiff marriage; the jury find the promise, but that (even tho) it was not in writing." However, this is contra to the great weight of authority, and, on the part of the court, was not unanimous, as a dissenting opinion held that the promise was for marriage itself, and not made in consideration of marriage, and was, therefore, outside the purview of the statute.

But right away, after this decision, we find the English courts breaking away from this interpretation of the statute, and following the dissenting opinion to the effect that promises to marry have no connection with the statute of frauds. Oral promises to marry were held not to come within the statute and were placed on the basis of ordinary contracts. As an illustration of this view of the courts, where the promise of the man was proved, and no actual promise of the woman, evidence of her carrying herself as consenting and approving his promise, was held sufficient. In the language of the court: "There is no necessity of proving an actual promise on the woman's part, for it is sufficient evidence to show that she countenanced the promise, and carried herself so as one who approved and consented to it." There is no mention of the statute of frauds here, or that the statute has anything to do with the case.

If an infant and a person of legal age mutually promised to marry, the infant, altho not bound (placing the agreement on the basis of an ordinary contract), may bring an action for breach of the contract by the adult.

In some cases it was held that mutual promises to marry were not by the statute of frauds necessary to be in writing. In Cork v. Baker, infra, the language of the court follows: "It was held that this (the promise to marry) is not within the statute of frauds and perjuries, which relates only to contracts in consideration of marriage." These decisions clearly take

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promises to marry out of the statute of frauds, or rather decide they never came within the statute.

However, we find, under some statutory regulations in the United States, that agreements to marry, on the face of them or by their provisions, which show they were to be performed at the end of a longer time than a year, come within the statute. In many cases it is shown to be doubtful as to whether these promises to marry ever came within the statute of frauds. The evidence is generally based upon circumstantial proof. As a general rule, where it is not shown definitely that the promise to marry was at the end of a period longer than a year, it will be presumed to have been meant to be performed within a year.

There are cases holding that the statement in the statute, requiring all agreements not to be performed within a year to be in writing, applies to promises to marry. A New Hampshire case holds that a contract to marry at the end of five years is within the statute of frauds, and should be in writing.

In a Kentucky case, it has been held that promises to marry are not within the statute of frauds and need not be in writing. In a Maryland case, where the parties had agreed to marry at the end of three years, the court held the promise could not be put on the same basis as an ordinary contract for the sale of goods or the performance of labor, and that it did not come within the statute of frauds. Many other cases hold that a promise to marry is not a promise in consideration of marriage, so as to require it to be in writing.

In concluding the statement on this phase of the subject, it is safe to say that, as a general rule, mutual promises of marriage were not regarded, and are not regarded, as coming within the statute. Some statutes expressly exclude from their op-

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7 Perkins v. Hersey, 1 R. I. 493 (1851); Honan v. Earle, 53 N. Y. 267 (1873).
9 Derby v. Phelps, 2 N. H. 515 (1822).
10 Withers v. Richardson, 21 Ky. 94 (1837).
11 Lewis v. Tapman, 90 Md. 294 (1900).
12 Clark v. Pendleton, 20 Conn. 495 (1850); Short v. Stotts, 58 Ind. 29 (1877); Morgan v. Yarbrough, 23 La. Rep. 272 (1850); Ogden v. Ogden, 1 Bland 284 (Md.), 1818; Hoitt v. Moulton, 21 N. H. 586 (1850).
eration mutual promises of marriage. However, the contrary view is taken in a good many cases. The general rule has been well expressed in a Kentucky case: “A promise to marry is not a promise 'in consideration of marriage,' so as to require it to be evidenced by writing under the statute of frauds.”

CASES WHERE MARRIAGE ALONE IS SUFFICIENT

By some courts in England and in this country marriage itself is considered such a part performance of an oral contract in consideration of marriage as will take the contract out of the statute of frauds. Some of these courts have gone so far as to say that marriage is the highest consideration known to the law, and that, where marriage has been performed in consideration of the agreement, being fully performed by the marriage on the one side, the agreement should be specifically enforced by the court. Lord Coke said: “If a man had given land to a man with his daughter in frank marriage generally, a fee simple had passed without this word 'heirs;' for there is no consideration so much respected in law as the consideration of marriage, in respect of alliance and posterity.” But a departure came with reference to this rule of the English interpretation of part performance under the statute. Chancellor Malins said of this departure in delivering his opinion in a certain case: “I must say in this case, as I have said on similar occasions before, that the decisions are to be regretted which have uniformly held that marriage is not part performance, so as to take parol contracts out of the statute.”

The views of these men are not generally accepted nowadays in those of our states where the statute of frauds applies. By the weight of authority marriage itself is not sufficient consideration for the enforcement of oral agreements in consideration of marriage. But we find a strong minority opinion, and the cases that follow will show something of the strength of this opinion.

15 Withers v. Richardson, 21 Ky. 94 (1827).
16 1 Bay (S. C.) 232 (1792).
17 Co. Litt. 8b.
18 Ungley v. Ungley, L. R. 4 Ch. Div. 73 (1876).
19 Rowell v. Barber, 142 Wis. 304 (1910).
In an early Maryland case, it was held that an agreement by a father with his daughter, in contemplation of her marriage, by way of advancement, and as a marriage endowment, followed by her marriage as then contemplated, has for its support a valuable consideration. It cannot be revoked by the father. The marriage is a consideration which vests the interest in the donee against all the world. The daughter is regarded as a purchaser, as much so, as if she had paid for the property an adequate pecuniary consideration.

In Irish Chancery it was held "no acceptance could be more solemn that the fact of marrying the lady." Where marriage follows upon the agreement, a distinct and positive dissent from the proposition of settlement would be required to be shown, in order to avert a decree of specific execution according to its terms.

In another case the promise was made by the father to the daughter to settle a portion upon her in consideration of her marriage. The future husband knew nothing of this, but after the marriage the husband sued her father for the portion. Held that the husband did not marry in consideration of the promise, knowing nothing of it. There is a reference in the letter of the father which would indicate a previous oral promise to both of them, and the case, for this reason, should have been decided the other way. The letter only confirmed the oral promise.

In a South Carolina case, where the English statute has been literally re-enacted, it has been said in chancery that an antenuptial oral agreement founded on the consideration of marriage, though resting in parol merely, provided it be satisfactorily established by proof, would be set up and enforced.

In a Maryland case it was held that, in order for an antenuptial promise to prevail against the statute of frauds, the proof of the agreement between the parties must be clear and

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20 Dugan v. Gittings, 3 Gill. 138, Md. (1845).
21 Greene v. Cramer, 2 Con. & Law 54; Saunders v. Cramer, 3 Dru. & War 87.
24 Hatcher v. Robertson, 4 Strobh Eq. 179 (1850).
25 Stoddert v. Tuck, 4 Md. Ch. 475 (1851).
positive. We find other Maryland cases lining up with this view.

**Cases Requiring Additional Performance**

By the weight of authority, where the promise contained in an oral antenuptial agreement is made in expectation or contemplation of the marriage, and there is a consideration for the contract other than the marriage of the parties, the promise is not within the purview of the statute of frauds relative to contracts made in consideration of marriage. In other words, marriage itself is not part performance, but marriage in connection with other acts may be. Chancellor Malins said: "I should say, therefore, that if A. is about to marry, and proves a promise on behalf of the intended wife's father that he will give him a house on his marriage, that is no valid contract, because it is not in writing; but if that promise is followed upon the marriage, by possession, that simple fact, if it be for an hour only, ought, in my opinion, as being a part performance of the promise, to take the case out of the statute of frauds, and the party who has got the contract thus perfected by part performance is in just as good a situation as if he had a contract in writing by the father saying that 'in consideration of the marriage' I will give or settle upon you a house."

In *Caton v. Caton,* an English case, the modern statutory rule was laid down with reference to parol agreements in consideration of marriage. There it was held that marriage was not such a part performance as would take the contract out of the statute of frauds.

In another English case the court held that persons are so likely to be led into such promises inconsiderately, that the law has wisely required them to be manifested by writing, and that it is the duty of the court to act in conformity with the statute, and not to endeavor to escape from it is generally salutary enactments.

When we come to statutory law in America we find the cases generally following the rule laid down in *Caton v.*

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*Ogden v. Ogden,* 1 Bland 284 (1818); *Crane v. Gough,* 4 Md. 316 (1853).

*Dygert v. Remerschnider,* 32 N. Y. 629 (1865).

*Ungley v. Ungley,* L. R. 4, Ch. Div. 73 (1876).

*L. R. 1, Ch. App. 137* (1865).

Caton. Here marriage is not considered such part performance of the oral contract as will take the case out of the statute.

In an Alabama case it was held that verbal agreements, entered into before marriage, to convey property or to make a settlement in consideration of the marriage, cannot be enforced. In an Illinois case it was held that a parol antenuptial agreement is void under the statute of frauds.

Kentucky does not agree with the part performance doctrine. She is one of the few states to hold that part performance will not take the case out of the statute.

In an 1854 case the court said that no suit at law or in equity can be maintained on a verbal antenuptial contract. A new Jersey case agrees with this case.

The fact that a person, during an agreement to marry, informs his intended wife that he will settle $10,000 on her, constitutes no inducement to the marriage, and is not binding as an antenuptial contract.

An agreement to marry may be so connected with a promise to make an antenuptial contract that it becomes one indivisible contract in consideration of marriage and comes within the statute of frauds, but, unless in writing, it is not good. In a Massachusetts case it was held that an oral agreement to execute an antenuptial contract is within the statute; and that if an oral agreement to marry is dependent upon such an agreement, and a part of it, no action can be maintained upon it, thereby making the agreement to marry part and parcel of the agreement in consideration of marriage. New York holds to the rule that, where a sum of money was promised plaintiff if she would marry the defendant, the agreement comes within the statute of frauds. Where the agreement is that neither party should have any estate in the property of the

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23 Andrews v. Jones, 10 Ala. 400 (1842).
24 Richardson v. Richardson, 148 Ill. 563 (1893).
26 Manning v. Riley, 52 N. J. Eq. 39 (1893).
28 Gaylor v. Roe, 99 Ind. 1 (1884).
29 Chase v. Fitz, 132 Mass. 359 (1882).
other, the agreement was held to be within the statute. Ohio follows the rule laid down here.

**Effect of Elements of Fraud**

We now come to the real question in the part performance doctrine—an oral agreement plus fraud. Where the cases are taken out of the statute, as a general rule, fraud appears as the one big outstanding element. I believe all the cases relating to the contract in consideration of marriage can be accounted for on this basis, when they are taken out of the statute. We can call this actual fraud, or give it some other name, as we choose; but the fact remains that there is fraud of some kind, where the case is taken out of the statute. Where the promise to the woman is made to convey her some property in consideration of marriage, this is a case of actual fraud, when the property is deeded away to another just before the marriage. It has all the elements of fraud. But where possession has been taken, under an agreement of this kind and money has been expended, we might class this as virtual fraud upon the one taking possession and improving with expenditures. In other words, if the agreement were not carried out, the one performing could not be put into the same position he was in before, so that he would not lose. Where the whole has been performed on the one side, where an action at law is inadequate, it would be a fraud against the one who has performed not to grant him specific performance.

The statute of frauds became a law to prevent frauds and perjuries. If, where fraud exists, specific performance were not decreed, then the statute of frauds would become an instrument of fraud. From this standpoint, the law would not be consistent if the fraud were not prevented, even tho the contracts are in parol.

In an Iowa case it was held that the purpose and intent of the statute of frauds is to prevent fraud, and that the courts will, so far as possible, refuse to permit it to be made the shield for fraud. A Massachusetts case says that the cases most

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41 Finch v. Finch, 10 Ohio St. 501 (1860); Henry v. Henry, 27 Ohio St. 121 (1875).
frequently referred to are those arising out of agreements for marriage settlements. In such cases, the marriage, altho not regarded as part performance of the agreement for a marriage settlement, is such an irretrievable change of situation that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held good to make the agreement, and not permitted to defeat it by pleading the statute.

I think this one of the best statements in the cases on taking these agreements out of the statute. The Massachusetts idea is supported generally in the United States, and is probably nowhere better stated than in the above.

In the case where the intended husband promised the intended wife, as an antenuptial oral agreement, that he would deed her a house and lot after marriage, and did deed the property, while debts of his were outstanding, it was held to be a fraud upon the creditors and the deed was set aside. An agreement was drawn between the father and the independent husband of his daughter, to be signed in consideration of the marriage, but was not signed. The intended husband married the daughter and sued her father for specific performance of the contract. Held, on the basis of fraud, that there should be specific performance. The actual fraud was in urging on the marriage and not performing his part as agreed to before the marriage. Some courts view this as no fraud, since there was no written contract.

Where the promise contained in an oral antenuptial agreement is made merely in expectation or contemplation of marriage, and there is a consideration for the contract other than the marriage of the parties, the promise does not come within the statute of frauds relative to contracts made in consideration of marriage. A good many states hold to this view. In a Missouri case it was held that the surrender of a child by his mother to the custody and control of a man whom she married in pursuance of an oral contract by which, in consideration of the marriage, and of the services of the child, the husband

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"Peck v. Peck, 77 Calif. 106 (1888); Green v. Green, 34 Kan. 740 (1886)."
"Manning v. Riley, 52 N. J. Eq. 39 (1893)."
"Nowack v. Breger, 34 S. W. 489 (1896)."
(intended) agrees to give the child a share of his estate equal to that which an heir would be entitled to, constitutes an independent, additional, and valuable consideration which will amount to part performance of the contract and take the case out of the statute.

In a New York case it was held that an oral agreement to marry, and pay the then existing debts of the proposed husband, in consideration that he convey to the proposed wife certain premises of which he is the owner, if fully performed by the wife, is valid and binding in equity upon the husband; and a conveyance made to her of the premises in pursuance thereof, is upon good and sufficient consideration.

In a Wisconsin case it was held that defendant's execution of the oral contract by providing for support and comfort of the wife during her life, and the conveyance of the land by her to defendant, takes the contract out of the statute. A number of cases uphold or support these in their contention that outside consideration will take these contracts out of the statute. In a Pennsylvania case, wherein it appeared that a man orally promised to transfer certain lands to his intended wife, in consideration of the marriage, it was held that, altho the agreement was void because it was a conveyance of land by parol, no question could arise on the ground it was made in consideration of marriage, since the English statute had not been adopted in that state.

In the case of an oral antenuptial agreement by a husband to make a settlement upon his wife in consideration of the marriage, if the husband after marriage conveys or settles property on her in pursuance of this prior agreement, she, according to the better view, is deemed a volunteer, and the settlement is subject to attack by the husband’s creditors to the same extent as any other voluntary transfer of his property for the benefit of his wife. This would be a fraud upon the creditors.

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*Dygert v. Remerschnider, 32 N. Y. 629 (1865).
*Larsen v. Johnson, 47 N. W. 615 (1890).