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Testamentary Promises to Pay

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TESTAMENTARY PROMISES TO PAY.

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The *New York Law Journal* for May 23, 1892, contains a suggestive editorial headed "A Will or Not a Will," in which the writer says "Interesting questions are constantly arising in the classification of instruments which, although expressing wishes or intentions to be carried out after death, are open to criticism on the score of testamentary execution." As is intimated by the writer, the difficulty of placing an instrument in either the class of contracts or wills is considerably diminished if the statutory provisions as to execution of wills are elaborate. Where holographic wills are allowed, or wills of personal property require no witnesses or no signature of the testator, the question of whether a promise to pay may be a good testament or a valid obligation is not uncommon. In this connection it is well enough to remark that a writing good as a testament at the time when passed upon might not be good to-day in the same court, by reason of change in the formalities required in executing a testament, and for this reason the dates are given when cases referred to in this article were decided. The ecclesiastical law, which required no particular form in the writing or executing of a will of personalty, nor even a signature where prevented by act of God, is true in this country save where modified by statute. 1 Wœrner on Adm., § 38; 1 Redfield Wills, Ch. VI, Sec. 1 §§ 1–11; *Masterman v. Maberly*, 2 Hag. Eccl. 235, 247 (1829). But while the possibility of uncertainty has been reduced materially, at least three interesting cases have arisen lately involving the question of whether certain writings were testamentary or not. These are referred to in the above editorial, and of them the two first are *Re Richardson's Estate* (29 Pac. Repr., 484), where the instrument was a letter and the question was whether it might be probated as a holographic will, and *Robinson v. Brewster* (30 N. E. Repr., 683) where the same question arose as to a deed. In the latter case, as the writing is brief, it is given in full:

KNOW ALL MEN BY THESE PRESENTS, that I, Joseph Robinson, for the consideration of one dollar, to me in hand paid, as well as my affection, do hereby assign and set over to my daughter, Eliza Jane Brewster, all of my property, both personal and real, to have the same after my death.

Witness my hand and seal this 7th day of May, 1877.

Attest: J. S. POST, E. MCCLELLAN. JOSEPH His X Mark ROBINSON. [SEAL]

This was admitted to probate as a will. The last case of the three cases referred to is in the nature of a promise to pay, or a promissory note, to take effect after death of the maker, and a discussion of this class of

cases will be the object of this article. The case is *Hegeman v. Moon*, decided by the New York Court of Appeals in March, 1892 (30 N. E. Repr., 487), and the court had before it a paper in this form:

$1,976.90. BROOKLYN, February 8, 1871.

One year after my death I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors, or assigns, the sum of nineteen hundred and seventy-six dollars and ninety cents, being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son, and others, as per statement rendered by him this day, without interest. CORNELIA W. HEGEMAN.

This, though testamentary in form, was held to be a promissory note in effect.

That an instrument in form is a note, check or indorsement will not prevent its operating as a testament is illustrated by several cases. In *Chaworth v. Beech* 4, Ves. Jr., 555 (1799), the deceased had indorsed on a bank note:

1791, June 13th. I give this note unto Sarah Hawksley, which is along with me for the love and regard I have for her.

GEORGE CHAWORTH.

Witness: JOHN BURTON.

The note so indorsed having been delivered to Sarah Hawksley by Chaworth, after his death she brought suit as indorsee and the writing was declared testamentary. In another suit against Chaworth's executor for an accounting it was said that the writing might have been proved as a will. In *Bartholomew v. Henley*, 3 Phillim. 317 (1820), deceased had drawn several checks payable to the order of a young woman with whom he was living, and in whose favor he had made his will. On the stubs of the checks were entries substantially alike. One such entry was as follows:

2808. Jan. 16, 1817.

I give this check to Miss Eyre for fear anything should happen to me before I can make a codicil to my will. £250.

It was held that the checks and indorsement on the stubs together were testamentary and could be probated as codicils to the will.

In *Hunt v. Hunt*, 4 N. H., 434 (1828), is an illustration of an indorsement of a note that was admitted to probate. The note and indorsement were as follows:

$1,000. BRATTLEBORO, April 28, 1813.

For value received I promise to pay Arad Hunt or his order, one thousand dollars, within one year from this date, and interest.

LUTHER WELD.

Atttest: JONATHAN HUNT.

If I am not living at the time this note is paid, I order the contents to be paid to Arad Hunt, 2d. Witness, ARAD HUNT.

Somewhat resembling the last case is Schad's Appeal, 88 Pa., 111 (1878), in which the writing construed was as follows:

PITTSBURGH, December 11, 1875.

I, Conrad Schad, husband of Margaretta Schad, have insured my life with the Knickerbocker Company, in New York, for four thousand dollars ($4,000). I, Conrad Schad, assign the whole amount, $4,000, to my wife, Margaretta Schad, after my death, when she can do with it according to her best will, without partiality toward her children. This I have written with good sound mind and set my name to it. CONRAD SCHAD.

This was held testamentary. It is to be noted in this case that the assignor retained the policy in his possession. Three years later, in *Fosselman v. Elder*, 98 Pa., 159 (1881), an interesting case came before the Court on the following facts. The deceased, Elizabeth Fosselman, had left a will, and among her effects was found a sealed envelope addressed by her: "Dear Bella, this is for you to open." It was opened by a niece of the deceased named Isabella, who was a legatee in the will, and was found to contain a promissory note for $2,000, payable to the order of the deceased, and the following letter:

LEWISTON, October 2, 1879.

My wish is for you to draw this 2,000 dollars for your own use, should I die sudden. ELIZABETH FOSSELMAN.

It was held that the "you" of the letter might be shown to mean the "Bella" of the address, and that "Bella" might be shown to be "Irabella," who was the niece named in the will of the deceased, and the note, letter and address on the envelope were probated as a codicil of Miss Fosselman's will.*

Contrasted with these cases, and illustrating the principle that such instruments as the above would not be entitled to probate if not executed in due form, are the cases of *Gough v. Findon*, 7 Wels, H. & G. 48 (1851), and *Mitchell v. Smith*, 4 De G. J. & S. 422 (1864). In *Gough v. Findon*, one Clarke had made two notes of £400 and £200, respectively, in favor of Sarah Gough, who, at the time, was and for a long time had been his servant. After Clarke's death his executors found two letters directed to "Sarah Gough, my late servant." One of the letters held the note for £200 and stated, "In addition to anything I may owe you, I enclose you 200 l. as a mark of my respect." The other letter, enclosing the note for £400 stated it to be for her "long and faithful services." It was held that these writings were not entitled to probate as they were not executed in accordance with the Statute of Wills. (I Vict., passed after the date of *Bartholomew v. Henley*). In the case of *Mitchell v. Smith*, one Joseph Patterson put three notes in the hands of his nephew, Simon Smith, saying; "I give you these notes," adding "that Smith should have them after his (Patterson's) death but that he (Patterson) would like to be master of them as long as he lived." Smith said they required indorsing, and Patterson indorsed them as follows:

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* Cf. *Fickle v. Snepp*, 97 Ind., 289 (1884). In this case notes folded up with and referred to in a will were made a part of the will.

24th September, 1857.

I bequeath—pay the within contents to Simon Smith, or his order, at my death.

His
JOSEPH × PATTERSON.
mark.

Witness: STEPHEN TEAL.

It was held that this endorsement was testamentary in tenor, but not executed in due form so as to be entitled to probate. If it had been witnessed by a sufficient number of witnesses the decision on this point would have been different.

There are several cases to the same effect in this country. In the case of *Moore v. Stephens*, 97 Ind., 271 (1884), Mrs. Manning made the following writing:

At my death, my estate shall pay to the treasurer of the Benevolent Friend Society of the White River Annual Conference and Church of the United Brethren in Christ, the sum of two hundred dollars, the interest of which is to be used for the benefit of superannuated and worn-out preachers of the White River Conference.

Given this third day of May, A. D. 1869.

My
ELIZABETH × MANNING.
mark.

Witness: L. K. MANNING.

This was said to be testamentary in character, but not duly executed. Nor was it allowed as a valid claim against her estate, on the ground referred to in the next case, a point to be commented on in connection with the question of whether such writings are good as obligations. In *Cover v. Stem*, 67 Md., 449 (1887), the deceased had written as follows:

Md. September 4, 1884.

At my death, my estate, or my executors, pay to July Ann Cover 3,000 dollars.

DAVID ENGEL, of P. [SEAL.]

Witness: COLUMBUS COVER.

Unhappily the law of Maryland, as to attesting testaments, had been changed in 1887, and for lack of two witnesses this could not be proved as a testament. Nor was it sufficient as an obligation to pay, for the reason to be referred to later.

All of the foregoing decisions are helpful on the other side of the question involved. If the instrument be not valid as a testament is it an obligation that may be enforced against the estate of the deceased, whether as a promissory note, or obligation of some sort?

In order to decide this regard must be had to several things. Apart from the question of intent which is involved in both questions, it is necessary at the outset to decide whether the writing was delivered.* Thus in *Gough v. Fendon, supra*, the court held that the writings were invalid as notes, being testamentary in intention, and to be delivered after the maker's death. And in *Mitchell v. Smith, supra*, the reservation by Patterson that he "would like to be master of (the notes) as long as he

*See *Clarke v. Lejourney*, 17 Conn. 511 (1846) where deceased had indorsed but not delivered a note payable to his order. The indorsement by the executrix did not pass title.

lived" rendered the indorsement ineffectual. On this point the court said, "In order to render the indorsement and delivery of a promissory note effectual they must be such as to enable the indorsee himself to endorse and negotiate the note." The matter of delivery is illustrated further in cases later to be referred to.

But in addition to making and delivering the instrument the relation of debtor and creditor must be created and subsist in the lifetime of the parties to the instrument, though the time of payment may be deferred until after the death of the maker. *Cover v. Stem*, 67 Md., 449 (1887); *Moore v. Stephens*, 97 Md., 271 (1884).

This relation of debtor and creditor should be more than nominal, it should be founded on sufficient consideration. The matter of consideration, as well as the subject as a whole, is well illustrated in the following cases: In *Holley v. Adams*, 16 Vt., 206 (1844) Adams during his last sickness made a gift to his daughter of a note in form following:

For value received, and for the consideration of love and affection that I have towards Minerva Holley, I promise and agree that she shall have and receive out of my estate fourteen hundred dollars, to be paid to the said Minerva Holley or her heirs after my disease.

BRISTOL, March 16, 1841. RILEY ADAMS.

Although given during his last sickness it was not given under conditions that made it a valid gift *mortis causa*. And the mere consideration of love and affection, in absence of evidence of any other consideration, did not make the note valid as a claim against the estate. It also was declared invalid as a testament.

In 1871, the case of *Dean v. Carruth*, 108 Mass., 242, was decided on interesting facts. It appears that a Mr. West was a friend of a Mrs. Dean, previously Mrs. Jane I. Baylies. He occasionally made her gifts: "as for instance of a coal scuttle and a picture of Faith, the former at Christmas." She, on the other hand, entertained him at supper Sunday evenings and rendered him some slight services. At one time he sent her a sealed envelope addressed, "Mrs. Jane I. Baylies: I do not wish you to open this until my decease." S. C. W.

Mrs. Dean retained this unopened until after the death of West, then opened it and found within a sheet of paper on which was the following:

TAUNTON, August 15, 1857.

For value received I promise to pay Mrs. Jane I. Baylies, five hundred dollars, on demand. SAMUEL C. WEST.

Witness, A. E. SWASEY.

DEAR JANE: Please accept the above from your true friend.

S. C. W.

In a suit on the note against West's administrator to which suit the defence was want of consideration, the jury found for the payee. On appeal the court said, "If the jury were satisfied, upon the whole case, including the note itself, that it was given in payment for services ren-

dered however disproportionate in value their verdict was right. Inadequacy of consideration without fraud is no defence."

Eight years later the case of *Warren v. Durfee* (126 Mass., 338) was decided by the court that decided *Dean v. Carruth*, on the following facts: the plaintiff, Miss Warren and James F. Westgate were engaged to be married. He was ill with heart disease. During their engagement she had cared for him in his illness and had bought and mended some articles of his wearing apparel. After a violent attack of his disease he wrote the following note:

$15,000. FALL RIVER, December 11, 1875.

On demand after date I promise to pay to the order of Lydia B. Warren fifteen thousand dollars, value received, payable after death.

JAMES F. WESTGATE.

This note was sealed up in an envelope, and when he gave it to her he said, "there was something which would provide for her in case anything should happen to him, that if they were married, and he wanted it given up, he should expect her to give it up." To this she assented. She received and retained the note in her possession until after the death of Westgate. Miss Warren claimed that her promise of a speedy marriage, and her services to Westgate were sufficient consideration for the note. But the court said the case was not like *Dean v. Carruth*, because the note was not delivered by Westgate absolutely, but conditionally and as a gift out of his estate, and because it was without consideration. It also was said not to be valid as a gift *mortis causa*, and not well executed as a testament. It is hard to reconcile the decision as to consideration with *Dean v. Carruth*. The delivery seems to have been absolute, the giver retaining the right to recall should he so elect in his life time.

With the cases in Massachusetts may be contrasted those in New York. In *Worth v. Case*, 42 N. Y., 362 (1870) it appears that one T. B. Worth had been ill and his sister Mary C. had taken care of him. He afterwards gave her a sealed envelope on which he had written, "Mary C. Worth: this is not to be unsealed while I live, and returned to me any time I may wish it, T B. Worth," and in which he had placed the following note:

ADDISON, January 30, 1864.

I promise to pay my sister Mary C. Worth, on demand, ten thousand dollars in, consideration of services rendered. T. B. WORTH.

Miss Worth retained the envelope and after her brother's death opened it and found the note. In a suit on the note, the jury made a special finding that her services were worth $1,000. It was held by the court on appeal that the note was delivered and that the consideration was adequate to support the note. After referring to the facts the court say: "He (Worth) may well, at the time, have estimated her services and attentions as worth more to him than $10,000. 'For all that a man hath will he give for his life.' It is true that in the manner of delivering

it (the note) to her, he reserved the *locus penitentiæ*, in case he should afterwards consider her services of less value to him; but he lived more than three years after that, and if his acts during that time are evidence of his opinion, he continued to believe, to the end of his life, that in giving the note for the consideration he had not committed a mistake. We have no primary standard by which we can measure or weigh their value to him." There was a dissenting opinion holding the note not delivered, nor intended to be operative, but that it was competent evidence of the value of the services.

In 1876 the case of *Earl v. Peck*, 69 N. Y., 596, was decided on facts of interest. One Dr. George Peck had taken a fatal dose of aconite. Before his death Mr. Peck made and delivered to Mary Earl the following note:

$10,000. For value received, I promise to pay Mary Earl, for services rendered, ten thousand dollars. GEORGE PECK.

STANFORD, October 11, 1873.

In a suit on the note the payee claimed the note was in payment of services by her for six years as housekeeper, on an understanding with Dr. Peck that he would not pay her a definite sum, but "would pay her well." The court held the consideration to be adequate, saying: "If the intestate chose to pay for services rendered a much larger sum than they were worth, he had a right to do so. The note was not a gratuity or gift. There is no standard whereby courts can find the measure of value in such cases."

Cases of this sort are to be distinguished from *Carnwright v. Gray*, 127 N. Y., 92 (1891), in which the note was as follows:

QUARRYVILLE, September 2, 1871.

Thirty days after date, I promise to pay to Cornelius Carnwright fifteen hundred dollars, with interest. SAMUEL P. FRELIGH.

In this case the question was as to the effect on the note of the time of payment, and the court said: "The fact that it was payable after the death of the maker does not affect its character (3 Kent's Com., 76.)" Such a writing might be a good holographic will, (cf. Re Richardson's Estate, 20 Pacific Reporter) but the testamentary intent would need to be shown and that it was revocable; see *Bristol v. Warner*, 19 Conn., 7(1848.)

It is obvious that the adequacy of consideration of such notes as in *Warren v. Durfee* or in *Bartholomew v. Henley* can be inquired into by creditors of the deceased maker's estate. And that undue influence could be set up by parties in interest. The danger of letting such instruments stand as notes or testaments is well expressed by the court in *Holley v. Adams*, 16 Vt., 206 (1844), *supra*, when, after declaring the note of the father given to his daughter void for want of consideration and invalid as a gift *mortis causa*, it said: "To hold differently, we think, would establish a very dangerous doctrine, and one that would overturn our whole system of *testamentary disposition* of estates. It might in some cases pu whole estates at the mercy of a few interested individuals who happen to

have access to and who have gained the confidence of the dying man, and the transaction would be disencumbered of all the statutory checks which the law has thrown around the disposition of property by will—there being no witnesses required, and there being no tribunal instituted by law for the purpose of testing its validity after the decease of the donor."

If a party in interest, as an executor of the maker's will or administrator of his estate, is sued by the payee of a note given under circumstances of fraud, he may obtain an injunction to restrain the suit, and on cause shown may have a decree ordering the note given up to be cancelled. See *Esdaile v. La Nauze*, 1 Y. and Col., 394; S. C. 4 L. J. (N. S.) Ex. Eq. 46. This principle is illustrated in the case of *Dent v. Bennett*, reported in 5 L. J. (N. S.) Eq., 58 (1835), and in 8 L. J. (N. S.) Eq., 125 (1839). In this case Jonathan Dent, being infirm and in his eighty-sixth year, made the following agreement with his physician, Lucas Bennett:

Whereas the said Lucas Bennett does hereby promise and agree that he will, at all times when required, diligently and faithfully give his medical and surgical attendance to the aforesaid Jonathan Dent for and during the remainder of his life; and the said Jonathan Dent, in consideration thereof and out of gratitude and respect to his friend, the said Lucas Bennett, for past services and for having saved his life when in the greatest danger, does hereby promise and agree that the said Lucas Bennett shall be fully entitled to the sum £25,000 at the said Jonathan Dent's decease.

The agreement also directed that sum of money to be paid by Dent's executors out of his personal estate, within six months from his decease, independent of any will the said Dent had then made or might make after the date of the agreement. Mr. Dent died four years after making the agreement, and Bennett brought a suit at law against his executors to enforce it. The executors brought a bill in equity to restrain proceedings at law. As a result of these actions he was enjoined from proceeding at law and the agreement was ordered to be delivered up to be cancelled. It was said that the agreement was one the influence of which would be "to accelerate the death on which the surgeon is to have £25,000," and to be intrinsically of such a character as to be "totally void in point of law." The court being satisfied it was made without adequate consideration, it was held invalid on that ground. A case somewhat resembling *Dent v. Bennett* is *Allen v. Davis*, 20 L. J. (N. S.) Eq., 44 (1850).

In conclusion it may be said that whether an ambiguous instrument is testamentary or a promise binding the estate of the maker is a matter of intention rather than form, except as to the execution of the instrument; that delivery of the instrument or retaining control over it with power of revocation is of importance in determining the intention of the maker. If the instrument in form is a promise to pay, did the maker intend to create the relation of debtor and creditor. If so, was the promise for sufficient consideration and was the act completed by delivery.