Kentucky Law Journal

Volume 24 | Issue 1 Article 8

1935

Wills--Advancement

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late marriage, and should specify by statute just who may marry and just at what age marriage may be contracted. The law has always deemed infants to be affected with an imbecility of judgment, and for that reason, incapable of giving their consent to marry before they reached a certain age. Child marriages militate against the proper education and culture of youth; and because most boys and girls are of innate unstable disposition, early marriages are frequently conducive to unhappiness for both parties throughout life. It is to obviate these conditions that statutes have been enacted requiring a relatively mature age before the marriage union may be entered. Without doubt such statutes were designed primarily to protect adolescent boys and girls from the precipitancy of their own injudicious acts when contemplating the marriage relation. But regardless of the undesirability of child marriages, if the only disability is nonage, it does not require the astuteness of a philosopher to apprehend that, once the marriage has been consummated, courts will go a long way in lending validity to such marriage since the parties could never assume their original status. Public policy and the importance of the martial status itself dictate such a procedure.

To summarize, the writer submits that the following propositions represent the law in Kentucky:

1. The marriage of a boy under sixteen or of a girl under fourteen would be perfectly valid if ratified by cohabitation after reaching those ages, although parental consent to the initial marriage was not obtained.

2. The marriage of a boy, under sixteen or of a girl under fourteen is not void, but is voidable only, and is valid for all civil purposes until annulled by a proper judicial pronouncement.

TOWN HALL.

WILLS—ADVANCEMENTS.

An advancement is a gift from a parent, or one who stands in *loco parentis*, to a child, which is to be charged to the child in the distribution of the parent's estate. Such gifts are usually made for the purpose of establishing or "advancing" the child in life. When so made it is unnecessary to present evidence that the parent intended the gift to be charged. The intent is presumed.

The doctrine of charging children with gifts from their parents in the settlement of the estate of the parents is of ancient origin. As might be surmised, it is designated to place all of the children on an equal footing and to prevent an undue preference of those who receive substantial gifts during the lifetime of the parents.

Strictly speaking, an advancement can exist only where the parent dies wholly or partially intestate. By analogy, however, the principle has been extended to cover gifts made after the execution of a will in which the children are named as devisees or legatees. It also

applies to gifts made prior to the execution of a will, if the will shows an intention on the part of the testator to charge the children with such gifts.

More than two centuries ago, it was agreed to be the constant rule "that where a legacy was given to a child, who afterwards upon marriage or otherwise had the like or a greater sum, it should be intended in satisfaction of the legacy, unless the testator should declare his intent to be otherwise."[1] A gift of a smaller amount is likewise presumed to be a *pro tanto* satisfaction of a legacy to a child. The charging of a gift to a child's legacy, when it would not be charged if the legacy were to another, may appear unreasonable and has been criticized by eminent law-writers. It is founded, however, on the equitable rule against double portions.[2]

If an advancement should exceed the portion due the child, he is under no obligation to repay the difference. To this extent it differs from a debt, which must be paid even though greater than the child's share of the estate. Unless specifically charged, an advancement does not bear interest, while a debt does. On the other hand, advancements are not barred by the statute of limitations, or by a release in bankruptcy, as in the case of debts. An advancement differs from a gift in that the latter is not chargeable to the parent's estate.

Children who have received advancements must bring the value of their gifts into "hotchpot" with the undevised estate of their parent before they can share therein. The hotchpot rule may be illustrated thus: *P* dies leaving three children, *A*, *B* and *C*, and an undevised estate of $6,000, after having made advancements of $2,000 to *A* and $1,000 to *B*. Adding the advancements to the remaining estate gives a total of $9,000, or $3,000 for each of the children. Deducting the advancements made to *A* and *B*, the remaining shares would be: *A*, $1,000; *B*, $2,000; and *C*, $3,000. Without the law of advancements, the undevised estate would be divided equally between the three children.

Small gifts or gifts for support, maintenance or primary education are not considered advancements, in the absence of specific evidence of intention.

The common law rule with respect to advancements has been incorporated in Section 1407 of the Kentucky statutes, which reads as follows:

> "Any real or personal property or money, given or devised by a parent or grandparent, to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undevised estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendable and distributable share of the whole estate, real and personal, devised and undevised. The advancement shall be estimated according to the value of the property

[1] *Izard* v. *Hurst*, Freem, C. C. 224 (1697).
[2] *Carmichael* v. *Lathrop*, 108 Mich. 473, 66 N. W. 350 (1896).

when given. The maintaining or educating, or the giving of money to a child or grandchild, without any view to a portion or settlement in life, shall not be deemed an advancement."

It will be noted that the above quoted statute treats only of advancements where the decedent dies wholly or partially intestate. In another statute, Section 4840, the deduction of advancements made subsequent to the execution of a will is provided for. Section 4840 is quoted below:

"A provision for or advancement to any person shall be deemed a satisfaction in whole or in part of a devise or bequest to such person contained in a previous will, if it would be so deemed in case the devisee or legatee were the child of the testator; and whether he is a child or not, it shall be so deemed in all cases in which it shall appear from parol or other evidence to have been so intended."

In *Gulley* v. *Lillard's Executor*[3], it was held that gifts made before the will and not charged therein, can be charged as advancements only in the distribution of the undevised estate.

One of the principal problems in connection with this subject is to determine what gifts or conveyances shall be regarded as advancements, and therefore chargeable to the child. In *Brannock* v. *Hamilton*,[4] payments for primary education of which no account was kept were held to be not chargeable as advancements. But in *Hill* v. *Hill*,[5] payments for a professional education, which were included in an account kept by the parent against the child, were designated advancements. Gifts of savings accounts by father to children were held to be advancements in *Collins* v. *Collins' administrator*.[6]

In *Sullivan* v. *Sullivan*,[7] the court said: "A person may by will dispose of his estate, and thus regulate the matter of advancements between the children, whether the advancements have in fact been made or not. But, if a person dies intestate, then the question is regulated by the statute (Section 1407), and the declaration or intention of the parent cannot control the fact."

From the above it would appear that the Kentucky law respecting advancements may be summarized briefly as follows:

1—WHERE THERE IS NO WILL—

(a) Gifts from a parent (or grandparent) to a child will be presumed to be advancements and charged to the child's portion of the parent's estate. This rule also applies to the undevised portion of the estate in the case of partial intestacy.

(b) Small gifts, or gifts for support, maintenance or primary education are not advancements.

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[3] 145 Ky. 746, 141 S. W. 37 (1911).
[4] 9 Bush 446 (Ky. 1872).
[5] 122 Ky. 681, 92 S. W. 924 (1906).
[6] 242 Ky. 5, 45 S. W. (2d) 811 (1931).
[7] 122 Ky. 707, 92 S. W. 966 (1906).

2—WHERE THERE IS A WILL—

(a) Gifts by a parent to a child prior to the execution of a will are not advancements unless charged therein.

(b) Gifts after the execution of a will are presumed to be in satisfaction of the legacies named in the will.

J. E. MARKS.

EQUITY—EXECUTORY CONTRACT FOR THE SALE OF REAL ESTATE—RISK OF LOSS.

In an executory contract for the sale of real estate upon whom is the risk of loss between the date of execution of the contract and the date of performance?

The first recorded decision upon this point was the English case of *Paine* v. *Meller*,[1] decided in 1801 and consistently followed in England since that time.[2] It is apparently followed by an overwhelming weight of authority in this country.[3] Although many cases have been cited as contrary to this view yet a close analysis of them reveals that in practically every instance there is some factual element which deprives the decision of the binding force of precedent.[4] In fact, only two cases have been found in which the court clearly placed the loss upon the vendor in an action in equity.[5] This view is supported to some extent by Dean Pound,[6] Keener,[7] and Pomeroy.[8]

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[1] 6 Vesey Jr. 349.

[2] 25 Laws of England, p. 369, and cases cited thereunder.

[3] See notes in 22 A. L. R. 575; 41 A. L. R. 1272; 46 A. L. R. 1126, setting out the authorities. Also 27 R. C. L. 293 and 66 C. J. 811.

[4] Thompson v. Gould, 20 Pick. (Mass.) 134 (1838), and Gould v. Murch, 70 Me. 288 (1879), both oral contracts and unenforceable because of the Statute of Frauds, and both actions were at law. Phinizy v. Guernsey, 111 Ga. 346, 36 S. E. 796 (1900) (containing dictum in favor of equitable conversion), and Good v. Jarrard, 93 S. C. 229, 76 S. E. 698 (1912), the vendor-vendee relationship had not arisen due to the non-performance of conditions precedent. Wells v. Calnan, 107 Mass. 514 (1871), and Powell v. Dayton Co., 16 Ore. 33, 16 Pac. 863 (1888), the actions were at law. In Cutliff v. McAnally, 88 Ala. 507, 512, 7 So. 331 (1889), there was only a weak dictum. Davidson v. Ins. Co., 71 Ia. 532, 534, 22 N. W. 514 (1887), involved only the construction of an insurance policy. Kares v. Covell, 180 Mass. 206, 62 N. E. 244 (1902), and Bautz v. Kuhworth, 1 Mont. 133, 136 (1869), were actions at law.

See Cockerill, *Equitable Coversion*, 1 So. Calif. L. Rev. 309 (1928), where, after reviewing all the cases in California on this point, concludes at page 325: "No criticism is intended to be made of the decisions in the cases discussed. They are, it is believed, correctly decided on their respective facts. The suggestion made is only that, disregarding the loss, the vendor was not entitled in any of them to a decree of specific performance. If this deduction be admitted the doctrine of equitable conversion was in no wise involved."

[5] Wilson v. Clark, 60 N. H. 352 (1880); Appleton Electric Co. v. Rogers, infra, note 13.

[6] *Progress of the Law—Equity*, 33 Harv. L. Rev. 813, 826-28 (1920).

[7] "The Burden of Loss as an Incident to the Specific Performance of a Contract," 1 Col. L. Rev. 1 (1901).

[8] 5 Pomeroy, Equity Jurisprudence (4th ed.), Sec. 2282 (1919).