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Pleading--Statute of Frauds May Be Raised by Demurrer

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faculty in the case of a discharge for consideration since a definite consideration would have to be clearly established; and as Commissioner Drury very aptly states, "We do not deny that an obligor in a note may be released by parol evidence, but such evidence should be clear, satisfactory and to the point." Finally, let it be said that the result in the principal case is the one most compatible with the intent of the drafters of the N. I. L., and the one which in the vast majority of situations is most just from the point of view of the business man.

In conclusion, it might be said that the most notable thing in the case is the learned and thorough way in which it was handled. It is believed that this is, perhaps, the most erudite opinion to be found in the Kentucky Reports. It sets out an exhaustive list of authorities bearing on the subject, and gives the reader an opportunity of viewing the problem from all angles; thus, it does not force one to accept the conclusion of the judge through lack of information. Rather, it sets out the different rules adopted by the various courts applicable to this set of facts, and then by close study and comparison, attempts to arrive at the most logical solution. An analysis such as this is certainly more conducive to an acceptance of the opinion as a proper statement of the law than a one-sided opinion in which the opposite view is not set out or considered at all.

KIRK B. MOBERLEY.

PLEADING—STATUTE OF FRAUDS MAY BE RAISED BY DEMURRER.—Deceased and wife, plaintiff, agreed to make mutual wills, each leaving his or her property to the other. This was done but subsequently deceased made another will leaving his property to his heirs. After probate of the first will, this second will was produced and the order probating the first will was set aside and another order entered admitting this second will to probate. The plaintiff then sued to set aside this second probate, to reinstate the first will and to have the property distributed thereunder. She claimed that this agreement to make mutual wills gave her a lien upon the property of her husband and that from the date of execution her husband held the land in trust for her benefit. Defendants demurred and on hearing of the demurrer it was held that this contract was within the Statute of Frauds and being oral was unenforceable. Plaintiffs contended that defendants, if they wished to rely upon the Statute of Frauds, must have pleaded it affirmatively. *Held*: "The question as to whether a contract is within the Statutes of Frauds may be raised by demurrer." *Gibson v. Crawford*, 247 Ky. 228, 56 S. W. (2d) 985 (1932).

The question as to whether the Statute of Frauds may be raised by demurrer, for ease of discussion, is divided into two groups of factual situations: (1) where the pleading alleges an oral contract within the purview of the Statutes of Frauds and alleges no circumstances to take the transaction out of the operation of the statute;

(2) where the pleading is silent as to whether the contract sued upon is oral or written.

In the first situation the great weight of American authority is to the effect that the statute may be raised by demurrer. *Thompson v. N. S. Coal Co.*, 135 Ala. 630, 34 So. 31, 93 Am. S. R. 49, 62, L. R. A. 551 (1903); *Seamans v. Barentsen*, 180 N. Y. 333, 73 N. E. 42, 105 Am. S. R. 659 (1905); *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. R. 449 (1875); *Dickey v. McKinlay*, 163 Ill. 318, 45 N. E. 134, 54 Am. S. R. 471 (1896).

The minority rule, namely, that the Statute of Frauds may not be raised by demurrer, finds its strongest support in North Carolina. *Ingram v. Corbit*, 177 N. C. 318, 99 S. E. 18 (1919). In a fairly recent case in Alabama the court reverted to the old English rule that, although the statute could be raised by demurrer in an action in equity, it could not be raised in an action at law. *McDonald v. McDonald*, 215 Ala. 179, 110 So. 291 (1926). This distinction seems indefensible in view of the fact that the codes have abolished the distinction between law and equity, at least, in such a sense as this.

The Federal courts follow the majority rule. *Norton v. Stegmyer*, 175 Fed. 56, 99 C. C. A. 332, 20 Ann. Cases 1134 (1910); *Rabe v. Danaher*, 756 Fed. (2d) 777 (1931). The Supreme Court early decided that a demurrer would raise the statute in *Randall v. Howard*, 2 Black 585, 17 L. Ed. 269 (1862).

A general demurrer is usually regarded as sufficient. *Barr v. O'Donnell*, 76 Cal. 469, 18 Pac. 429 (1888). But it has been held that the demurrer should state the ground of objection relied on. *Lewis' Comrs. v. Breakwater Fisheries Co.*, 12 Del. (Ch.) 208, 110 Atl. 669 (1920).

Kentucky, at first, inclined to the view that a party could not avail himself of the Statute of Frauds on demurrer. *Kirby v. Chitwood's Admr.*, 4 T. B. Mon. 91, 16 Am. Dec. 143 (1826). But the statute in Kentucky putting writings signed by the parties upon the same footing as sealed instruments, Ky. Stats. sec. 471, has changed the rule and all such writings evidencing any contract must now be declared on as specialties; and if the petition does not aver a writing it will be considered as made by parol. *Ball v. McCrea*, 8 B. Mon. 423 (1848); *Altman and Taylor v. Joplin*, 5 K. L. R. 184 (1883).

Thus it will be seen that Kentucky is one of the few jurisdictions which is in a position to hold that, not only will a demurrer lie where it clearly shows that the contract sued upon is oral and within the Statute of Frauds and no circumstances are alleged to take it out of the statute but, also in situation number two where the pleading is silent as to whether the contract sued upon is oral or written. *Boone v. Coe*, 153 Ky. 233, 154 S. W. 900, 51 L. R. A. (N. S.) 907 (1913); *Smith v. Theobald*, 86 Ky. 141 (1887); *Caudill v. J. P. Gorman Coal Co.*, 242 Ky. 294, 46 S. W. (2d) 93 (1932). This rule also

seems to prevail in Indiana. *McCoy v. McCoy*, 32 Ind. App. 38, 69 N. E. 193 (1903). But the vast amount of authority is to the contrary. *Speyer v. Desjardins*, 144 Ill. 641, 32 N. E. 283 (1892); *Van Epps v. Redfield*, 68 Conn. 39, 35 Atl. 809 (1896).

From the foregoing statements it will be seen that the principal case represents the modern view in Kentucky and also that this view is with the weight of authority to the extent of a pleading which clearly shows a case for the application of the Statute of Frauds. It is not inconsistent with this majority view when it allows the statute to be raised by demurrer although it does not appear on the face of the pleading that the contract is written or parol. The settled rule in Kentucky is that the pleader must allege a written contract or circumstances removing the case from the operation of the Statute of Frauds. If such were not the rule, undoubtedly Kentucky would follow the majority view that the statute could not be raised by demurrer.

The majority view appears preferable in the light of reason. If the pleader, who should undoubtedly be in a better position to state his case than any other, can do no more than state a contract, which, on its face, is unenforceable, then such pleading should be demurrable.

ROBERT E. HATTON, JR.

CRIMES—HOMICIDE IN DEFENSE OF PROPERTY.—While homicide in self-defense, and homicide in defense of habitation have historically been considered justifiable, there has been some confusion regarding homicide in defense of property other than habitation. Just how far may the owner go in defending his property? Does a mere trespass justify taking a human life? Are common law felonies and statutory felonies against property to be considered alike?

A recent Kentucky case, *Commonwealth v. Beverly*, 237 Ky. 35, 34 S. W. (2d) 941 (1931), involved the right of a citizen to kill another apprehended at night in the act of stealing his chickens. The jury in the lower court did not agree, and the Court of Appeals was asked to certify the law in the case. The defendant shot without warning and continued to fire after repeated requests to stop. He had no evidence that the men were armed, but testified that he feared for his life. The Court of Appeals certified that the defendant was entitled to an instruction on self-defense carrying the idea that he shot in good faith on reasonable grounds to apprehend immediate danger to his life, but that the jury should also be informed that the defendant could be found guilty of voluntary manslaughter on the theory that he used more force than reasonably necessary to prevent the taking of the chickens. While taking chickens valued at more than three dollars is a statutory felony in Kentucky, the law does not justify the taking of human life to prevent a felony not involving the security of the person or home, or in which violence is not a constituent part.