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The Termination of Separation Agreements

John D. Glase

law remedy of damages, since delivery of the deed and payment would be concurrent acts, and the defendant could thus be assured of performance by the plaintiff. Applying Cardozo's rule no "injustice or oppression" would result to the defendant because the defendant is then receiving what was contracted for.

It is submitted that the court should rid itself of a rule such as this —a rule without foundation—and that where one seeks specific enforcement of a contract, "if there is no other good reason why it should not be enforced except the want of mutuality of remedy, it will be so enforced".[11]

John A. Cherry

THE TERMINATION OF SEPARATION AGREEMENTS

The Pennsylvania cases on this subject are comparatively few in number, and the rules set down, while not inaccurate, are stated loosely. This is accounted for by the fact that agreements of separation between husband and wife are seldom used in Pennsylvania due to the fact that the husband is compelled by statute to support his wife.

Before citing cases to illustrate the rules, it would be well to define a separation agreement and point out the differences between it and a postnuptial property settlement. It is this latter form of contract which has caused the courts much confusion in this regard. In general, the usual separation agreement provides that the husband shall pay a certain amount to the support of the wife during the separation, and the terms of such a contract are, in the main, executory. On the other hand, a postnuptial property settlement has to do with the dividing of property and property interests between husband and wife. There is no question of the validity of such an agreement of separation, both before and after the Act of June 8 1893,[1] if made in contemplation of an immediate or an inevitable separation.[2] Neither is there any question of the validity of a postnuptial proper-

[11] Lamprey v. St. Paul & C. Ry. Co. et al., 89 Minn. 187, 94 N. W. 555.

[1] Married Women's Property Act, P. L. 344.
[2] Fennell's Estate, 207 Pa. 309; Rodenbaugh v. Rodenbaugh, 17 Pa. Super. Ct. 619.

ty settlement, if reasonable in its terms and if entered into by the wife with a full knowledge of the facts and for an adequate consideration; and separation, in this connection, is *not* required.[3] "If there was any doubt before on this subject, it was definitely settled by the Act of June 8, 1893".[4]

The courts have not always been careful in distinguishing between the two types of agreements, which are very different both in subject matter and in legal effects and results. The fundamental distinction is well stated in the following excerpt from the case of *Ray's Estate*[5]:— "A distinction exists between a simple separation settlement or postnuptial property settlement making a division and allotment of property and property interests between the parties. The question whether a deed is a separation deed or a postnuptial settlement depends on the intention of the parties to be gathered from the terms of the deed." The subject matter of a separation agreement is usually provision for support of the wife during separation and its terms are necessarily executory; whereas, the subject matter of a postnuptial property settlement is property itself and just as necessarily executed. The importance of these distinctions will be seen when the specific cases on the termination of these agreements are examined.

Postnuptial property settlements do not have to be drawn up in contemplation of a divorce or even of separation and are *final*, once they have been fully executed,—that is, they are not terminated by the adultery or remarriage of the wife; and this type of contract can only be rescinded by an express agreement to that effect.[6]

In separation agreements any express statement or stipulation in regard to terminating such agreement is controlling, the intention of the parties governing in this as in other contracts. The trouble lies, however, with separation agreements which do not contain express stipulations in regard to their termination and which, in the last analysis, resolve themselves into problems of interpretation. It is purely a question of the intention of the parties as gathered from the deed of separation as a whole. The most difficult problem is whether the reconciliation of the parties annuls or abrogates

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[3]Hintner's Appeal, 54 Pa. 110; Singer's Estate, 233 Pa. 55; Scott's Estate, 147 Pa. 102.
[4]Ray's Estate, 304 Pa. 421.
[5]304 Pa. 421. This excerpt was in turn taken from 30 Corpus Juris 1058, section 833.
[6]Schouler, Dom. Rel., 5th. ed., section 218.

the agreement. There is a nice statement of this situation in a Kansas case[7]:—"It is frequently said that reconciliation and resumption of the marital relation will render a contract void. This is a loose and inaccurate statement of a supposed rule. The truth and the law is, that having entered into a valid separation agreement, the courts cannot and will not deem such contract avoided unless the conduct of the parties impels to the conclusion that they themselves so regard it". The subsequent cohabitation of the parties is evidence of an intention to abandon the agreement. "It is not subsequent cohabitation alone which avoids such agreements, but the intentional renunciation of them, which the resumption of marital relations sometimes evidences. So far as subsequent cohabitation establishes such an intention and so far only does it have the effect of avoiding the contract."[8] Where there is doubt as to the intention of the parties, the reasonableness of abrogation may control,—that is, in such cases, the court will examine the surrounding circumstances in order to throw light on the question of whether or not abrogation was intended.[9] In some jurisdictions, reconciliation and resumption of the marital relation operate automatically to abrogate the agreement either because public policy discourages separation agreements or because the consideration has failed.[10] It would seem, however, that the public policy argument in this connection is very weak; and be that as it may, it is certainly not the law of Pennsylvania, for the courts do not even mention the public policy angle. It was said in *Singer's Estate*[11] that if the reconciliation is accompanied by an understanding that the agreement is to continue in force, such understanding, though oral, will control.

What constitutes such reconciliation as will abrogate a separation agreement? There is an answer to this question in the New York case of *Re Smith*,[12] quoting from the opinion:—"The rule of law is well settled that separation agreements for the support of the wife are, unless a contrary intent is shown, annulled by any subsequent cohabitation between husband and wife, even though such cohabitation be for ever so short a time, provided that, when such cohabitation takes place, it was their intention to resume permanently the marital relation . . . . . and it being clear that the marital relation was resumed, the presumption is that permanency was intended".

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[7]Dennis v. Perkins, 129 Pac. 165, 88 Kan. 428 (1913). See also Daniels v. Benedict, 97 Fed. 367; Hintner's Appeal, 54 Pa. 110.

[8]Ray's Estate, 304 Pa. 421.

[9]Dennis v. Perkins, 88 Kan. 428 at page 434.

[10]Sargent v. Sargent, 39 Pac. 931 (Calif.); Wells v. Stout, 9 Cal. 479.

[11]233 Pa. 55.

[12]36 N. Y. Supp. 820.

If an agreement between husband and wife providing for their separation goes beyond the terms of a mere separation deed, and is in effect a good voluntary settlement by the husband on his wife, a subsequent reconciliation between the parties cannot affect the agreement so far as it constitutes a settlement, and hence the settlement must stand notwithstanding the reconciliation.[13] This suggests another distinction between the executed and executory provisions of a separation agreement. This is well stated in *Henkel's Estate*,[14] where the court says that a reconciliation between husband and wife abrogates the covenants of an agreement of separation *only* so far as the agreement has not been executed, and those provisions which have been carried out are final and cannot be abrogated. It is an absolute misstatement, however, to say that reconciliation revokes any terms of a separation agreement, inasmuch as it is the intention of the parties and not the reconciliation of the husband and wife which is the important element.

There are also the added problems of adultery, divorce, and remarriage of the wife to be considered. It is needless to say that the misconduct of the husband does not abrogate any agreement between himself and his wife. But the misbehaviour of the wife presents a different problem. The law is settled that a separation agreement will not be abrogated by the mere fact of the wife's adultery.[15] The same is true as to a divorce and subsequent re-marriage of the wife. This is not, however, a very frequent difficulty inasmuch as there is usually included in the agreement a *dum casta* clause, which takes care of these contingencies. This rule is not a hardship on the husband because if he desired to make the chastity of his wife a condition to the continuance of the agreement he might have inserted a *dum casta* clause. As aptly stated in *Muhr's Estate*[16]:—The agreement of separation was not for the preservation of the marriage relation but its very purpose was the getting rid of certain incidents of matrimony. Her adultery in no way diminished the benefits he obtained by reason of the agreement".

There is a question, voiced by at least one writer, as to whether a divorce on some grounds other than adultery will come within a *dum casta* clause and abrogate the agreement. It would seem that it would not, as the clause itself implies and provides for only adultery or subsequent remarriage.

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[13]Baird v. Connell, 121 Iowa 278, 96 N.W. 863.

[14]59 Pa. Super. Ct. 633.

[15]Muhr's Estate, 59 Pa. Super. Ct. 393; Dixon v. Dixon, 24 N.J. Eq. 133; 30 Corpus Juris 1065, section 846.

[16]59 Pa. Super. Ct. 393.

The death of the husband, *in the absence of any express stipulation to the contrary,* will not affect the provisions of a separation agreement.[17] In such cases, according to a New York court, the widow has an election between taking her intestate share and continuing with the terms of the agreement, the election of one of which precludes recourse to the other.[18] Again, however, this is not a very frequent difficulty, inasmuch as this contingency is usually foreseen and expressly provided for in the agreement.

Before summarizing the conclusions on this subject, it would be well to repeat that there are not many Pennsylvania authorities on the issues here treated; but the points submitted below would very probably be the law of Pennsylvania as gathered from some express decisions and dicta running through all of the cases on this subject. From this review, the following conclusions may be drawn:—

1. Both separation agreements, made in contemplation of an immediate or an inevitable separation, and postnuptial property settlements, when the wife is aware of all the facts and there is no fraud, force, or coercion practiced upon her, are valid and binding in Pennsylvania and are *not* contrary to public policy.

2. There is an important distinction between a separation agreement, the terms of which are mainly executory, and a postnuptial property settlement, the terms of which are executed. This is important in that reconciliation of the parties *may* abrogate the former; whereas, it will never serve to annul the latter type of agreement without an express subsequent agreement to that effect. This distinction is too little noticed and applied by the courts.

3. The effect of reconciliation on a separation agreement being a matter of intention, an express stipulation in the agreement is of course controlling.

4. Reconciliation, if the intention is to resume permanently the marital relation, will annul *those and only those* terms of an executory nature which provide for living apart, and this only if no contrary intent is shown in the instrument. Reconciliation, without more, will never annul a property settlement.

5. The adultery or divorce and remarriage of the wife will *not* automatically annul an agreement for separation. This is not a practical difficulty, however, inasmuch as a *dum casta* clause is usually inserted. The death

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[17]McVay's Estate, 260 Pa. 83; Barnes v. Klug et. al., 113 N.Y. Supp. 325.
[18]In re Junge, 212 N. Y. Supp. 119.

of the husband does not abrogate separation agreements unless there is an express provision to that effect.

6. Finally and most important, the termination of such agreements is a question *not* of automatic revocation but of the *intention* of the parties as gathered from the deed of separation as a whole and other circumstances.

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ASSIGNABILITY OF EASEMENTS IN GROSS IN PENNSYLVANIA

I

INTRODUCTION

The common theory in regard to easements in gross is that they are mere personal interests in the land of another; that they are personal to the grantee because not appurtenant to other premises; and that because of their personal character are not assignable or inheritable, *nor can they be made so by any terms of the grant.*[1] The last clause, "nor can they be made so by any terms of the grant" is alleged by Professor Simes[2] to have been a personal contribution of Professor Washburne to the law of easements in gross. The latter assumes, however, to rely on a statement of Sir William Blackstone as his authority.[3] In discussing ways as incorporeal hereditaments, the commentator said: "This may be grounded on a special privilege; as where the owner of land grants to another a liberty of passing over his grounds, to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and if the grantee

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[1]Boatman v. Lasley (leading case) 23 Ohio State 614, (1873); 9 Ruling Case Law 739; 19 Corpus Juris 867; Louisville & N.R.R. Co. v. Koelle, 104 Ill. 455, (1882); Washburne on Easements, 4th ed., 11, 45; Tinicum Fishing Co. v. Carter, 61 Pa. 38, (1869); Lindenmuth v. Safe Harbor W.P. Corp., 309 Pa. 58, (1932); Weekly v. Wildman, 1 Ld. Raym. 405 at p. 407, (1698); 14 L.R.A. 333, (excellent note on assignability of easements in gross); Stockdale v. Yerden, 220 Mich. 444, 448, 190 N.W. 225, 226, (1922) quoting 9 R.C.L. 739. Cf. also Thomas v. Brooks, 188 Ky. 253, 221 S.W. 542, (1920); 30 Yale Law Journal 94; Atlantic Mills v. N.Y.C. Railroad, 221 App. Div. 386, 223 N.Y. Supp. 206 (3rd Dept.), (1927); Waller v. Kildebrecht, 295 Ill. 116, 122, 128 N. E. 807, 809 (1920); Tide Water Pipe Co. v. Bell, 280 Pa. 104, 124 Atl. 351, 40 A.L.R. 1516 (1924); Cadwalader v. Bailey, 17 R. I. 495, 23 Atl. 20, (1891).

[2]Simes, "The Assignability of Easements in Gross in American Law," 22 Mich. L.R. at 536, (1924).

[3]Blackstone's Com., Bk. II, 35.