

nature of the article sold is determined and the place of delivery indicated, with only the time indefinite but fixed within a period certain, the courts have generally held that the buyer's right to order within the interval is an option which, if not exercised, leaves the duty on the seller to perform on the last day of the period to avoid being in default and to hold the buyer on the contract.² Similarly, where the seller has the option to deliver at any time during a period upon giving notice, failure to give notice does not relieve the buyer of the duty of accepting delivery on the last day.³ Where the place of delivery is not stipulated, contracts with this same provision as to time of delivery are construed to require an order and shipping directions as conditions precedent to the seller's duty to deliver, and a failure to order is a breach of contract.⁴

The difference in result seems justifiable. Whereas in the absence of a stipulation as to place, delivery is impossible without further instructions, in contracts like that in the instant case the undertaking by the seller to deliver within the period is unequivocal and dependent on no other factors. It is well established that, absent special circumstances, a stipulated time for performance is of the essence of a contract and the other party's duty is conditioned on performance in or by that time.⁵ It seems reasonable that the rule should apply in construing "on or before" and buyer's option contracts.

S. F. T.

WILLS—FORGERY—ADMISSIBILITY OF TESTATOR'S DECLARATIONS MANIFESTING FRIENDSHIP—[Arkansas].—Proponent offered the testimony of himself and others to show the special regard of testatrix for himself as contrasted with the heirs. He opposed the admission in evidence of declarations of testatrix, outside the *res gestae*, which showed her friendly feeling toward contestants and were offered in corroboration of additional substantial evi-

2. *Bennett v. Igleheart Bros.* (1927) 37 Ga. App. 200, 139 S. E. 431; *Phelps v. McGee* (1856) 18 Ill. 155; *North v. Kizer* (1874) 72 Ill. 172; *A. B. Hemenover v. Buckles* (1922) 225 Ill. App. 392; *Wilmering v. McGaughey* (1870) 30 Ia. 205, 6 Am. Rep. 673; *Chandler v. Robertson* (1840) 39 Ky. 291; *Sousely v. Burn's Adm'r* (1873) 73 Ky. 87; *British Aluminum Company, Ltd. v. Trefts* (1914) 163 App. Div. 184, 148 N. Y. S. 144; *Rogers-Pyatt Shellac Co. v. Starr Piano Co.* (1925) 212 App. Div. 792, 209 N. Y. S. 727; *Cleveland & Co. v. Sterrett* (1871) 70 Pa. 204; *Conawingo Petroleum Refining Co. v. Cunningham* (1874) 75 Pa. 138. *Contra: Posey v. Scales* (1876) 55 Ind. 282.

3. *Horticultural Development Co. v. Loxley Farms Co.* (1925) 214 Ala. 109, 106 So. 686; *Duncan v. Allen* (1926) 204 Ala. 551, 108 So. 357; *Kirkpatrick v. Alexander* (1877) 60 Ind. 95; *Rickey v. Shinkle* (1887) 36 Kan. 516, 13 Pac. 795; *Crown Embroidery Works v. Gordon* (1920) 190 App. Div. 472, 180 N. Y. S. 158; *Livesley v. Strauss* (1922) 104 Ore. 356, 206 Pac. 850; *Brunswig Grain Co. v. Anchor Grain Co.* (C. C. A. 5, 1926) 10 F (2d) 304.

4. *Big Muddy Coal & Iron Co. v. St. Louis-Carterville Coal Co.* (1913) 176 Mo. App. 407, 158 S. W. 420; *Colvin v. Weedman* (1869) 50 Ill. 311; *Weill v. American Metal Co.* (1899) 182 Ill. 128, 54 N. E. 1050; *Percy Kent Co. v. Silberstein* (1926) 214 N. Y. 440, 150 N. E. 509.

5. *Sabin Robbins Paper Co. v. Cal Hirsch & Sons Mercantile Co.* (Mo. App. 1924) 263 S. W. 479; *Lokey v. Rudy-Patrick Seed Co.* (Mo. App. 1926) 285 S. W. 1028; *Williston, Sales* (2d. ed. 1924) 1132, sec. 453a.

dence to prove a forgery of the will. *Held*, that such evidence was properly admitted.¹

Contrary to the practice in England,² most American jurisdictions exclude the declarations of a testator, apart from the *res gestae*, where the forgery of the will is in issue.³ The courts taking this view stress the receptivity of such unsworn declarations to fabrication and fraud.⁴ The utterances are considered substantive facts extraneous to the will proper, hence incompetent unless a part of the *res gestae*.⁵ The minority of states seem to have allowed a limitation to this rule, admitting the declarations when they do not constitute the sole evidence of forgery but are offered in corroboration of direct evidence.⁶ Texas⁷ and Ohio⁸ have changed over to the majority view. On the other hand the exception propounded in the minority jurisdiction has meanwhile won more following and is gradually supplanting the former view.⁹

1. *Holloway v. Parker* (Ark. 1938) 122 S. W. (2d) 563. See 1 *Jarman, Wills* (7th ed. 1930) 417.

2. *Doe d. Ellis v. Hardy* (Assizes 1836) 1 Moo. & R. 525, 174 Eng. Rep. 181.

3. *Throckmorton v. Holt* (1900) 180 U. S. 552; *Leslie v. McMurtry* (1895) 60 Ark. 301, 30 S. W. 33; *Robinson v. Brewster* (1892) 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Walton v. Kendrick* (1894) 122 Mo. 504, 27 S. W. 872; *Miller v. Miller* (1909) 96 Miss. 526, 51 So. 210; *Farleigh v. Kelley* (1903) 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; *Chaney v. Coulter* (1918) 29 Ohio C. A. 177, 45 Ohio C. C. 481; *Swope v. Donnelly* (1899) 190 Pa. 417, 42 Atl. 882; 70 Am. St. Rep. 673; *Ricketts v. Ricketts* (1924) 151 Tenn. 525, 267 S. W. 597; *Maris v. Adams* (Tex. Civ. App. 1914) 166 S. W. 475.

4. *Leslie v. McMurtry* (1895) 60 Ark. 301, 30 S. W. 33; *In re Gregory* (1901) 133 Cal. 131, 65 Pac. 315; *Robinson v. Brewster* (1892) 140 Ill. 649, 30 N. E. 683, 33 Am. St. Rep. 265; *Mooney v. Olsen* (1879) 22 Kan. 69; *Morvant's Succession* (1893) 45 La. Ann. 207, 2 So. 349; *Miller v. Miller* (1909) 96 Miss. 526, 51 So. 210; *Walton v. Kendrick* (1894) 122 Mo. 504, 27 S. W. 872; *Farleigh v. Kelley* (1903) 28 Mont. 421, 72 Pac. 756, 63 L. R. A. 319; *Boylan v. Meeker* (1860) 28 N. J. L. 274; *Johnson v. Hicks* (N. Y. 1869) 1 Lans. 150; *Chaney v. Coulter* (1918) 29 Ohio C. A. 177, 45 Ohio C. C. 481; *Swope v. Donnelly* (1899) 190 Pa. 417, 42 Atl. 882, 70 Am. St. Rep. 637; *Ricketts v. Ricketts* (1924) 151 Tenn. 525, 267 S. W. 597; *Kennedy v. Upshaw* (1885) 64 Tex. 411; *Maris v. Adams* (Tex. Civ. App. 1914) 166 S. W. 622.

5. *Ibid.*

6. *Venable v. Venable* (1910) 165 Ala. 621, 51 So. 833; *Hannah v. Peake* (Ky. 1819) 2 A. K. Marsh 133; *Hoppe v. Byers* (1883) 60 Md. 381, *Corbett v. State* (1890) 3 Ohio C. D. 79, 5 Ohio C. C. 155; *Johnson v. Brown* (1879) 51 Tex. 65. The fact that such declarations can be manufactured is said to go to their weight, not their admissibility. *Rea v. Pursley* (1930) 170 Ga. 788; 154 S. E. 325; *Atherton v. Gaslin* (1922) 194 Ky. 460, 239 S. W. 771; *In re Creger's Estate* (1929) 135 Okla. 77, 274 Pac. 30.

7. *Kennedy v. Upshaw* (1885) 64 Tex. 411; *Maris v. Adams* (Tex. Civ. App. 1914) 166 S. W. 475.

8. *Chaney v. Coulter* (1918) 29 Ohio C. A. 177, 45 Ohio C. C. 481.

9. *Gilliland v. Dobbs* (Ala. 1937) 154 So. 784; *In re Thompson's Estate* (1927) 200 Cal. 410, 253 Pac. 697; *Rea v. Pursley* (1930) 170 Ga. 788, 154 S. E. 325; *Baird v. Shaffer* (1917) 101 Kan. 585, 168 Pac. 836; *In re Bailey* (1920) 180 N. C. 30, 103 S. E. 896; *State v. Ready* (1909) 78

It may be that the instant decision extends no further than to the situation where evidence objected to is produced in response to a dispute raised by proponents, thus making out a case of invited error. This solution appears to have been the basis of decision elsewhere.¹⁰ It is submitted, however, that the Arkansas court accepts the above-held limitation to the majority rule recognized more generally by other recent decisions.¹¹ The contest is thus given complete perspective with a continuing safeguard against fraud afforded by the power of rejecting declarations when offered as the sole proof.¹²

In Missouri an early tenuous holding¹³ excluded declarations of a testator where forgery was in issue on the basis of earlier dicta¹⁴ set forth in discussing admissibility to show mental capacity. No subsequent case has arisen on this specific subject. It would seem, however, that the question as to the admissibility of testator's declarations where forgery of the will is in issue cannot be resolved by analogies drawn from cases involving fraud, undue influence, or mental capacity.¹⁵ In such cases distinctions may be drawn between declarations prior to the date of execution and declarations subsequent thereto; but the date of execution is itself in issue where the will is contested on the ground of forgery. Since the minority view applies only to cases involving a claim of forgery, a strong argument may be advanced against the soundness of interpreting the Missouri decision as an adoption of the majority rule. To construe the decision as admitting of the minority limitation would place Missouri in accord with recent decisions refusing to crystallize the special situation as to forgeries into a rule admitting no exception.

W. N.

N. J. L. 601, 75 Atl. 564, 28 L. R. A. (N. S.) 240; *People v. Storr* (1912) 207 N. Y. 147, 100 N. E. 730, 45 L. R. A. (N. S.) 860; *In re Creger's Estate* (1929) 135 Okla. 77, 274 Pac. 30; *Maxwell v. Ford* (1927) 103 W. Va. 124, 136 S. E. 777. The acceptance of this limitation does not, of course, involve complete rejection of the general rule.

10. *Venable v. Venable* (1910) 165 Ala. 621, 51 So. 833; *Gilliland v. Dobbs* (Ala. 1937) 154 So. 784; *In re Bailey* (1920) 180 N. C. 30, 103 S. E. 896.

11. *In re Thompson's Estate* (1927) 200 Cal. 410, 253 Pac. 697; *Rea v. Pursley* (1930) 170 Ga. 788, 154 S. E. 325; *Baird v. Shaffer* (1917) 101 Kan. 585, 168 Pac. 836; *Atherton v. Gaslin* (1922) 194 Ky. 460, 239 S. W. 771 (the leading case); *In re Creger's Estate* (1929) 135 Okla. 77, 274 Pac. 30; *Maxwell v. Ford* (1927) 103 W. Va. 124, 136 S. E. 777.

12. *Venable v. Venable* (1910) 165 Ala. 621, 51 So. 833; *In re Thompson's Estate* (1927) 200 Cal. 410, 253 Pac. 697; *Rea v. Pursley* (1930) 170 Ga. 788, 154 S. E. 325; *Baird v. Shaffer* (1917) 101 Kan. 585, 168 Pac. 836; *Hannah v. Peake* (Ky. 1819) 2 A. K. Marsh 133; *Hoppe v. Byers* (1883) 60 Md. 381; *State v. Ready* (1909) 178 N. J. L. 601, 75 Atl. 564, 28 L. R. A. (N. S.) 240; *In re Creger's Estate* (1929) 135 Okla. 77, 274 Pac. 30; *Maxwell v. Ford* (1927) 103 W. Va. 124, 136 S. E. 777.

13. *Walton v. Kendrick* (1894) 122 Mo. 504, 27 S. W. 872.

14. *Gibson v. Gibson* (1857) 24 Mo. 227, 228, 234.

15. *In re Creger's Estate* (1929) 135 Okla. 77, 274 Pac. 30.