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Contributors to the March Issue/Notes

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NOTES

NEGLIGENCE—IMPUTED—"JOINT ENTERPRISE"—In a recent decision, the Supreme Court of Kansas has apparently disregarded its own precedent in holding that an automobile owner accompanying a driver is chargeable with the driver's negligence if both are riding for mutual pleasure and are engaged in a joint enterprise, without considering the element of *fault* as essential to liability.

The question of *liability* of the associates in the so-called "joint enterprise" is involved in the recent case of *Quinlan v. Zielinski.*[1] The plaintiff was injured in a collision between an automobile in which he was riding and an automobile owned by the defendant Joseph Zielinski, and operated by the defendant Helen Oertel. In his petition, the plaintiff set forth these facts and alleged that the two defendants

1 294 Pac. 677 (Kan. 1931).

"were engaged in a joint enterprise, that is, they were riding for the mutual pleasure of both." The trial court overruled a demurrer to the petition. On appeal, the Supreme Court of Kansas affirmed the order overruling the demurrer. In a special concurring opinion, Harvey, J., said "that before the plaintiff can recover (if a trial took place) from the appellant the evidence must be such as to show, or at least to enable the jury reasonably to infer, that the appellant (Zielinski) was in joint control with the driver of the car in the operation of the car at the time of the casualty."

The question of imputed negligence in the so-called "joint enterprise" doctrine may arise in any one of three distinct ways: (1) The passenger-associate may bring an action against the driver-associate; (2) The passenger-associate may bring an action against a third person whose contributory negligence concurred with that of the driver-associate to produce the injury; and (3) A third person may have been injured by the negligence of the driver and may bring an action against both the driver and his associate on the theory that they were engaged in a "joint enterprise," as was done in the principal case. In the first situation the weight of authority and the better view is that summed up by Main, J., in the case of *O'Brien v. Woldson*,[2] as follows: "When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would be to admit one guilty of negligence to take refuge behind his own wrong." [3] In the second situation the better view seems to be that the passenger-associate will be barred from a recovery because of the imputed contributory negligence of his driver-associate if the former had a power of control over the latter.[4]

The court in the instant case discussed the question of *liability* of the passenger-associate. The inference is that if the right of control exists there is *liability* on the part of the passenger-associate. This is a recognition of liability without fault. If a right of control exists, it would seem to be more desirable to hold that there is no liability unless there has been a failure to exercise reasonable diligence to control the driver-associate's conduct so as to prevent him from doing acts dangerous to himself and to the plaintiff.[5]

The petition alleged that the defendant Zielinski owned the automobile. This is universally conceded to give the right of control where the question is one of disability to recover on the part of the owner-

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2 270 Pac. 304 (Wash. 1928).

3 See Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence*, 6 NOTRE DAME L. 216, 217, 218, 219 (1931).

4 See Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence*, 6 NOTRE DAME L. 172 (1931).

5 See Bohlen, *Some Recent Decisions on Tort Liability*, 4 TULANE L. R. 378 (1930).

associate of a car that is operated by another associate. Furthermore, the driver was a lady who was accompanied by a gentleman escort. So there is ample evidence of the existence of the right of control, if this fact is to be regarded as material.

The decision is not in accord with the better view, *viz.*, that fault is essential to liability. The Supreme Court of Kansas has recognized that fault is essential to liability in the case of *Missouri, K. & T. Ry. Co. v. Davidson.*[6]

In view of the facts presented in the instant case and of the law involved in the question under comment, as presented by Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence,*[7] it appears that the principal case is one in which a consideration of the element of fault is certainly essential in determining the liability of the associates in the "joint enterprise."

J. P. Guadnola.

PAROL AGREEMENTS TO LEAVE PROPERTY.—By reason of the Statute of Frauds, equity will not decree specific performance of a mere voluntary agreement of parol gift of land. Shortly after its enactment, however, the chancellors, being the "keepers of the king's conscience," saw that a strict enforcement of this statute would often work gross injustice and hardships, and that the statute, instead of fulfilling its end would itself become an instrument of fraud. To guard against such a situation the equity courts worked out the doctrine of part performance. The older cases held that mere possession was sufficient to take the agreement out of the statute. The trend of the later decisions, however, is to the effect that possession must be coupled with the making of permanent and valuable improvements.

In this country the courts have been swayed for the most part by the idea that it would be a shock to the conscience to allow one to throw up his oral agreement and plead the Statute of Frauds, when the other in reliance upon it, has performed certain acts. The statute would thus be aiding and abetting fraud which it was its purpose and design to prevent. Under the fraud theory, pure and simple, possession alone would not necessarily be a sufficient act of part performance to take an oral contract out of the statute, since the party to whom possession has been delivered might be put back where he was before the contract, and no real loss be suffered by him as a result of the trans-

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[6] 14 Kan. 349 (1875). *Cf.* remarks of Mason, J., in Johnston v. Marriage, 86 Pac. 461 (1906): "If the act is purely accidental, no recovery can be had upon any ground."

[7] *Supra* note 4.

action.[1] "Nothing is considered a part performance which does not put the party in a situation which is a fraud upon him, unless the agreement is fully performed." [2]

A leading case on this subject is the New Jersey decision of *Young v. Young*.[3] There a father verbally agreed with his son that if the son would live upon a designated farm which belonged to the father, and cultivate and improve it at his own expense, that he would give the farm to the son, when he (the father) should be done with it. In reliance on this agreement, the son entered into possession, and repaired, cultivated and improved it for 20 years till he died. Thereafter his wife and heir at law continued the performance of the contract until the father died. By his will the father left the property to another son. The court held that the contract was a valid one because the performance by and in behalf of the son was enforceable in equity, even though the agreement was oral.

The evidence in the case shows that the son made many improvements on the farm, among which were the planting of an apple orchard, and the building of a new kitchen, smoke-house and cistern, and a large barn on which the words "Jacob Young" (the complainant's husband) were painted. Equity will decree specific performance of a parol contract where one party has so altered his position that he cannot be adequately compensated in money, and where a recovery of damages would not restore him to his *status quo*. In the words of McGill, Ch., in the case of *Young v. Young*, "The foundation of the doctrine upon which this jurisdiction rests is the prevention of a fraud upon him who performs. Whenever this doctrine has been applied, the elements of constructive fraud will be found to exist. When they are absent, equity will not interfere." *Wallace v. Brown;* [5] *Brewer v. Wilson;* [6] *Eyre v. Eyre.*[7] In such a case the defendants act as trustees of the property for the complainants. *Dozier v. Matson.*[8] The underlying principle always is that when one of the parties in relying on the parol agreement so alters his position, that a refusal on the part of the other party would inflict "an unjust and unconscientious injury and loss" upon him, the other party will be estopped, by force of his acts, to set up the statute. *Brown v. Hoag;* [9] *Kinyon v. Young.*[10] Equity

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1 See note, 3 L. R. A. (N. S.) 790, supplemented by note, 8 L. R. A. (N. S.) 870.

2 2 STORY, EQUITY JURIS. (10th ed.) 761.

3 16 Atl. 921 (N. J. 1889).

4 *Supra* note 3, at 925.

5 10 N. J. Eq. 308 (1855).

6 17 N. J. Eq. 180 (1869).

7 19 N. J. Eq. 102 (1868).

8 7 S. W. 268 (Mo. 1888).

9 29 N. W. 135 (Mich. 1886).

10 6 N. W. 835 (Mich. 1880).

will never permit the Statute of Frauds to be made an instrument of deception and fraud. *Signaigo v. Signaigo.*[11]

Parol agreements to leave property to an infant, though void under the statute, have been upheld in equity. In a leading case from Nebraska, *Kofka v. Rosicky,*[12] a girl about seventeen months old was given by her parents to her uncle and aunt under an agreement that they should adopt her, and rear, nurture and educate her, that she was to be as their own child, and at their death was to receive all their property. She lived with them until they died, and took their name, not even knowing her true father and mother, but recognizing and calling her uncle and aunt as father and mother. The uncle and aunt died possessed of real estate in the city of Omaha, the title to which they did not, either by deed or will, transfer to the child. *Held,* that there was such a part performance of the contract by the parties thereto as entitled her to a decree giving her title to the property by way of specific performance. The child was never legally adopted. Later Nebraska decisions supporting this rule are: *O'Connor v. Waters;*[13] *Moline v. Carlson;*[14] *Lacy v. Zeigler.*[15] To quote the court in *Tuttle v. Winchell*: [16]

"The parent's sacrifice in giving up the child to those who promise to adopt it, and the subsequent society, companionship and filial obedience of the child, constitute the consideration for the parol contract of adoption."

It is always a matter of discretion in the court whether it will grant relief under the circumstances of the particular case. In reaching its decision in *Kofka v. Rosicky,*[17] the court cited *Van Dyne v. Vreeland.*[18] There Vreeland and his wife adopted a boy who was given up to them and was put under their complete management and control. Upon their death he was to have their property. Nothing was said whether he was to acquire it by deed or will. The property was never conveyed. *Held,* there was such a performance on both the complainant's and defendant's side as to take the case out of the operation of the statute. To quote the court:

"There has been such a substantial performance on both sides as puts the complainant in a situation which is a fraud upon him unless the agreement is now fully performed."

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11 205 S. W. 23 (Mo. 1918).
12 59 N. W. 788, 25 L. R. A. 207, 43 A. S. R. 685 (Neb. 1894).
13 129 N. W. 261 (Neb. 1911).
14 138 N. W. 721 (Neb. 1912).
15 152 N. W. 792 (Neb. 1915).
16 178 N. W. 755 (Neb. 1920).
17 *Supra* note 12.
18 11 N. J. Eq. 370 (1857), rehearing 12 N. J. Eq. 142 (1858).

In *Sutton v. Hayden,*[19] a Mrs. Green made an agreement whereby she took her brother's infant, with the understanding that she was to give it all the property she owned upon her death. The child lived with her as a daughter, and took care of her for the rest of her life. She did all in her power to fulfill the terms of the agreement, but Mrs Green never conveyed the property to the child. The court states:

"There are things which money cannot buy; a thousand nameless and delicate services and attentions, incapable of being subject of explicit contract, which money with all its peculiar potency is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction by decreeing the specific performance of that contract."

In the Iowa case of *Franklin v. Tuckerman* [20] one woman verbally agreed to convey her property to another in return for services in the way of caring for and supporting her. The promisor was old and in delicate health. The complainant cared for and nursed her for four years until she died, but the deceased failed to make a conveyance of the property to the complainant. *Held,* proof of such service is proof of part performance, and is sufficient to take the contract out of the statute. "It can in no way be presumed," said the court, "that she continued to wear out her life for nearly four years in hard service merely for the benefit of one whom she owed no duty." It was evident that the complainant accepted the offer and stood by her contract. Since the services were of a peculiar character it is obvious that the parties never intended to measure them by any money standard. Besides the complainant could not be restored to her former situation, or be compensated by any recovery of money damages. Cases in point are: *Bolman v. Overall;* [21] *Mayo v. Mayo;* [22] *Olsen v. Hoag;*[23] *Brinton v. Van Cott;*[24] *Stellmacher v. Bruder.*[25] But the evidence to support the oral contract must be clear, convincing and satisfactory. *McInnerny v. Graham.*[26] The late Illinois decision of *Mould v. Rohm,*[27] holds that the complainant must not only establish the full execution of the contract on her part, but must also

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19 62 Mo. 101 (1876).
20 27 N. W. 759 (1886).
21 2 So. 624 (Ala. 1887).
22 135 N. E. 395 (Ill. 1922).
23 221 Pac. 984 (Wash. 1924).
24 33 Pac. 218 (Utah 1893).
25 95 N. W. 324 (Minn. 1903).
26 174 N. W. 395 (Iowa 1919).
27 113 N. E. 991 (Ill. 1916).

show that the agreement was full, complete, certain and fair in all its provisions. The enforcement of an agreement to devise property must not be inequitable. *James v. Lane.*[28]

Specific performance of a parol contract was not granted in the Federal case of *Jaffee v. Jacobson.*[29] There the complainant's uncle, a lawyer of considerable means living in Denver, Colorado, married and childless, offered to adopt two children of his deceased sister, who were living with their father in Prussia. The uncle asked that they come to this country and live with him, and that he have full dominion and control over them as if in fact he were their father. In consideration he promised to bequeath them one-half of his estate upon his death. The father consented, but before the children emigrated for America the uncle died, and the widow refused to recognize their interest in the estate. It was held that no case for specific performance was stated, as it was apparent that the main consideration for the uncle's agreement—the society and companionship of the children—the benefits and pleasures which he expected would result from the new relation—had failed. Since he died before either of the children became members of his family, the chief consideration for the agreement was never received, and therefore specific performance was denied. In an Oregon case, *Woods v. Dunn,*[30] the promisor was 67 years old, uncouth in person and habits, requiring special attention, food, and ever-increasing care, and tired of living with his relatives, died within four or five months after he made the oral agreement. It was held that this did not make the consideration so inadequate as to make the specific performance of the contract unjust or unreasonable. Specific performance will likewise be granted where a nephew lived with his uncle and aunt until he reached majority. *Bateman v. Franklin.*[31]

Walter R. Bernard.

SURETYSHIP—CONTRIBUTION AS AFFECTED BY INSOLVENCY OF ONE OR MORE CO-SURETIES.—The question of what sureties should be considered in an action for contribution was raised in the recent Missouri case of *Phelps v. Scott.*[1] While the reasoning of the court is not clear, it seems to indicate that only the co-sureties who were solvent at the time the suit for contribution was brought need be considered in determining the amount that could be recovered by the paying surety. The

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28 175 Pac. 387 (Kan. 1918).
29 48 Fed. 21 (1891).
30 159 Pac. 1158 (Ore. 1916).
31 217 Pac. 318 (Kan. 1923).
1 30 S. W. (2d) 71. (1930).

court stated in its opinion that, "Where one of several sureties equally bound has paid the whole debt, he should have the right to recover from solvent co-sureties a pro rata amount of the sum paid, based upon the number of solvent sureties and excluding the insolvent ones. . . . And it seems that in an action for contribution the insolvent sureties need not be made parties to the proceedings."

Although contribution originated in equity, and was at first enforced only in courts of equity, the right to such became so well established that common law courts assumed jurisdiction to enforce jurisdiction between the co-sureties. The theory behind such enforcement is that of an implied promise by each co-surety to reimburse each of the others for any payment in excess of his proportion of the debt. In a number of jurisdictions statutes were adopted providing for contribution and giving a cause of action therefore at law. However, the development of a legal remedy did not affect the jurisdiction belonging originally to the courts of equity.[2] This is true regardless of the adequacy of the remedy at law, so, therefore, there is frequently a remedy either at law or in equity. But where the law is manifestly insufficient the only adequate remedy may be in equity.

Both at law and equity it is generally held that a surety is not entitled to contribution from his co-sureties and that a cause of action does not accrue until the surety has paid, satisfied, or discharged the entire debt or more than his proportionate share thereof. This is limited only by the right of a surety to exoneration in equity before payment.[3]

Notwithstanding the general rule, in some states it has been held that a surety before he has paid the debt may file a bill in equity to compel his co-sureties to contribute with him to pay it. This is what is known as exoneration in equity. In an Oregon case, *Davis v. Albany First National Bank*,[4] the court held that, "In equity and good conscience plaintiffs have a right to demand that the other co-obligors be required to contribute their share in the liquidation of the loan even before plaintiffs pay the debt on the property of the plaintiffs is sacrifice therefor. At law the surety must pay the debt before she can have an action, but not so in equity." [5] This brings up the question of what is the contributive share that each co-surety is bound to pay.

This in turn raises the question as to what is a contributive share in an action at law. The general rule is that an action at law by a

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2 Wayland v. Tucker, 4 Gratt. 267, 50 A. D. 76 (Va. 1848).

3 Stallworth v. Preslar, 34 Ala. 505 (1859); Nally v. Long, 56 Md. 567 (1881).

4 80 Ore. 474 (1917).

5 McBride v. Potter Lovell Co., 169 Mass. 7 (1897); Vian v. Hilberg, 111 Neb. 232 (1923).

surety for contribution lies only against co-sureties severally for the *aliquot* part due from each. Lord Eldon, in *Cowell v. Edwards*,[6] stated this rule as follows:

"At law the amount of the contribution that a surety was required to make was determined by the number of sureties. It made no difference that some of the sureties had been insolvent or were beyond the courts jurisdiction." [7]

The courts of most states hold in conformity with this rule. The only exceptions are in those jurisdictions in which there is no distinction between law and equity, notably among those are New Hampshire [8] and Indiana, [9] and those where the general rule has been limited by statute. An illustration of where such a statute has been applied can be found in *Higdon v. Bell*.[10] In that case the court held that "at common law contribution could be enforced only for the *aliquot* share of each, reckoned as if all were solvent and such rule is still in force except as modified by civil code 1910, paragraph 3564, providing that 'if one of the co-sureties be insolvent the deficiency of his share must be borne equally by the solvent sureties within the jurisdiction called upon to enforce contribution'." Besides Georgia, Alabama and Missouri also have statutes applying the equity rule in actions at law.

This leads one to wonder what the rule in equity actually is. In equity a surety to a note must contribute to a co-surety, who has paid the debt, so much thereof as shall make each equal in the loss, counting only those sureties who are solvent. Thus, if there are five co-sureties on a joint obligation and two are insolvent and one co-surety pays, he can recover one-third from each of the other co-sureties, one over the total number of available sureties.[11]

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6 2 B. & P. 268 (1800).

7 Adams v. Hays, 120 N. C. 383 (1897); Cowell v. Edwards, 2 B. & P. 268 (1800); Durfee v. Kelly, 149 La. 445 (1917); Samuel v. Zackery, 26 N. C. 377 (1844); Stothoff v. Dunham's Exrs., 19 N. J. Law 181 (1842); Jones v. Blanton, 41 N. C. 115 (1849); Aiken v. Peays Exrs., S. C. 5 Strod. 15 (1850); Moore v. Brumer, 31 Ill. App. 400 (1889); Wetmore & Morse Granite Co. v. Ryle, 93 Vt. 245 (1919); Harrison v. Kirk's Adms., 8 Ky. Law Rep. 779 (1887); Johnson v. Tenn. Oil Dev. Co., 75 N. J. Eq. 314 (1909).

8 Henderson v. McDuffee, 5 N. H. 3, 20 Am. Dec. 557 (1829); Fletcher v. Grover, 11 N. H. 368, 35 Am. Dec. 497 (1840).

9 First National Bank v. Mayer, 189 Ind. 299 (1920); Michael v. Allbright, 126 Ind. 172 (1890); Windly Exrs. v. Williams, 18 Ind. App. 158 (1897).

10 25 Ga. App. 54 (1920).

11 Comstock v. Potter, 191 Mich. 629 (1916); Cobb v. Haynes, 47 Ky. 137 (1847); Stewart v. Goulden, 52 Mich. 143 (1883); Dodd v. Winn, 27 Mo. 501 (1858); Currier v. Baker, 51 N. H. 613 (1872); McKenna v. George, 2 Rich. Eq. 15 (N. C. 1845); Riley v. Rhea, 73 Tenn. 115 (1880); Gross v. Davis, 87 Tenn. 726 (1889).