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Recent Decisions

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RECENT DECISIONS

CONTRACTS—INFANTS—ESTOPPEL BY FRAUDULENT REPRESENTATIONS.—In *Sternlieb v. Normandie National Securities Corporation*, 188 N. E. 726, we have a decision of the Court of Appeals of New York, rendered January 9, 1934, in which the court discusses the *pros* and *cons* as to the advisability of permitting infants to disaffirm their contracts, whether they be made for necessities or not. Here one Irving Sternlieb, an infant is attempting to recover from the defendant corporation, the purchase price of five shares of stock, purchased by the infant plaintiff on September 21, 1929, paying \$990 for the aforesaid stock. The stock depreciated in value until it became practically worthless and on September 14, 1932, the plaintiff notified the defendant that he had rescinded his contract and demanded a return of the purchase price paid, stating that he was ready and willing to tender back the worthless stock. The defendant, in its answer, as a defense, set up the fraudulent representations of the infant that at the time of the purchase he was over 21 years of age and that the defendant, relying on these statements, parted with the stock. The plaintiff moved to strike out this defense, which motion was denied by the Municipal Court. This decision was reversed by the Appellate Division. The Court of Appeals affirmed the decision of the Appellate Division, holding that this defense was insufficient in law.

The common law rule of New York and the majority of other states is that an infant has not the capacity to bind himself absolutely by his contracts since any contract made by him during his infancy may be avoided. See *International Text-Book Co. v. Connelly*, 206 N. Y. 188, 99 N. E. 722 (1912); *Beardsley v. Hotchkiss*, 96 N. Y. 201 (1884). But the general rule is that he is liable for necessities purchased. See *Smoot v. Ryan*, 65 So. 828 (Ala. 1914); *Midland Valley R. Co. v. Johnson*, 215 S. W. 665 (Ark. 1919); *Stanhope v. Shambow*, 170 Pac. 752 (Mont. 1918). Law as to the validity of infants' contracts can be found as far back as the year 1200, in which the court permits an infant to disaffirm his contract upon reaching the age of 21. See Y. B. 20 and 21 Edw. I, p. 318; and by the fifteenth century it was generally well settled that an infant's bargain was void at his election and also that he was liable for necessities. See Y. B. 18 Edw. IV, p. 17, and 10 Hen. VI, pl. 46.

For centuries the age of 21 has been fixed by the law at which both man and woman has been regarded as being of full capacity, and generally no distinction has been drawn between a minor of tender years, and one having nearly attained his majority. But see *Hakes Inv. Co. v. Lyons*, 166 Cal. 557, 137 Pac. 911 (1913), and *Casement v. Callaghan*, 35 N. D. 27, 159 N. W. 77 (1916), which, by statute, held that a minor above the age of 18 cannot disaffirm a contract without restoring the consideration. By statutes, in many states, a woman becomes of age at 18: Colorado, Dakota, Idaho, Illinois, Iowa, Kansas, Maryland, Minnesota, Missouri, Nebraska, Nevada, Ohio, Oregon, Vermont, and Washington. In a few states marriage by either man or woman under the age of 21 gives them full contractual capacity: Iowa, Louisiana, and Washington. See *Ex parte Hollopete*, 52 Wash. 41, 100 Pac. 159, 21 L. R. A. 847, 132 Am. St. Rep. 592 (1909).

All these early cases show that both the common law and statute favored the infant in his contractual capacity and guarded him against the fraud and deceit of his fellow adults. Now, what we really want to determine is just how far these laws favoring the infant, have gone. It is conceivable that if the law will go to the extreme in protecting the infant in his contracts that such a law will be taken advantage of by more mature infants and as a result innocent persons will suffer thereby.

When an infant who has nearly reached the age of maturity, induces another, by fraudulent representations, to enter into a contract with him, the infant should

be made to incur some risk so as to discourage future attempts by infants to avoid their contracts at the expense of another. It is a general rule that the infant's right to plead the defense of infancy is not lost to him by estoppel based on his false assertions as to his age. See *Wieland v. Kobick*, 110 Ill. 16, 51 Am. Rep. 676 (1884); *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464 (1899); *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678 (1878). But see *Ingram v. Ison*, 26 Ky. L. Rep. 48, 80 S. W. 787 (1904), holding "that one who, at the time of the execution of a deed was lacking not more than a month of 21 years of age, and represented that he was over 21 and bore that appearance, being a married man, the father of two children, and wearing a full beard, was estopped to maintain a suit in equity to set the deed aside on the ground of his infancy at the time of execution." Also, it was held in *Ostrandër v. Quin*, 84 Miss. 230, 105 Am. St. Rep. 426, 36 So. 256 (1904), "that wilful misrepresentation of a mature woman over 18 years of age, that she was 21 at time she borrowed money on a mortgage was a bar to a suit in equity by her to avoid the mortgage on the ground of her minority at the time of execution."

Most of the jurisdictions require that the infant, before he can disaffirm his contract by the defense of infancy, must first tender back that consideration which he has received, if any remains in his possession. See *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732 (1855); *American Freehold Land Mtg. Co. v. Dykes*, 111 Ala. 178, 18 So. 292, 56 Am. St. Rep. 38 (1895). But see *Carr v. Clough*, 26 N. H. 280, 59 Am. Dec. 345 (1853), which laid down the doctrine "that the infant shall not be permitted to rescind his contract, and recover the articles parted with by him, *without first restoring* the property or consideration received therefor." See also *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; 55 Tex. 281 (1879). (This and other Texas cases to the same effect have been overruled by *Bollock v. Sprowls*, 93 Tex. 188, 54 S. W. 661, 77 Am. St. Rep. 849, 47 L. R. A. 326 (1889)).

The contracts of an infant relating to personal property can be avoided upon his reaching majority, or during his minority. See *Bell v. Burkhalter*, 176 Ala. 62, 57 So. 460 (1912); *Wuller v. Chuse Groc. Co.*, 241 Ill. 398, 89 N. E. 796, 132 Am. St. Rep. 216, 28 L. R. A. (N. S.) 128 (1909). It is well settled, and the decisions are numerous, that an infant's conveyance of realty can be avoided only after he has attained his majority. We cite only a few of the numerous decisions: *Zouch v. Parsons*, 3 Burr. 1794 (1603); *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418 (1882); *Harrod v. Myers*, 21 Ark. 592, 76 Am. Dec. 409 (1860); *Hastings v. Dollarhide*, 24 Cal. 195 (1864). These rules have been held to apply generally to all contracts whether executory or executed, although some statutes regulate the time within which an infant's contract can be disaffirmed. See *Luce v. Jestroob*, 12 N. D. 548, 97 N. W. 848 (1903), where by statute the contract of a minor cannot be disaffirmed after the expiration of one year from his majority. In some jurisdictions the contract may be repudiated after the infant becomes of age, within the Statute of Limitations. *Wright v. Buchanan*, 287 Ill. 468, 123 N. E. 53 (1919). While in other jurisdictions it is held that the right to avoid the contract is not lost by mere inertness or silence continued for a period less than the Statute of Limitations. *Putnam v. Walker*, 61 Fla. 720, 55 So. 844, 36 L. R. A. (N. S.) 33 (1911).

As we survey these well established principles of both the common law, and where re-enacted by statute, it can be clearly seen that the law protects the infant very well. But what about innocent persons who deal with these infants? Are they the ones who are to be made to suffer injustices as perpetrated by those infants whose maturity has far exceeded their age? At this point we have extremely desirable cases which present the equitable side of the issue.

In *Fitts v. Hall*, 9 N. H. 441 (1838), the court allowed the maintenance of an action for the fraudulent misrepresentations that the defendant was of age

saying: "This fraudulent representation was intended to induce, and did induce the plaintiff to make a contract for the sale of the hats, but by no means makes it part and parcel of the contract. It was antecedent to the contract and if an infant is liable for a positive wrong connected with a contract, but arising after the contract is made, he may well be answerable for one committed before the contract was entered into, although it might have led to the contract." The reason given was: "If in procuring it, he may well, at law, be answerable for the previous deceit through which it was procured, if he has thereby obtained the property of another and refuses performance on his part." (Recovery must be for the actual loss, and not according to the terms of the contract.)

In the second case, *Commander v. Brazil*, 88 Miss. 668 (1906), where a minor succeeded in getting an adult to purchase land from him on the fraudulent misrepresentation that he was able to convey without the right to disaffirm, the court said: "Minority is given for the protection of a person under age, but it cannot be used as a weapon with which to commit a fraud. When a minor has reached the stage of maturity in years and physical appearance calculated to deceive a person of ordinary prudence and the minor does deceive such person as to his age and asserts that he is of full age, and induces a contract to be made with him, and accepts the benefits of his contract he will not be heard at any future time to deny that he was of full age at the time the contract was executed." Here we find in this case that the law puts much stress on the mature physical appearance of the infant, and justly so. When the person so appears as he did in this case, why should he be protected, at the expense of the other? I can immediately see where objection would arise by those who contend that the law would be forced to set some age at which an infant's contracts are voidable. Clearly so, but why not allow equity jurisdiction to step in, and decide these cases at their own discretion and thereby aid innocent parties and deter the mature infant who makes contracts which he does not intend to keep?

In the third case we have *Rice v. Boyer*, 108 Ind. 472 (1886), where an infant disaffirms a contract for the purchase of chattels (not necessities), and where the adult seller then brought an action *ex delicto*, the court stated: "Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by the fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached and one which *strictly harmonizes* with the great doctrine that the infant is liable for his torts." Going further, the court says: "We are unwilling to sanction any rule which will enable an infant who has obtained the property of another by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or *selling it to another* and when asked to pay its just and reasonable value successfully pleads his infancy." Mr. Pomeroy pushes this doctrine farther by saying: "If an infant procures an agreement to be made through false and fraudulent representations that he is of age, a court of equity will enforce his liability as though he were an adult and may cancel a conveyance or executed contract obtained by fraud." 2 *Pomeroy's Equity Jurisprudence* (4th ed.) § 945.

As shown by these three aforesaid cases, we have a tendency to get away from the majority holding at law, and shift the cases into equity. To hold, as these cases do, would not be to deprive the infant of that protection which the law sedulously seeks to afford them in their dealings but would put them on an equal

level with the adult and prevent the more mature from making unfair agreements. For a recent decision which is contra, see *Summit Auto Co. v. Jenkins*, 153 N. E. 153 (Ohio 1925), where the court held that a minor was not estopped from setting up the defense of infancy in avoidance of his contract (he had fraudulently misrepresented his age), but could recover the amount paid by him without diminution for use of the automobile or for damages for depreciation.

The principal cases which hold that there is an estoppel are: *Damron v. Commonwealth*, 110 Ky. 268 (1901), and *Sackett v. Asher*, 22 L. R. A. (N. S.) 453 (Ky. 1909).

As we have seen from the above stated authorities, the decisions are numerable, and the rule very general, that an infant may avoid his contracts. But what about these contracts being contrary to public policy? Like so many questions of public policy there is much to be said on both sides and the necessities of one period of time are not always those of another. The law, from time out of mind, has recognized that infants must be protected from their own folly and improvidence. It is not always flattering to our young men in college and in business, between the ages of 18 and 21, to refer to them as infants, and yet this is exactly what the law considers them in their capacities and abilities to protect themselves in ordinary transactions and business relationships. That many young people under 21 years of age are improvident and reckless is quite evident, but these defects in judgment are by no means confined to the young. There is another side to the question. As long as young men and women, under 21 years of age having the semblance and appearance of adults, are forced to make a living and enter into business transactions, how are persons dealing with them to be protected if the infant's word cannot be taken or recognized at law? Are business men to deal with young people at their peril?

Some states have met the situation by legislation. In Iowa a statute has been enacted which states that "A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided." Code of Iowa (1927) § 10493.

"No contract can be thus disaffirmed in cases where, on account of the minors own misrepresentations as to the majority or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting." Code of Iowa (1927) § 10494.

Also, a Georgia statute provides: "An infant who, by permission of his parent or guardian, or by permission of the law, practices any profession or trade, or engages in any business as an adult, he shall be bound for all contracts connected with such profession, trade or business." Ga. Civ. Code (1910) § 4235. This statute is discussed in *Pearson v. White & Cochran*, 13 Ga. App. 117, 78 S. E. 864 (1913); *Ullmer v. Fitzgerald*, 106 Ga. 815, 32 S. E. 869 (1899). See also Kan. Rev. St. (1923) § 38-103; Comp. Laws of Utah (1917) § 3957; Rem. Comp. Stat. of Wash. (1922) § 5830.

These statutes and other recent decisions have thus indicated the changing attitude of the public and legislative bodies of the various states toward this question. It would be well if the other states would follow the example of the states above mentioned.

As Justice Putman says, "We must remember that the privilege of infancy is a shield, not a sword, and upon the rescinding of the contract by the infant the parties should be restored to their original rights." *Carr v. Clough*, 26 N. H. 250, 59 Am. Dec. 345 (1853).

William F. Donahue.

CONTRACTS—QUANTUM MERUIT UNDER SPECIAL CONTRACTS.—In the recent case of *Nesbitt v. Miller*, 188 N. E. 702 (Ind. 1934), the very interesting question again arises as to the recovery for part performance of a personal contract which had been terminated by death. One B. F. Nesbitt had contemplated growing a peach orchard on his farm. Consequently he entered into a written contract whereby he procured the services of W. A. Miller. W. A. Miller was to supervise the growing of the orchard, and the marketing of the crop. Miller was to be compensated for his services by receiving one-half the proceeds from the sale of any one crop which he had the right to select. He was to continue his supervising until the crop of which he was to receive one-half of the proceeds had been sold. From January 11, 1917, the date of the execution of the contract, until February 12, 1921, when Miller's death terminated the contract, the deceased had rendered services to Nesbitt, the defendant, to the best of his ability in pursuance of the performance of his part of the contract but had received no compensation, the deceased not having selected the crop from the proceeds of which he was to be paid. Emily I. Miller, executrix, of the deceased promisor, W. A. Miller, brought this action in quasi contract to recover from Nesbitt the value of the services rendered by deceased under the express contract. The management of the case seems to indicate that neither the plaintiff's nor the defendant's attorneys thoroughly understood the theory of the case. First, the defendant's attorney, laboring under the false interpretation of the theory of the plaintiff's case, contended that the plaintiff was seeking to recover upon the contract made between the decedent and the defendant; that the said contract was one of a strictly personal nature involving particular skill and ability; that it was an entire and indivisible contract and no right of recovery existed when there was only a partial performance, even though death, or some other cause beyond the control of the promisor, and not due to his fault, prevented a complete performance on his part. This contention had been the grounds of the defendant's demurrer. But his demurrer had been properly overruled because a sufficient cause of action had been alleged and the recovery was not sought on the express contract but in a quasi contract for the value of services rendered to the defendant. The plaintiff in turn seems to have wandered from her original theory by her evidence on the question of the quantum of recovery. Instead of proving the value of the services rendered, evidence was introduced to prove the value of the 1920 peach crop, thus, signifying that the plaintiff thought her quantum of recovery would be the consideration promised by the defendant in the express contract. The lower court rendered judgment in favor of the plaintiff. From this judgment the defendant appealed. The Appellate Court of Indiana reversed the judgment of the lower court, ordering a new trial, *holding* that the plaintiff should not be allowed to recover one-half the proceeds of the sale of the peach crop of 1920 which she would have been entitled to had the contract been completed; since she was suing on quasi contract and judgment in the lower court was rendered upon this action, she should only recover upon proving the value of services rendered by the deceased to the defendant; and that the plaintiff should recover on the theory of her complaint which was quasi contract or not at all.

Before proceeding further with this discussion let it be emphatically stated that any recovery that may be obtained in the principal case will be obtained, not on the express contract, but in quasi contract. *Tandy's Assignee v. Hatcher*, 9 Ky. Law Rep. 150 (1887); *Coe v. Smith*, 4 Ind. 72 (1853); *Chamness v. Cox*, 2 Ind. App. 485, 28 N. E. 777 (1891); *Lee v. Ashbrook*, 14 Mo. 378, 55 Am. Dec. 110 (1851); *Cann v. Rector, Wardens of the Church of the Redeemer*, 66 Mo. App. 500, 85 S. W. 994 (1905); *Parker v. Macumber*, 17 R. I. 674, 16 L. R. A. 858 (1892); *Williams v. Butler*, 105 N. E. 387 (Ind. 1914).

"A quasi contract is one where liability exists from implication of law arising from facts and circumstances, independent of agreement or presumed inten-

tion based on the doctrine of unjust enrichment; the agreement being one defining the duty of the defendant rather than his intention." 4 Words & Phrases 81; *Board v. Highway Com., Bloomington Twp. v. City of Bloomington*, 253 Ill. 164, 97 N. E. 280, Ann. Cas. 1913A, 471 (1911).

The early common law rule, which is contra to the doctrine adopted in the principal case, is that a contract to do a certain thing or to work a certain term for a certain sum is an entire contract, and unless the thing is completed or the full term served, no recovery can be had for part performance. This principle is adopted in the early English case of *Cutter v. Powell*, 6 T. R. 325, 2 Smith's Leading Cases 18 (1795), where a sailor, hired for a voyage, had taken a promissory note from his employer for a certain sum provided he proceed, continue and do his duty on board for the voyage; before the arrival of the ship he died. Held, no wages could be claimed on the contract or on a quantum meruit. This principle had also been followed in: *Givham v. Dailey*, 4 Ala. 336, 21 L. R. A. (N. S.) 923 (1842), *Ellis v. Hamlen*, 3 Taunt. 52 (1810); *Sinclair v. Bowles*, B. & C. 92, 4 M. & R. 1 (1829).

The rigor of this common law rule has been much relaxed in different states of the union, though in many it is still strictly enforced. The tendency, however, is observable in recent adjudications to administer an equitable relief to the parties rather than to hold them to the very letter of their engagements. So it was decided in the case of *Haynes v. Baptist Church*, 88 Mo. 285, 57 Am. Rep. 413 (1885), where A. agreed to make and put in place certain church fixtures, and was to be paid on the completion and acceptance of the work, but before the completion and acceptance the church burned down, that A. could recover for as much as he had done up to the time of the fire. Also, see *Wilson v. Wagar*, 26 Mich. 464 (1873). In these two cases we notice the trend away from the harsh and unjust common law rule followed by the leading case of *Cutter v. Powell*, *supra*, and other English and American cases cited *supra*.

The cases under recovery upon quantum meruit can be classified into two groups: (1) Recovery in quantum meruit where the breach of the contract has been innocent and without the fault of either party; and (2) Recovery in quantum meruit where the breach of the contract has been wilful.

Thus, we find modern American decisions tending toward a more lenient doctrine, as in the case *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57 (1876). It was said: "And where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it." *Accord: Wolfe v. Howes*, 20 N. Y. 197, 75 Am. Dec. 388 (1859); *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 531 (1856); *Fuller v. Brown*, 11 Met. (Mass.) 440 (1846); *Knight v. Bean*, 22 Me. 531 (1843); *Lakeman v. Pollard*, 43 Me. 463, 69 Am. Dec. 77 (1834); *Green v. Gilbert*, 21 Wis. 401 (1867). So that sickness or death is generally regarded as an act of God in such a sense that it excuses the performance and a recovery is allowed upon a quantum meruit.

In *Coe v. Smith*, 4 Ind. 79, 28 Am. Dec. 618 (1853), it was decided that the administrator of deceased attorney who in his lifetime agreed to defend a certain suit for \$500, but who died before completing said defense, may recover for as much as such services are worth. The action here was upon the quasi contract. Also, see *Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85 (1854); *Parker v. Macumber*, 17 R. I. 674, 16 L. R. A. 858, 24 Atl. 464 (1892), holding that party prevented from fully performing contract by an act of God entitled to recover on implied assumpsit for services rendered. The courts all recognize the injustice of imposing upon a man, in addition to the calamities of nature, the added misfortunes of a deprivation of the fruits of his toil. Instances where the rule is invoked when sickness is the cause of abandonment are found *supra*.

Under our second class of cases, wherein there has been a wilful breach and abandonment of the contract, we find a diversity of opinion. The better view is to "Let the defaulter suffer."

It is generally held in a great number of our courts that where a person is employed for a term under an entire contract and abandons and refuses to complete it without legal cause, he can recover nothing for what he has done. This principle is substantiated by innumerable courts and is the prevailing rule. *Lantry v. Panks*, 8 Cow. 63 (1827); *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442 (1858); *Olmstead v. Beale*, 19 Pick. 528 (1837); *Thayer v. Wadsworth*, 19 Pick. (Mass.) 349 (1837); *Davis v. Maxwell*, 12 Met. (Mass.) 286 (1847); *Stark v. Parker*, 2 Pick. (Mass.) 267 (1824); *Henson v. Hampton*, 32 Mo. 408 (1862); *Kelly & Bragg v. Town of Bratford*, 33 Vt. 35 (1860); *Patnote v. Sanders*, 41 Vt. 66 (1868).

It was held in *Riddell v. Peck-Williamson Heating & Ventilating Co.*, 69 Pac. 241 (Mont. 1902), that where the plaintiff agreed with the defendants, for a certain sum, to install a heating plant in a building, and the plaintiff abandoned the work without cause after a part of the plant had been put in, there being no severance of the contract nor apportionment of the consideration, he could not recover on a quantum meruit for the value of the work done and materials furnished. Also, see *Jennings v. Lyons*, 39 Wis. 553, 20 Am. Rep. 57 (1876), where the plaintiff agreed that he and his wife would work for the defendant for a year, for a gross sum, and four months afterwards the wife, being about to give birth to a child, left, and the plaintiff was thereupon discharged, that, in an action to recover wages on the quantum meruit, the plaintiff should have foreseen and provided for his wife's sickness when he made the contract, and that, therefore, his non-performance was not excused and he could not recover. And in *Smith v. Brady*, 17 N. Y. 173 (1858), it was held the retention of the benefit received, is not a waiver of the failure by the other party to perform, for the very reason that it was a benefit that could not be returned and the keeping of it would raise no presumption that payment would be made therefor.

But, however, the courts, in their endeavor to discover a rule which would be applicable to all cases which would do justice to both parties, have made even a wider departure and hold that although the person contracting to perform an entire service wilfully abandons it, he may still recover upon a quantum meruit, less damages not exceeding the amount of the service which the other has suffered in consequence. *Britton v. Turner*, 6 N. H. 481, 26 Am. Dec. 713 (1834); *Lee v. Ashbrook*, 14 Mo. 378, 55 Am. Dec. 110 (1851); *Purcell v. MaComber*, 11 Neb. 209, 7 N. W. 529 (1880); *Duncan v. Baker*, 21 Kan. 99 (1878).

In one of the leading and celebrated cases on this point, *Britton v. Turner*, *supra*, the plaintiff agreed to work for the defendant for the term of one year. The defendant agreed to pay \$125 for the year's labor. The plaintiff worked for nine months and then left the defendant's service without his consent. For the value of the services for the period while in the defendant's employ, the plaintiff brought assumpsit for work and labor done. Held, that the laborer, though voluntarily leaving before his term expired, could recover on quantum meruit. This decision although adopted in a few states is not followed in the majority of them. Likewise, under the principle adopted in *Ryan v. Dayton*, 25 Conn. 188, 65 Am. Dec. 560 (1856), an employee may recover the reasonable value of services rendered where he agrees to labor for a certain time, and for a specific sum, to be paid at the expiration of that time, where he is dismissed by the employer because of absence occasioned by sickness. The measure of recovery is the benefit received. This will be determined by the jury, with consideration given to such circumstances as the manner of the breach of the contract, whether with or without cause. *Coe v. Smith*, *supra*.

The party contracting for the services may reduce the recovery by showing the loss that he has incurred on account of the failure fully to perform. *Greene v. Linton*, 7 Pert. (Ala.) 133, 31 Am. Dec. 707 (1838); *Coe v. Smith*, *supra*.

But although the measure of recovery is the benefit received, it is proper to offer proof of the actual worth of the services as prima facie the benefit to the party receiving the services would be measured by their worth. *Coe v. Smith*, *supra*.

In Williston on Contracts, § 468 (1), (3), the following principles are stated: "Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by contract and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of part performance rendered, unless it can be and is returned to him in specie within reasonable time.

"The value of performance is the benefits derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price.

"Since there is no fault on either side, the loss due to impossibility or frustration must lie where it falls. Neither party can be compelled to pay for the others disappointed expectations. But on the other hand, neither can be allowed to profit by the situation. He must pay for what he has received. The amount he must pay is gauged by the extent that what he has received forwards the object of the contract.

"If the contract was an unwise one from the standpoint of one who has received performance, that does not limit his duty to pay. If on the other hand, the contract was a disadvantageous one from the standpoint of the one rendering the performance, he cannot recover for what he has done on a more profitable basis than the contract affords."

So in conclusion, to adopt the rule laid down in *Cutter v. Powell*, *supra*, which held that the party shall be held to a literal compliance with his special contract before he can recover anything for labor is too harsh and often, would be unjust. On the other hand, to follow the rule stated in the case of *Britton v. Turner*, *supra*, that a party may voluntarily abandon his special contract and lose nothing thereby, would have a tendency to encourage bad faith and lessen the sacredness of solemn obligations which it is the duty of the court to uphold and enforce so far as the same can be done without doing manifest injustice.

From consideration of the above cases we obtain the doctrine that seems to be recognized:

Where under a special contract a party has in good faith bestowed some labor or parted with some articles to the benefit of another, who has as a matter of fact enjoyed the benefit of the labor or the articles, whether voluntarily or involuntarily, and where the incomplete performance has not been the result of the party's own provoking or of causes which he might with ordinary diligence have provided against, the one receiving such benefit must pay therefor. *William v. Butler*, 58 Ind. App. 47, 105 N. E. 387 (1914); *Ball v. Dolan*, 21 S. D. 619, 114 N. W. 998 (1908); *Stolle v. Stuart*, 21 S. D. 643, 114 N. W. 1007 (1908); *Wuchter v. Fitzgerald*, 83 Or. 672, 163 Pac. 819 (1917); *Feldschau v. Clatsop County*, 105 Or. 237, 208 Pac. 764 (1922); *Schwasnik v. Blandin*, 65 Fed. (2d) 354 (1933).

Frank G. Matavovsky.

CRIMINAL LAW—EVIDENCE—HUSBAND AND WIFE.—Defendant was indicted for conspiracy to violate the prohibition laws. He was tried twice and upon both trials his wife was excluded as a witness on his behalf upon the grounds of incompetency. The Circuit Court of Appeals sustained this holding. *Held*, reversing the decision of the Court of Appeals, that the wife of one on trial in a Federal court for a criminal offense is not incompetent as a witness on his behalf. *Funk v. United States*, 78 L. Ed. 231 (1933).

This decision expressly overrules *Hendrix v. United States*, 219 U. S. 79, 55 L. Ed. 102, 31 S. Ct. 193 (1910), and *Jim Fuey Moy v. United States*, 254 U. S. 189, 65 L. Ed. 214, 41 S. Ct. 98 (1920), which formulated the opposite doctrine. The point of evidence settled by this case is not to be confused with the privilege given a husband and wife at common law not to testify against each other. The instant case deals not with a privilege but with a positive rule of law and thus the question of waiver is not involved. *Wigmore on Evidence* § 604, p. 1037.

The common law is not inflexible and immutable but on the contrary is capable of growth and change to meet varying conditions. *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 111 (1883); *Rosen v. United States*, 245 U. S. 467, 62 L. Ed. 406, 38 S. Ct. 148 (1917); *Benson v. United States*, 146 U. S. 325, 36 L. Ed. 991 (1892). Since the reasons for the existence of the rule at common law are set out in Professor Connor's article on this subject, published elsewhere in this issue of the *Lawyer*, it is unnecessary to repeat them here. It is sufficient to say these reasons have been generally discredited and that legislation in most of the states and in England has removed the disability entirely. *Wigmore on Evidence* §§ 488, 602. The present decision is, therefore, in harmony with the maxim, "Cessante ratione legis, cessat ipsa lex," and with the modern tendency to include rather than exclude testimony despite the interest of the witness. It results in the removal from federal jurisprudence of another of those anachronisms of the law which impede the administration of justice.

Thos. L. McKevitt.

EVIDENCE—PRESUMPTION OF ISSUE—WHERE REBUTTABLE.—In the case of *United States v. Provident Trust Co.*, 54 S. Ct. 389 (1934), it was *held* that evidence was admissible to show that because of an operation a woman could not be presumed to be able to bear a child. This would seem to be contra to the views in the great majority of cases. In this case the woman involved was a beneficiary of a will which provided that in the event of her death without issue the residue of the estate would go to certain charities. But under the *Internal Revenue Act* of 1918, § 403 (a) (3), 40 Stat. 1057, 1098, if the value of the remainder devise can be determined at the time of the testator's death it can be deducted from the estate tax. The charities maintained that because of an operation, which had taken place before the testator's death, the presumption of the beneficiary's having issue is rebutted. This granted, the amount of the devise to the charities could have been estimated at the time of the testator's death by deducting the beneficiary's life estate from the gross estate. However, the government argued that this presumption could not be rebutted. The operation concerned a removal of the beneficiary's uterus, Fallopian tubes and both ovaries, absolutely precluding any chance of pregnancy. This would be the strongest possible evidence against the presumption. But the government relies on the view of Lord Coke (2 Blackstone Commentaries 125) that the presumption was irrebuttable even though both husband and wife be an hundred years old.

The consensus of opinion seems to be that the English courts have relaxed the rigidity of this view, while the American courts continue along the strict line of

interpretation. See note 67 A. L. R. 538, 539, where it is said: "In theory the fundamental difference between the American and English cases is the tendency of the American with a few exceptions to treat the presumption of possibility of issue as absolute, while the English courts have refused to apply a hard and fast presumption to the question whether the possibility of issue is ever extinct, but consider it from a practical point of view, and, the common experience of mankind in the light of circumstances of each particular case."

First, to consider the English view. In *Leng v. Hodges*, Jacob, 585, 37 Eng. Rep. 971 (1822), the presumption was overruled on the basis of age, the woman being sixty-nine years of age. The same liberality was taken with the presumption in *Miles v. Knight*, 12 Jur. 656 (1848). The English view has even gone so far as to hold that women of fifty-six and fifty-one years old (albeit both were spinsters) were incapable of issue. *Lyddon v. Ellison*, 19 Beav. 565, 52 Eng. Rep. 470 (1854); *Carr v. Carr*, 106 L. T. N. S. 733 (1912). There were some views to the contrary, however, in *Groves v. Groves*, 9 L. T. N. S. 533 (1864). A woman forty-nine years of age who had not borne a child for twenty years was held still capable of producing issue in the eyes of the law. But the most striking case against the irrebuttability of the presumption was *Re Summers*, 30 L. T. N. S. 377 (1874). Here the woman was forty-seven years old and had borne six children. She had not been pregnant for seventeen years, and on the basis of medical testimony she was held incapable of further issue.

In America the courts adopt a different view. The presumption is, in the majority of cases, considered irrebuttable during the life of a woman. In *Flora v. Anderson*, 67 Fed. 182 (1895), the testator devised the estate to his daughter and her issue. But at the time of the making of the will the daughter was fifty years of age; and when a man attempted to claim as her illegitimate son after her death it was held that "it was conclusively presumed to be possible to have issue at any time during her life, and it was not competent to prove that she was past the age of childbearing when the will was made." Accord: *Sims v. Birden*, 197 Ala. 690, 73 So. 379 (1916); *Reasoner v. Herman*, 191 Ind. 642, 134 N. E. 276 (1922); *Futrell v. Futrell*, 224 Ky. 814, 7 S. W. (2d) 232 (1928); *State v. Lash*, 16 N. J. L. 380, 32 Am. Dec. 397 (1838); *White v. Allen*, 76 Conn. 185, 56 Atl. 519 (1903); *Shuford v. Brady*, 169 N. C. 224, 85 S. E. 303 (1915).

However, in *Mgle v. Williams*, 48 N. J. Eq. 33, 21 Atl. 854 (1891), evidence was allowed to show that a woman had undergone her change of life twenty years before and was incapable of producing. The court said that the presumption that she was past the age of childbearing might have arisen from her age alone. Likewise in *Hill v. Spencer*, 196 Ill. 65, 63 N. E. 614 (1902), where the court said: "The allegation that Martha Hill is past the time of life to bear children is meaningless as she is presumed in law to be capable of bearing children as long as she lives unless more than matter of age is stated in the bill." Another bit of enlightenment is to be seen in *Ansonia Nat. Bank v. Kunkel*, 105 Conn. 744, 136 Atl. 588 (1927), where it was held that "the established legal presumption that a woman of any age may give birth to a child, like other legal presumptions, has definitely limited uses"; and held that the supposition was not reasonable that the testator thought a woman sixty-one years of age, childless and married forty years, might still give birth to a child.

The court in the last case deserves an accolade of praise. It is not the usual thing for the British courts to lead the American judiciary in laxity of interpretation, but in overruling an absurd presumption such as that stated by Lord Coke, and followed in America, the English bench deserves commendation. It is to be hoped that the American courts will follow suit and break their strict adherence to this presumption.

Joseph Kirincich.

TORTS—INDEMNITY AMONG TORT-FEASORS—RELEASE.—In an action to recover damages for a personal injury sustained by the plaintiff as the result of the alleged malpractice in medical treatment administered to the plaintiff by the defendant, it appeared that the plaintiff had sustained an injury to an ankle in a fall on a defective sidewalk maintained by one *B.*, against whom she had made a claim for the damages which she had sustained by reason of his negligence in maintaining the sidewalk; that the defendant had administered medical treatment for the injured ankle until the plaintiff was discharged as cured on September 4, 1928; that on April 26, 1929, she settled her claim against *B.* for \$700, and, in consideration of this payment, she executed a release, which discharged *B.* from all liability for harm done or to arise from the injury; and that subsequently she returned to the defendant for further treatment, receiving injuries as a result of the defendant's negligence in administering a diathermic heat treatment for which she brought the present action. The trial court ruled that the release operated as a release of this claim against the defendant. Upon appeal, this judgment was reversed. *Noll v. Nugent*, 252 N. W. 574 (Wis. 1934).

The mistakes of a competent physician or surgeon are among the consequences that may reasonably be expected to result under ordinary circumstances from the personal injury caused by *B.*'s negligence in the principal case. *Smith v. Kansas City Rys. Co.*, 208 Mo. App. 139, 232 S. W. 261 (1921). But where the negligence of the surgeon or physician is highly unexpected, as where he mistakes the one injured by defendant for another patient, the defendant is not liable for the harm due to this negligence. *Purchase v. Seelye*, 231 Mass. 434, 121 N. E. 413, 8 A. L. R. 503 (1918). Where the negligence of two or more persons combines to produce an injury, the general rule is that such persons are jointly and severally liable, whether they are acting together, or there is a common design, or their acts of negligence are separate and independent. *Clinger v. Chesapeake & O. R. Co.*, 128 Ky. 736, 109 S. W. 315, 15 L. R. A. (NS) 998 (1908); *Cleveland, etc. Ry. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258 (1908); "Negligence," 45 C. J. 896, 897. While several persons may be guilty of several distinct negligent acts, yet, if their concurrent effect is to produce an actionable injury, they are all liable therefor, and the liability is joint and several. *Clinger v. Chesapeake & O. R. Co.*, *supra*.

On the other hand, there may be cases where the injured person is entitled to maintain an action against two or more persons as if they were joint wrongdoers, without their being, as among themselves, joint wrongdoers. Thus, if *A.*'s servant, *B.*, negligently injures *C.*, while *B.* is engaged in performing *A.*'s work, *A.* and *B.* are each liable to *C.*; as between themselves, *B.* is the wrongdoer and *A.* is subjected to liability merely by the doctrine of *respondent superior*; so that if *C.* sues *A.* alone and recovers damages for the injury, *A.*, in turn, may compel *B.* to indemnify him for the loss. See *Clyatt v. Taylor*, 71 S. E. 1076, 1078 (Ga. 1911).

In *Hooyman v. Reeve*, 168 Wis. 420, 170 N. W. 282 (1919), which was an action for malpractice, the effect of a release given by the injured party to his employer came up on a demurrer to an answer. It was recited in the answer that the injured party had executed a release in which he acknowledged "full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained" by him while in the employment of his master, the Appleton Coated Paper Company. The court said: "The malpractice, if any, contributed to produce the injury settled for and satisfied by the master; hence such cause of action against the defendant was compensated for and extinguished by the settlement made. Clearly the settlement covered all damages sustained, including injury caused by the alleged malpractice. The damages sustained by the acts of the