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Restitution -- 1962 Tennessee Survey

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I. INTRODUCTION

For the prevention of unjust enrichment of a defendant the courts make available a number of restitutionary remedies to a plaintiff. These remedies developed separately, and they differ somewhat in their characteristics, but during recent years writers have seen that there is a single principle underlying them all, whether they are administered at law or in equity.

At law the principal remedy is quasi contract, sometimes called a contract implied in law.[1] The court of appeals draws a distinction between such an obligation and a contract implied in fact in the case of *Mefford v. City of Dupontonia*.[2] The latter, it is indicated, is a true contract and subject to the protection of the Tennessee Code section affording treble damages for procurement of breach of contract;[3] but the former "is not within the protection of [the section] since it is not really a contract at all, but simply an obligation to pay for services imposed by law, without consent, and enforced by action ex contractu."[4] The "implied contract to pay a reasonable [attorney's] fee," held to exist in *Interstate Life & Accident Insurance Co. v. RKO Teleradio Pictures, Inc.*[5] was clearly a contract implied in fact rather than a quasi contract.

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1. The classic exposition is Lord Mansfield's opinion in the famous case of Moses v. Macferlan, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). See also RESTATEMENT, RESTITUTION 4-10 (1937).
2. 354 S.W.2d 823 (Tenn. App. M.S. 1961).
3. TENN. CODE ANN. § 47-1706 (1956).
4. 354 S.W.2d at 826, citing Weatherly v. American Agricultural Chem. Co., 16 Tenn. App. 613, 623, 65 S.W.2d 592, 598 (M.S. 1933).
5. 201 F. Supp. 574 (W.D. Tenn. 1962).

II. RESCISSION

In four cases which were brought by complainants to rescind or cancel a contract the court recognized the availability of the equitable remedy. In each case, however, the facts were held not to warrant the remedy. In *Schlickling v. Georgia Conference Ass'n Seventh-Day Adventists*,[6] cancellation of a conveyance was sought on the ground of mental incompetency and undue influence. The court analyzed the evidence through some thirty-two pages and concluded that the chancellor below was in error in letting the case go to the jury and that he should have held for the defendant as a matter of law.

In *Pipkin v. Lentz*,[7] a grantor sought to rescind conveyances on the ground of fraud and inadequacy of consideration. Affirming the court below, the court of appeals held that the charge of fraud was not proved and that "mere inadequacy of consideration is not a ground for rescission." "If this young man did, in fact, make a bad bargain, he has no one to blame but himself . . . . [I]t was the complainant who initiated these deals and . . . he was well aware of what he was doing . . . . The courts should not assume a paternalistic role when the rights of persons who are *sui juris* are involved."[8] An additional reason for the decision lay in the delay in seeking relief.

Wimberley v. Wimberley[9] involved a support contract. Aged parents had conveyed a farm to complainants, reserving a life estate. Complainants later conveyed to defendants (a nephew of complainant and his wife) with provision that the mother should always have a home on the farm. Defendants later moved from the farm to town and offered to take the mother with them, but she refused to go. It was held that there was not a breach of a support contract which the complainants could enforce, though the mother's right to relief was not affected by the ruling. A rescission of a deed is seldom granted for breach of contract unless it is a support contract. Here the court felt that the complainants had themselves violated the spirit of the contract and relief to them gave no assurance of relief to the parent.

Lindsey-Davis Co. v. Siskin[10] involved a bill to rescind an assignment of a judgment. The court held that a demurrer was properly sustained to the bill on the ground that it failed to allege a tender of the consideration received, and "a contract will not be rescinded if the

6. 355 S.W.2d 469 (Tenn. App. W.S. 1961).

7. 354 S.W.2d 87 (Tenn. App. M.S. 1961). This case is also discussed in Smedley, *Equity—1962 Tennessee Survey*, 16 VAND. L. REV. 761, 764-66 (1963).

8. 354 S.W.2d at 92. The sentence order has been altered for sake of clarity.

9. 360 S.W.2d 779 (Tenn. App. W.S. 1960).

10. 358 S.W.2d 331 (Tenn. 1962). This case is also discussed in Smedley, *Equity —1962 Tennessee Survey*, 16 VAND. L. REV. 761, 771-72 (1963).

parties cannot be placed in status quo."[11] The basis on which the rescission is sought is not clear from the opinion.

III. Illegal Contracts

In *Conner v. Holbert*,[12] plaintiff purchased certain property, having it conveyed to his wife. His effort here to establish a resulting trust in his favor was repelled on the ground that he had placed the property in his wife's name for the purpose of defrauding creditors and was therefore coming into equity with unclean hands. It is customary in cases involving illegal contracts to refuse to grant any restitutionary relief on the grounds that the parties are *in pari delicto*. Relief is granted ouly if fraud or duress or some other reason causes the parties not to be regarded as being *in pari delicto* or if some other exception to the maxim is found to apply.[13] Thus, although a usurious contract is illegal, the duress and economic pressure which the creditor exercises over the debtor is held to keep the parties from being *in pari delicto*, and the debtor can recover usurious interest paid.[14] This is expressly recognized in Tennessee by statute.[15] In *Tanner v. Mobley*,[16] the court seems to say that the statutory right is exclusive. It interprets the statute as making the right of recovery a personal one, so that a grantee of a mortgagor is held to have no right to recover usurious payments made on the mortgage.[17]

IV. Payment Under Legal Compulsion

In *Woods Lumber Co. v. MacFarland*[18] plaintiff had paid a corporate excise tax assessed against it and sued for a refund on the ground that its net earnings were not properly apportioned between Tennessee and Arkansas. The action of the chancellor in giving partial relief was affirmed.

When a surety is required to pay the debt of his principal he is entitled to indemnity.[19] This restitutionary principle was applied in

11. 358 S.W.2d at 333.

12. 354 S.W.2d 809 (Tenn. App. E.S. 1961).

13. For general treatment, see Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 U. Pa. L. Rev. 261 (1947).

14. *Id.* at 271.

15. Tenn. Code Ann. § 47-1617 (1956).

16. 209 Tenn. 490, 354 S.W.2d 446 (1962).

17. For other cases during the survey period involving usury, see Rush v. Chattanooga DuPont Employees' Credit Union, 358 S.W.2d 333 (Tenn. 1962), and Adams v. Schwartz, 356 S.W.2d 597 (Tenn. App. W.S. 1960).

18. 209 Tenn. 667, 355 S.W.2d 448 (1962).

19. Restatement, Restitution § 76 (1937).

Kincaid v. Alderson.[20] Alderson and wife mortgaged their mobile home to Commercial Credit Corporation, the installment payments including premiums on an insurance policy on Alderson's life. Alderson contracted to sell the house to Kincaid, contracting to execute title on payment of the amount due on the mortgage. Alderson died and the insurance proceeds paid off the mortgage. The Kincaids then brought an action against Mrs. Alderson to compel execution of a clear title. The court declined to grant the relief. It explained that Kincaid was primarily liable on the mortgage, and when Alderson died and his insurance paid it, this was the same thing as if he had been a surety paying the debt of his principal. "When the debt is thus paid the surety is subrogated to the rights of the creditor . . . . This payment constitutes 'an unjust enrichment of the principal' who must 'reimburse the surety to the extent of the enrichment.' "[21]

A. *Contribution Between Joint Tortfeasors*

The very interesting question as to whether Tennessee recognizes contribution between joint tortfeasors is presented in the case of *Huggins v. Graves v. Adams.*[22] It was brought before the federal court, which was bound by Tennessee law, which it carefully traced and discussed in reaching the conclusion that contribution is allowed within the state.

Early Tennessee cases had followed the English decision of *Merryweather v. Nixan*[23] in denying relief.[24] In *Central Bank & Trust Co. v. Cohn,*[25] however, the supreme court granted contribution between converters of property when the plaintiff was a mere technical converter with no moral guilt. Subsequently, in *Cohen v. Noel,*[26] the court held, in accordance with the general common law rule, that indemnity (not contribution) might be had when the defendant's

20. 209 Tenn. 597, 354 S.W.2d 775 (1962). This case is also discussed in Covington, *Insurance—1962 Tennessee Survey,* 16 VAND. L. REV. 773, 787-89 (1963); Lacey, *Creditor's Rights and Security Transactions—1962 Tennessee Survey,* 16 VAND. L. REV. 706, 709-11 (1963).

21. 354 S.W.2d at 778, citing RESTATEMENT, SECURITY § 104(2), comment *h* (1941). See also RESTATEMENT, RESTITUTION §§ 76, 80 (1937).

22. 210 F. Supp. 98 (E.D. Tenn. 1962). By a mixup in patients, plaintiff, who was scheduled for a hemorrhoidectomy, received instead an orchidectomy. (Look this latter term up if you do not appreciate the enormity of the injury.) Suit was against the surgeon and the hospital, and they brought in the anesthetists under the federal third party practice, seeking indemnity or contribution. Under a jury verdict the court found indemnity inappropriate, but allowed contribution.

23. 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799). This case involved intentional wrongdoers and commentators have interpreted it as limited to that situation, but decisions quickly applied it to negligent tortfeasors.

24. Rhea v. White, 40 Tenn. 121 (1859); Anderson v. Saylors, 40 Tenn. 551 (1859). See also Maxwell, Saulspaw & Co. v. Louisville & N.R.R., 1 Tenn. Ch. 8 (1872).

25. 150 Tenn. 375, 264 S.W. 641 (1924).

26. 165 Tenn. 600, 56 S.W.2d 744 (1933).

negligence was active and the plaintiff's was merely passive.[27] On the basis of these two cases the supreme court held that contribution was allowable between negligent tortfeasors in *Davis v. Broad Street Garage*.[28] This case was widely regarded as laying down a general rule in Tennessee in favor of contribution, although there was some language in the opinion about active and passive negligence which indicated a possible confusion between contribution and indemnity. This conclusion was sustained by the holding in *American Casualty Co..v. Billingsley*,[29] but shortly thereafter the decision in *Vaughn v. Gill*[30] once again raised doubts. Here the supreme court held that contribution would not be allowed because the plaintiff had not lost anything, the judgment having been paid by his insurance company, which was therefore subrogated to his rights, and which was not shown to have been a party to the action. This settled the case, but the opinion continued with dicta suggesting that contribution could not be had unless the injured party had obtained judgments against both of the tortfeasors, so that they were "under a common burden or liability." This viewpoint was sharply criticized,[31] and it may be significant that the supreme court withdrew it from official publication. An extensive dictum in *Stewart v. Craig*[32] indicates that the rule of the *Davis* case is still applicable.[33] Casual and ambiguous remarks in two other cases[34] are apparently not significant.

27. On a later trial, it was found that the negligence of both parties was active, and indemnity was not allowed. Cohen v. Noel, 21 Tenn. App. 51, 104 S.W.2d 1001 (M.S. 1937).

28. 191 Tenn. 320, 232 S.W.2d 355 (1950). The decision is approved in 4 VAND. L. REV. 907 (1951) and 21 TENN. L. REV. 672 (1950).

29. 195 Tenn. 448, 260 S.W.2d 173 (1953).

30. 264 S.W.2d 805 (Tenn. 1953).

31. See Wade, *Restitution—1954 Tennessee Survey*, 7 VAND. L. REV. 941, 948-50 (1954); Sturdivant, *Joint Tortfeasors in Tennessee and the New Third-Party Statute*, 9 VAND. L. REV. 69, 74-76 (1955); LaFerry v. Ajax Truck Rentals, 161 F. Supp. 707, 709 (E.D. Tenn. 1958) (opinion of Darr, J.).

32. 208 Tenn. 212, 344 S.W.2d 761 (1961).

33. In speaking of a case decided in 1916, the court said that the decision in that case "was made necessary by the then accepted rule in this State that there could be no contribution between joint tort-feasors . . . ." It then referred to Davis v. Broad Street Garage, *supra* note 28, saying that it held that contribution is still not possible when the tort-feasors were "guilty of a willful tort, an immoral act, or where consciously violating the law," bnt also "held that where the joint tort-feasor was guilty of mere passive or negative negligence that he may recover a contribution where other joint tort-feasors have contributed more proximate, positive or active negligence to the injury." It adds that the holding "was subsequently approved" by American Cas. Co. v. Billingsley, *supra* note 29, "and has been followed in other unreported cases." 208 Tenn. at 215-16, 344 S.W.2d at 762. There was, significantly, no reference made to Vaughn v. Gill, *supra* note 30, or the limitations which it might possibly impose.

34. In Yellow Cab Co. v. Pewitt, 44 Tenn. App. 572, 581, 316 S.W.2d 17, 21 (M.S. 1958), a casual remark about "the rule of no contribution between" tort-feasors played no part in the decision. It was regarded as not significant in the *Huggins* case.

Carefully reviewing the Tennessee authorities,[35] the court in the *Huggins* case reached the conclusion that *Davis v. Broad Street Garage* currently sets forth the Tennessee law that contribution will be allowed between negligent tortfeasors, and that the limitation suggested by the dictum in *Vaughn v. Gill* "is not binding as the law of Tennessee."[36] Judge Wilson's opinion is a valuable and useful one,[37] and there is every reason to believe that the state supreme court will agree with the conclusion when a proper case arises before it.[38]

In the recent case of O'Rear v. Oman Constr. Co., 362 S.W.2d 217 (Tenn. 1962), the court referred to the case of Stewart v. Craig, *supra* note 32. That case had held that a covenant not to sue when given to an employee had the effect of releasing his employer, whose only liability was vicarious and derivative through the employee. It said of that case that "it is at least a step away from that very unjust enrichment rule of no contribution between joint tort-feasors." And in the succeeding sentence, though in a different paragraph, it said: "Tennessee is the only State in the Union now adhering to the aforesaid rule." *Id.* at 218. There is here very plainly an ellipsis or omission of some words or a sentence. The "aforesaid rule" cannot refer to a rule of no-contribution, not only because it is almost certain that such a rule does not now exist in Tennessee bnt also because even if it did exist Tennessee could not by any possible interpretation be the only state to follow it. Instead, the court must have been referring to the rule of Mink v. Majors, 39 Tenn. App. 50, 279 S.W.2d 714 (W.S. 1953), to the effect that money paid by one joint tortfeasor for a covenant not to sue cannot be credited pro tanto against any recovery from another joint tortfeasor. In the *Stewart* case, the court quoted a previous Survey article (Wade, *Torts--1956 Tennessee Survey*, 9 VAND. L. REV. 1137, 1154 (1956)) that the *Mink* rule "'is apparently unique to the state of Tennessee. Courts everywhere all disagree with it'" and then it proceeded "to the conclusion that insofar as the *Mink* case disagrees with what we have said herein we disapprove its holding." 208 Tenn. at 222, 344 S.W.2d at 762. In any event the question of contribution between joint tortfeasors was not before the court in any fashion in the *O'Rear* case. The remark was *obiter*, made without detailed consideration or review of the authorities, and it surely will not be treated as controlling on the matter.

35. The court cited and relied on the articles cited note 31 *supra*.

36. 210 F. Supp. at 104.

37. The only criticism which can be made of the opinion in the *Huggins* case is of its suggestion twice that in Tennessee an action for contribution must be by bill in equity. 210 F. Supp. at 103, 105. It may be by a bill in equity, and was, perhaps, in a majority of the cases; but it may instead be in quasi contract, and was so in several Tennessee cases. See, *e.g.*, Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933); American Cas. Co. v. Billingsley, 195 Tenn. 448, 260 S.W.2d 173 (1953). Indeed, in LaFerry v. Ajax Truck Rentals, 161 F. Supp. 707, 709 (E.D. Tenn. 1958), Judge Darr suggests that the limitation of common burden involved in the *Vaughn v. Gill* dictum may be limited to an equitable action and not applicable to a law action.

38. Even the earlier cases which had denied restitution had done so on the ground that authority required it and had indicated that the just rule would be otherwise. See, *e.g.*, Anderson v. Saylors, 40 Tenn. 551, 552 (1859) ("whatever may have been . . . the apparent right of the one, on principles of natural justice, to have such contribution"); Maxwell, Saulspaw & Co. v. Louisville & N.R.R., 1 Tenn. Ch. 8, 15 (1872) ("equitable contribution among tort-feasors is not inequitable").

As Justice Burnett said in Davis v. Broad Street Garage, 191 Tenn. 320, 325-26, 232 S.W.2d 355, 357-58 (1950), the allowing of contribution between negligent tortfeasors "may be a further extension of the exceptions to the rule as heretofore applied by the courts of this State. If it is, justice and right demand that this further extension to the exceptions be here applied. 'There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants

Though Tennessee does not now have a third-party practice and it would have been necessary in the state court for the defendants to pay the judgment and then sue for contribution (or indemnity), the court held that under the Federal Rules of Civil Procedure (Rule 14), the third parties might be joined and contribution awarded. This was regarded as a matter of procedure in which the federal rules controlled.[39]

V. Benefits Wrongfully Acquired

In *Conner v. Holbert*,[40] a husband claimed a curtesy right in real property of his wife. He had killed her and had been convicted of voluntary manslaughter, and the question was whether he could acquire the property interest in this unlawful manner. Though a number of courts have held that the killer must be held to be a constructive trustee of the property acquired, Tennessee in several early cases had reached diverse results.[41] The recurrence of the problem resulted in a statute providing that a person killing another would forfeit all interest in the other's property which he would have acquired "by deed, will or otherwise."[42] The statute was held in the *Conner* case

were equally, unintentionally responsible, to be shouldered onto one alone, according to the accident of a successful levy of execution, the plaintiff's whim or malevolence, or his collusion with the other wrongdoer, while the latter goes scot free . . . .'" Existing authority in Tennessee does not now require this unjust result, and it is hard to believe that the Tennessee Supreme Court would now reinstate it. The Restatement of Restitution says that the rule is "explainable only on historical grounds." Restatement, Restitution § 102, comment *a* (1937).

For good general discussions, see Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 Cornell L.Q. 522 (1936), 22 *id.* 569 (1937); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. Pa. L. Rev. 130 (1932).

39. *Accord*, LaFerry v. Ajax Truck Rentals, 161 F. Supp. 707 (E.D. Tenn. 1958); Vaughn v. Terminal Transp. Co., 162 F. Supp. 647 (E.D. Tenn. 1957). Earlier cases had held otherwise, Fontenot v. Roach, 120 F. Supp. 788 (E.D. Tenn. 1954); Trammell v. Appalachian Elec. Cooperative, 135 F. Supp. 512 (E.D. Teun. 1955). See, in accord with the ruling in the instant case, 3 Moore, Federal Practice 430 (1948).

40. 354 S.W.2d 809 (Tenn. App. E.S. 1961). See also note 12 *supra* and accompanying text.

41. In Carter v. Montgomery, 2 Tenn. Ch. 216, 220 (1875), apparently the first case anywhere involving the problem, the court assumed without discussion that the killer would inherit. In Box v. Lanier, 112 Tenn. 393, 79 S.W. 1042 (1904), the court held that a husband killing his wife could not take the wife's choses in action as survivor, since this involved a common law rule to which the court could engraft an exception. In Beddingfield v. Estill & Newman, 118 Tenn. 39, 100 S.W. 108 (1907), decided after the statute was passed, the court agreed with the *Box* rule that a husband could acquire no estate in his wife's property but held that when he already owned the property as a tenant by the entirety, he could not be deprived of his interest in it. This is contrary to the majority rule; for authorities, see 2 Vand. L. Rev. 145 (1948). See generally Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 Harv. L. Rev. 715 (1936); Restatement, Restitution §§ 184-89 (1937).

42. Tenn. Code Ann. § 31-109 (1956) (real property); *id.* § 31-207 (personal property).

to apply to a curtesy interest and to a killing which amounted to a voluntary manslaughter, and thus accomplished directly the same result that the constructive trust would have attained. The *Conner* case also involves another problem of restitution. Defendant had converted certain government bonds belonging to his son and had been held liable for this. He contended that he used them in some degree to discharge federal tax liability which he apparently contended constituted a tax lien on the property of his wife involved in the curtesy claim to the real property discussed above. His argument seems to have been that she was therefore unjustly enriched at his expense, and that his son, who now had inherited the real property, was also enriched so that this was an equitable defense to the claim for conversion of the bonds. The court declared that the pleadings and proof failed to make out any enrichment and found it unnecessary to consider a problem of substantive law.

In *Tennessee Hospital Service Ass'n v. Strang*,[43] a woman who obtained money from plaintiff Hospital Association by filing fraudulent claims was liable for the money received, a decree pro confesso being rendered against her. The major problem in the case was whether doctors who had negligently signed certificates supporting her fraudulent claims would be liable in tort. The court held in the affirmative.

43. 354 S.W.2d 488 (Tenn. App. E.S. 1961).