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Restitution -- 1960 Tennessee Survey

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RESTITUTION — 1960 TENNESSEE SURVEY

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Only two Tennessee restitution decisions were reported in the Southwestern Reporter during the year covered by this survey. One involves a question as to the liability of an intestate's estate for burial expenses which were not ordered by either the administrator or the sole heir and next of kin. The other involves a question concerning indemnity or contribution as between unintentional tortfeasors who were guilty of different degrees of negligence.

I. LIABILITY OF ESTATE FOR BURIAL EXPENSES

A claim for burial expenses always arises after the death of the decedent and usually before discovery of a will or the appointment of a personal representative. Reasonable burial expenses are proper charges against the estate, provided the funeral arrangements are made by an appropriate person, and not by an officious interloper.[1] Public decency and welfare require a reasonably prompt burial of the dead. If an appropriate person made the funeral arrangements, the personal representative is under an enforceable duty to pay the reasonable cost of the funeral, even though he was not the one who made the arrangements and refuses to pay voluntarily. The obligation of the personal representative to pay is quasi-contractual; it is not based upon any promise or assent. There are two exceptions to the general rule that the estate is liable for reasonable funeral expenses: one involves the officious intermeddler rule; the other, the rule that there is no legal obligation to pay for a benefit voluntarily conferred as a gift.[2]

In *Johnson v. Hailey*[3] decedent died intestate in Obion County, leaving as his sole heir and next of kin his son, a member of the Atlanta Bar. At the request of the decedent's brother, a local undertaker provided the casket, the vault and other necessary articles and services for the burial. Decedent's brother sent a telegram to the son, who was then in Michigan, advising him of the time of the funeral. The

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1. RESTATEMENT, RESTITUTION § 115b (1937); WOODWARD, THE LAW OF QUASI CONTRACTS § 205 (1913).
2. Annot., 35 A.L.R.2d 1399 (1954).
3. 325 S.W.2d 255 (Tenn. 1959).

son arrived shortly before the services and made no objections to the funeral arrangements. It was held that the decedent's brother was not an interloper, and that the estate was liable to the undertaker for charges which were reasonable and not out of proportion to the size of the estate, even though the charges exceeded the amount called for by decedent's burial certificate.

This decision is sound. There was no intention on anyone's part to make a gift. Decedent's brother was clearly an appropriate person to take charge of the emergency and to arrange for the funeral, since decendent's son was a non-resident and was in a distant state at the time of the death.

II. CONTRIBUTION—UNINTENTIONAL TORTFEASORS

We turn now to the question of contribution between unintentional tortfeasors. According to the *Restatement*[4] and a majority of the cases,[5] where a tort resulting in an injury to a third party is caused by the negligence of both the plaintiff and defendant, the plaintiff can recover no contribution from defendant, his joint tortfeasor, even though he has had to pay the full amount of the damages to the third party. This majority rule, denying contribution where the entire loss has fallen on one of two tortfeasors both of whom are equally but unintentionally responsible, often produces inequitable results. The courts of Tennessee apparently follow the better but minority view and allow contribution between tortfeasors where both are *equally* responsible for an injury resulting from their concurrent negligent acts.[6]

The recent Tennessee case of *Sherman White & Co. v. Long*[7] involves the issue of contribution or indemnity between unintentional tortfeasors where one is more negligent than the others. In that case, a driver negligently ran his truck into the rear of the last car of a two-mile line of automobiles temporarily blocked on account of a blasting operation by contractors rebuilding the highway. The last car was halted just over a rise in the highway and was not protected by a warning sign or a flagman. The owner and the driver of the truck compromised and paid personal injury claims resulting from the collision, and then sued the highway contractor for indemnity. It was held that neither the driver nor the truck owner could recover anything, as the driver's conduct in failing to maintain proper outlook,

4. RESTATEMENT, RESTITUTION § 102 (1937).
5. PROSSER, TORTS 248, 249 (2d ed. 1955).
6. Davis v. Broad Street Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950), 4 VAND. L. REV. 907 (1951), 21 TENN. L. REV. 672 (1951); *cf.* NOEL, *Torts—1959 Tennessee Survey*, 12 VAND. L. REV. 1367 (1959).
7. 326 S.W.2d 469 (Tenn. 1959).

speed and control constituted "active negligence" precluding any right of restitution, and the conduct of the contractor in failing to warn of the stopped traffic by signs or a flagman was "passive negligence" and was probably only remote negligence not a proximate cause of the accident.

Even in jurisdictions where contribution between negligent tortfeasors is not generally allowed, either contribution or indemnity is often allowed to a tortfeasor guilty of only "passive negligence" against one guilty of "active negligence."[8] It is often difficult to distinguish between "active" and "passive" negligence. The decision in the *Long* case illustrates the difficult and technical character of the distinction. Basically both parties simply failed to realize and guard against a dangerous situation created by a line of cars parked on a road just beyond a rise in the highway. If the Tennessee courts have in fact completely abandoned the unreasonable rule against contribution as between negligent tortfeasors, the *Long* case would seem to be an appropriate one for contribution, though not indemnity, provided the negligence of the contractor was a "proximate" cause, as it appears to the present writer to have been. Usually the active-passive doctrine is significant only as an exception to the no contribution rule. It is interesting to speculate as to what the decision would have been if the contractor had paid the injured party and was seeking indemnity or contribution against the driver and the owner of the truck.

8. PROSSER, TORTS 251 (2d ed. 1955); Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933).