Promise to Pay Debt of Third Party--Sufficiency of Memorandum Under Statute of Frauds (Standard Oil Co. of N.Y. v. Koch, 260 N.Y. 150 (1932))

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the defendant is not the owner of the land on which the infant was
injured, the rule seems to be that he is liable on the theory that the
object was an attractive nuisance, and he was negligent in maintain-
ing it. But, where the injury is not reasonably foreseeable, the de-
fendant, although not the owner, will not be held liable in negli-
gence. Keeping the above rule in mind, where the minor is
rightfully on the land of another whether it be public or private,
defendant not the owner thereof, will be held either in nuisance
or negligence. Also, where the child and defendant are intruders
on the land of another, the courts seem to favor the child. In
the instant case, the jury was justified in finding that the plaintiff
was rightfully on the land, although not by the invitation of the
defendants, and that defendants should have exercised reasonable
care toward the plaintiff. The defendants should have foreseen
the danger in maintaining the abandoned automobile with gasoline
in its tank, where children were accustomed to play.

S. B. S.

Promise to Pay Debt of Third Party—Sufficiency of
Memorandum Under Statute of Frauds.—Defendant was the
president of a recently formed corporation, which had purchased the
partnership of which he was a member. The plaintiff not knowing
Kunz v. City of Troy, 104 N. Y. 344, 10 N. E. 442 (1887); McCloskey v.
Buckley, 223 N. Y. 187, 119 N. E. 395 (1918); Earl v. Crouch, 57 Hun 386,
10 N. Y. Supp. 882 (N. Y. 1890); Wells v. City of Brooklyn, 9 App. Div. 61,
41 N. Y. Supp. 143 (2d Dept. 1896); Gumbell v. Clausen-Flanagan Brewery,

4 Crane, J., in dissenting opinion, instant case, at 605, 184 N. E. at 112; Hall
v. N. Y. Telephone Co., 214 N. Y. 49, 108 N. E. 182 (1915); Perry v. Rochester
Lime Co., 219 N. Y. 60, 113 N. E. 529 (1916); Beetz v. City of Brooklyn,
1900).

5 Supra note 2.

6 Weitzmann v. A. L. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477

Supp. 297 (2d Dept. 1900); Wilson v. American Bridge Co., 74 App. Div. 596,
77 N. Y. Supp. 820 (4th Dept. 1902); Nenstiel v. Friedman, 90 Misc. 368,
153 N. Y. Supp. 120 (1915).

9 Constantino v. Watson Contracting Co., 219 N. Y. 443, 114 N. E. 802
(1916); Kruger v. Hogan, 234 N. Y. 369, 138 N. E. 23 (1922); Wittleder v.
1900).

10 Lilly v. N. Y. C. & H. R. R. Co., 107 N. Y. 566, 14 N. E. 503 (1887);
Braun v. Buffalo General Elec. Co., 200 N. Y. 484, 94 N. E. 206 (1911); Bur-
516 (4th Dept. 1926), aff'd, 244 N. Y. 548, 155 N. E. 892 (1926); Connell v.
Berland, 223 App. Div. 234, 228 N. Y. Supp. 20 (1st Dept. 1928), aff'd, 248
N. Y. 641, 162 N. E. 557 (1928); De Haem v. Rockwood Sprinkler Co., 258
N. Y. 350, 179 N. E. 764 (1932).
RECENT DECISIONS

of the sale, continued to deliver merchandise, which was received
by the corporation on the strength of the partnership guaranty.
When this was discovered, the defendant to prevent a suit on the
partnership guaranty and to obtain an extension of credit for the
corporation orally agreed to guarantee the corporate debt. The
memorandum of the guaranty merely provided that Koch was to
insure payment "of $3,000 of such goods as the corporation may
have or shall have bought." After the signing of the paper in
question, the vendor refused to make deliveries and sued on the
guaranty. The defense raised is the failure of performance or of
an excuse for neglecting to perform the executory consideration,
namely the deliveries. The plaintiff asserts the sufficiency of the
memorandum. Held, the written memorandum was incomplete in
that it failed to state the agreement, and that the executory consid-
eration is deficient because of non-performance. Standard Oil Co.

In a suit to enforce a promise to pay the debt of a third party,
it is required that the agreement or some memorandum thereof be
in writing and signed by the party to be charged.1 This however
is only necessary in the case of a collateral promise and has no
reference to an original promise to pay another's debt where the
beneficial consideration moves to the promissor, who thereby as-
sumes an independent duty of payment.2 The term "agreement"
implies not only the promise but also the conditions of the contract.3
While a memorandum must contain these elements substantially it
is not necessary that it be the formal contract itself,4 but any docu-
ments evincing intent, terms and the parties will suffice if they con-
stitute an agreement without reference to parol testimony. If the
consideration consists in the performance of an act, such perform-
ance is an implied condition precedent to the liability on a guar-
anty.5 Therefore if the instrument in the present case was com-
plete evidence of an agreement, it would still lack force as the
plaintiff refused to deliver.

C. T. S.

1 N. Y. Pers. Prop. Law (1909) §31, subd. 2.
2 Mallory v. Gillett, 21 N. Y. 412 (1860); White v. Rintoul, 108 N. Y. 222,
15 N. E. 318 (1888); Perry v. Erb, 23 Misc. 105, 50 N. Y. Supp. 714 (1898);
Amer. Wire & Steel Bed Co. v. Schultz, 43 Misc. 637, 88 N. Y. Supp. 396
(1904).
3 Sears v. C. Brink & C. Brink, 3 Johns. 210 (N. Y. 1808); Kerr v. Shaw
& Shaw, 13 Johns. 236 (N. Y. 1816); Wright v. Weeks, 25 N. Y. 153 (1862);
Drake v. Seamen, 97 N. Y. 230 (1884); Barney v. Forbes, 118 N. Y. 580, 23
N. E. 890 (1890).
4 Argus Co. v. Mayor et al. of Albany, 55 N. Y. 495 (1874); Raubitschek
v. Blank, 80 N. Y. 478 (1880); Barney v. Forbes, supra note 3.