St. John's Law Review

Volume 7
Number 2 *Volume 7, May 1933, Number 2*

Article 24

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))

St. John's Law Review

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 maintaining it.[3] But, where the injury is not reasonably foreseeable, the defendant, although not the owner, will not be held liable in negligence.[4] Keeping the above rule in mind,[5] 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.[6] Also, where the child and defendant are intruders on the land of another, the courts seem to favor the child.[7] 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.[8] The defendants should have foreseen the danger in maintaining the abandoned automobile with gasoline in its tank, where children were accustomed to play.[9]

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

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[3] 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 586, 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, 119 App. Div. 778, 192 N. Y. Supp. 451 (2d Dept. 1922).

[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, 10 App. Div. 382, 41 N. Y. Supp. 1009 (2d Dept. 1896); Saverio-Cella v. Brooklyn Union El. R. Co., 55 App. Div. 66, 66 N. Y. Supp. 1021 (2d Dept. 1900).

[5] *Supra* note 2.

[6] Weitzmann v. A. L. Barber Asphalt Co., 190 N. Y. 452, 83 N. E. 477 (1908); Hogle v. H. H. Franklin Mfg. Co., 199 N. Y. 388, 92 N. E. 794 (1910).

[7] Wittleder v. Citizen Elec. Illuminating Co., 47 App. Div. 410, 62 N. Y. Supp. 297 (2d Dept. 1900); Wilson v. American Bridge Co., 74 App. Div. 596, 77 N. Y. Supp. 820 (4th Dept. 1902); Nenstiehl v. Friedman, 90 Misc. 368, 153 N. Y. Supp. 120 (1915).

[8] 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. Citizen Elec. Illuminating Co., 50 App. Div. 478, 64 N. Y. Supp. 114 (2d Dept. 1900).

[9] 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); Burrows v. Livingston-Niagara Power Co., 217 App. Div. 206, 216 N. Y. Supp. 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).

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 consideration is deficient because of non-performance. *Standard Oil Co. of N. Y.* v. *Koch,* 260 N. Y. 150, 183 N. E. 278 (1932).

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 assumes 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 documents evincing intent, terms and the parties will suffice if they constitute an agreement without reference to parol testimony. If the consideration consists in the performance of an act, such performance is an implied condition precedent to the liability on a guaranty.[5] Therefore if the instrument in the present case was complete evidence of an agreement, it would still lack force as the plaintiff refused to deliver.

C. T. S.

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[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); Raubitchek v. Blank, 80 N. Y. 478 (1880); Barney v. Forbes, *supra* note 3.

[5] Sun Oil Co. v. Heller, 248 N. Y. 28, 161 N. E. 319 (1928).