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THE LAW OF CONTRIBUTION.

THE doctrine of contribution may be defined as the rule by which one person, when compelled to discharge more than his share of any joint liability, can recover from those liable with him their aliquot proportion of the common burden. The justice of the rule is obvious, and is recognised by the codes of all civilized nations. The instances of its application under our law are numerous; but all depend on the fundamental principle that whenever persons are in *equali jure* a common liability is a common charge. They may, however, for the sake of convenience, be considered under three heads:—

I. Contribution between joint debtors.

II. Contribution between joint owners.

III. Contribution between owners of contiguous property.

I. CONTRIBUTION BETWEEN JOINT DEBTORS.

The cases under this head may be divided into two classes:—

A. Co-sureties. B. Other joint debtors.

A. Contribution between sureties, unlike some other of the instances of the application of this doctrine, was originally enforced only by the courts of equity, the chancellors finding its germ in the Roman law, where, however, it existed in but a crude and imperfect form. By that law, a surety upon payment of the debt became entitled to the benefit of the doctrine of subrogation,

which, placing him in the position of the creditor, enabled him to enforce all the remedies of the latter as well against the principal as the other sureties. A cession of all such remedies would always be decreed by the court if refused by the creditor, the transaction being really more the sale than the payment of the debt. If, however, the surety failed to demand this cession, he had no remedy against his co-sureties, the theory of the law being that he obtained contribution, not by reason of any equity between him and the other sureties, and still less from any idea of an implied contract between them, but that he sued as creditor, to whose position he was subrogated, and for whom he was *procurator in rem suam:* Pothier, Obligations, p. ii. c. 6, § 7, Art. 4. This original harshness of the law was, however, modified to some extent by the plea or "exception" of division, introduced by the Emperor Adrian. The effect of this was that the court would decree a division of the debt between those sureties who were short, and thus restrict the demand of the creditor against the surety sued to his proportion only. If, however, as was the case with judicial sureties and sureties for debts due the state, this exception could not, or if in other cases it were not, pleaded, the surety paying the debt was still entitled to the benefit of the doctrine of subrogation: Pothier, Obligations, p. ii. c. 6, § 6, Art. 12.

The English courts of equity in adopting this remedy, briefly sketched above, from the Roman law, modified. and enlarged it, basing it, not upon the narrow ground of subrogation, but upon the broadest principles of natural equity, that since the payment of the debt by one surety released all from their liability, the others *ought* to reimburse him to the extent of their respective shares: *Deering* v. *Winchelsea*, 2 Bos. & Pul. 270. *Qui sentire commodum sentire debet et onus.* The surety was still entitled to all collateral securities held by the creditor, but contribution was decreed entirely independent of the doctrine of subrogation, and based, as we have said, upon the simplest and broadest principles of natural equity.

The idea that contribution depends upon the theory of an implied contract between the sureties has, however, been advocated by some courts of law, who gradually assumed jurisdiction over the subject. It would seem, however, to have been thus advocated more to give jurisdiction and to overcome some technical objections to the *form* of the action, than from any idea that such an implied contract

actually exists (*Barry* v. *Ransom*, 2 Kern. (N. Y.) 467), since it is not consistent even with the rulings of the courts expressly advocating it: *Bachelder* v. *Fisk*, 17 Mass. 464. Lord ELDON, in *Craythorne* v. *Swinburne*, 14 Ves. 160, intimated that since the rule was so well understood, the sureties might be said to contract with reference to it; but it seems difficult, even in this modified form, to reconcile the doctrine with sound reason.

In case the sureties all became bound by the same instrument, or even by different instruments with the knowledge of one another, it might, perhaps, be said that they contracted with reference to this principle, and that each bound himself on the faith of the liability of the others. But this surely cannot be said when the liability of the sureties depends upon different instruments, and they become bound without any common knowledge; and yet it is well settled, both at law and in equity, that this is no bar to obtaining contribution: *Deering* v. *Winchelsea*, 2 Bos. & P. 270; *Cowell* v. *Edwards*, Id. 268; *Chaffee* v. *Jones*, 19 Pick. 260. And independent of this the object of the contract is simply to express the relations between the sureties and the creditor; it is made with *him*, for his benefit. How then can an entirely independent contract between the sureties themselves be implied therefrom? Again, where is the consideration to support such an implied contract? As we have seen, it cannot be said, except in a single case, that one surety binds himself, on the faith of the liability of the others. Neither can it be said that the law will raise an implied contract to contribute because the surety who paid the debt did what the others were legally bound to do, since this can only be applied to cases where one has paid what was solely the debt of another, and for which he was, as between themselves, only collaterally liable: *Jeffreys* v. *Gurr*, 2 B. & Ad. 833; *Pownall* v. *Ferrand*, 6 B. & C. 439; *Davies* v. *Humphreys*, 6 M. & W. 153. Exoneration by the principal is, indeed, based upon this doctrine, since here the surety has paid the debt of the former and not his own; but it cannot be applied between the sureties themselves, since these all stand in *equali jure*, all are equally liable, and the surety asking contribution has only paid his own debt. To reason as did the court of Massachusetts (*Bachelder* v. *Fisk*, *supra*), that since the action is assumpsit the right must rest on an implied contract, is reasoning in a circle, since the idea of an implied contract was first

advanced expressly to give a basis for this action of assumpsit. This is shown by the very case (*Birkley* v. *Presgrave*, 1 East 220) which the Massachusetts court cites to maintain its position, where the court decided that, since *ubi jus ibi remedium*, the action of assumpsit must be adapted to the case by a special count setting forth the facts.

The history of the adoption of this remedy by the common-law courts may serve still further to illustrate this point. As has been stated, the right was originally enforced only by the courts of equity, and was only adopted by the common-law courts within a comparatively recent period. There were indeed the common-law writs, *de contributione faciendâ inter cohæredes*, and *de feofemente*: Fitzherbert, Natura Brevium 162, b.; *Harbert's Case*, 3 R. 11 b.; but as their titles indicate, they were applicable only between joint owners of real property. The older reports contain many cases in which contribution between sureties or joint debtors was denied by the common-law courts: *Offley & Johnson's Case*, 2 Leond. 166; *Sir Wm. Whorwood's* and *Wormleighton* and *Hunter's Cases*, Godb. 243, and other cases cited in Viner's Abr. tit. *Surety*. One of the earliest instances of its recognition by the law courts is the case of *Layer* v. *Nelson*, decided in 1687, and reported in 1 Vernon 456, but even here it was declared to rest on a special custom of London, and that it could not be extended to cases in which the contract was made elsewhere. In 1787, it was said by BULLER, J., "the first case of the kind in which the plaintiff succeeded was before GOULD, J., at Dorchester:" *Touissant* v. *Martinant*, 2 T. R. 104.

Aside, therefore, from the fact that the idea that contribution between sureties depends upon an implied contract seems not to be founded in good reason, it would seem that the courts of law thus gradually adopting the remedy from equity, must have based it upon the same ground as that on which it there rested.

An implied contract may, however, be *assumed* in order to support the action at law, but no other consequence should be deduced from it: *Deering* v. *Winchelsea*, *supra*; *Barry* v. *Ransom*, *supra*; and this is practically the view even of those courts most strenuously advocating the notion of an implied contract, as in the Massachusetts case before cited (*Bachelder* v. *Fisk*, 17 Mass. 464), where the court was in the end, for the sake of con-

sistency with its own rulings, obliged to fall back on the maxim *ubi jus ibi remedium.*

Although the action may be thus maintained at law, equity is still the usual and better tribunal, Lord ELDON regretting that, owing to the necessary incompleteness of the remedy in the law courts, they ever assumed jurisdiction: *Cowell* v. *Edwards, supra.* Thus where one surety dies, contribution against his representatives cannot be obtained at law. The contract of the surety with the creditor is a personal one, and his death must necessarily terminate his liability; and it cannot be said, therefore, that the subsequent payment of the debt by another surety enured to the benefit of his estate: *Waters* v. *Riley,* 2 Har. & G. 305; *York* v. *Peck,* 14 Barb. 644. Equity, however, disregarding these technical objections, on account of the manifest hardship of the case, will decree contribution against the representatives of a deceased surety: *Simpson* v. *Vaughn,* 2 Atk. 33; *Primrose* v. *Bromley,* 1 Atk. 89. The rule in equity has also been held to be the rule of law by the courts of some states, which have no equity tribunals, on account of the necessity of the case: *Bachelder* v. *Fisk, supra; Riddle* v. *Bowman,* 7 Foster 236.

So in the case of the insolvency of one surety, complete relief cannot be obtained at law, since the remedy being several against each surety, the insolvent's share cannot be apportioned: *Brown* v. *Lee,* 6 B. & C. 689; *Chaffee* v. *Jones,* 19 Pick. 260. This difficulty not existing in equity, the insolvent's share will be there apportioned among all the other sureties: *Peters* v. *Rich,* 1 Ch. R. 34; *Holt* v. *Harrison,* Id. 240. The court of New Hampshire adopted this as the rule of law, on the same ground of necessity as in the case of a deceased surety: *Henderson* v. *McDuffie,* 5 N. H. 38.

This right of contribution not arising in favor of any surety till he has paid more than his share of the debt, is not barred by the discharge of any other by a certificate in bankruptcy. If the payment of the debt be made subsequently, the bankrupt's share is the same as any other debt contracted after his discharge; if made before it is provable against his estate, like any other debt. This is the rule under both the English and American acts: *Collins* v. *Prosser,* 1 B. & C. 682; *White* v. *Corbett,* 1 E. B. & E. 1103; *Dole* v. *Warren,* 32 Me. 94; *Dunn* v. *Spark,* 1

Carter 397; Hilliard on Bankruptcy, p. 323; James on Bankrupt Law of 1867, p. 142.

The payment of the debt upon which this claim for contribution is founded must have been made *compulsorily*. This does not mean, however, that it is necessary for the surety in all cases to delay until the creditor sues and obtains judgment against him; it is sufficient that upon default of the principal the creditor demand the debt of him, and he may thereupon pay and recover contribution from his co-sureties: *Cowell* v. *Edwards*, 2 Bos. & Pull. 268; *Bradley* v. *Burwell*, 3 Denio 61. This, indeed, would be his only proper course, for if he compelled the creditor to sue, the costs of the suit would fall solely upon himself, he having no right to demand contribution for an expense incurred in thus uselessly resisting a legal demand: *Knight* v. *Hughes*, 3 Car. & P. 467; *Henry* v. *Goldney*, 15 M. & W. 494. If, however, there be any valid defence, it would be the duty of the surety upon whom the demand is made to plead it, in all cases in which it would be hopeful and prudent for him to do so; and in the event of such defence proving unsuccessful, he could recover from his co-sureties their proportion of the costs, they being incurred for the common benefit: *Kemp* v. *Finden*, 12 M. & W. 421; *Fletcher* v. *Jackson*, 23 Vt. 593; *Davis* v. *Emerson*, 17 Me. 64. And, indeed, not to plead such defence would bar his claim to contribution, since the payment would then be regarded as having been made voluntarily.

With this exception it may be generally stated that contribution cannot be extended beyond the liability assumed by the sureties when making the contract with the creditor. Thus there can be no recovery of interest, since the right to compel contribution arising immediately upon payment of the debt by any surety, if he delay making the claim, he suffers for his own neglect: *Bell* v. *Free*, 1 Swanst. 90; *Bezoil* v. *Bowerbank*, 1 Campb. 50. The application of this rule must, however, be confined to the reasons upon which it is based. Thus if the remedy of the surety is, by reason of his co-surety's insolvency, practically worthless, there is authority for the statement that he may, when the latter becomes again solvent, recover from him his share of the debt with interest from the time of payment: *Swain* v. *Wall*, 1 Ch. R. 149.

This right of contribution affects only the relations of the sureties between themselves, and is entirely distinct from and inde-

pendent of the contract with the creditor, and cannot be modified by any act of his. Thus a surety, though discharged by the creditor, is still liable for his share of the debt in respect to contribution: *Ex parte Gifford*, 6 Vesey 805; Story's Eq., § 498 and note. The sureties may, however, between themselves, make any contract they please, and one surety may thus be exempted from all liability to contribute: *Swan* v. *Wall*, *supra*; *Craythorne* v. *Swinburne*, 14 Vesey 160; *Barry* v. *Ransom*, 2 Kern. 467. Such agreement may be either express or implied. Thus, if one surety enter into the original contract at the request of the others, there might as to him be an implied waiver of the right to contribution, and if compelled to pay the debt, he could recover the whole amount from his co-sureties. Parol evidence, as well of an express agreement as of such extrinsic circumstances, is admissible, it not being offered to vary the terms of a written contract, the object of that being simply to express their relations with the creditor: *Craythorne* v. *Swinburne*, *supra*, *Bradley* v. *Ransom*, *supra*, overruling GREY, J., in *Norton* v. *Coons*, 2 Selden 33.

If the surety paying the debt release any of his co-sureties, he could still compel the others to contribute their proportion, their liability to him being several and not joint: *Graham* v. *Robinson*, 2 T. R. 282; 23 Vt. 581.

The foregoing remarks, though made more especially with reference to sureties for the debt of another, apply to all contracts of indemnity. Thus in the case of double insurance, in the absence of the usual clause in the policy regulating this, any one set of underwriters compelled to pay the whole loss would have contribution against the others: *Newby* v. *Reed*, 1 W. Bl. 416.

B. *Other Joint Debtors.*—The principles already discussed with reference to co-sureties apply equally to joint debtors generally, this distinction having been made only for convenience. In the Roman law, however, there was a distinction in some respects between the two classes. Thus only sureties could plead the exception of division: Pothier Oblig., p. II. c. 6, § 6, Art. 2. Again, while the doctrine of subrogation applied equally to both, joint debtors, unlike sureties, could obtain contribution without subrogation, by means of the *actio pro socio:* Pothier Oblig., p. II., c. 3, Art. 8, §§ 5 and 6.

Contribution between Wrongdoers.—This is the only exception

to the general rule that contribution will always be decreed whenever one person pays more than his share of any joint liability, both law and equity denying relief to one whose claim must be based on his own wrong: *Merryweather* v. *Nixon*, 8 T. R. 186 (Smith's L. C.). This must, however, be confined to the reasons upon which it is based, and can therefore only be applied to cases of actual *moral* wrong, or where the act was wilfully committed and known to be illegal: *Wooley* v. *Batte*, 2 Car. & P. 417; *Adamson* v. *Jarvis*, 4 Bing. 66; *Bailey* v. *Bussing*, 28 Conn. 455; *Horbach* v. *Elder*, 18 Penna. 33. *Ignorantia juris non excusat*, but here the plaintiff does not seek to escape from his liability, but only asks that those equally responsible with him for the injury should bear their proportion of the penalty. Where the tort was committed by the servant of several persons, while employed in the common service, and one master is sued, it is clear that the reason of the rule denying contribution between wrongdoers does not apply: *Worley* v. *Balte*, *supra*; *Horbach* v. *Elder*, *supra*.

II. CONTRIBUTION BETWEEN JOINT OWNERS.

A. *Between Joint Owners of Chattels.*—One joint owner of a chattel cannot, as a general rule, compel the others to contribute towards expenses incurred by him in making repairs or improvements on the common property, unless made with the consent of such other owners. This consent, however, need not be express, but may be implied from circumstances; as in the case of animals, the owners of which may always be presumed, unless there be special circumstances, to desire that they should be fed and sheltered; the owner may also in many other cases be regarded as agent for all: Story on Part. § 414; *Steamboat New Orleans* v. *Phœbus*, 11 Peters 175. The subject is usually discussed with reference to part owners of ships, and many questions of interest are involved not strictly falling within the limits of this article.

B. *Contribution between Joint Owners of Real Estate.*—Contribution between joint owners of real estate, while based upon the same equitable principles as in the cases already considered, is not so exclusively a creature of chancery, the common law providing the means for its enforcement. Contribution may be enforced by one joint owner of real estate against another in two cases.

(1). *For expenses incurred in making repairs on a house.*—In regard to repairs or improvements made by one joint owner of real estate, the general rule is the same as in the law of personal property: *Bowles's Case*, 11 R. 82 b; *Taylor* v. *Baldwin*, 10 Barb. 582. An exception was, however, made by the common law in favor of joint owners of houses and mills; one tenant, in case his co-tenant refused to join him in making necessary repairs, being enabled to compel him so to do by means of the writ *de reparatione faciendâ:* Fitzherbert's Natura Brevium 162 b; Co. Litt. 200 b. This writ was, according to Lord COKE, based upon reasons of public policy, the owners being "bound, *pro bono publico*, to maintain houses and mills which are for the habitation and use of man:" Ibid.; and it is upon this ground, and because such property cannot be conveniently partitioned, that the action now rests: *Doane* v. *Badger*, 12 Mass. 65; *Mumford* v. *Brown*, 6 Cowen 475. The expenses of all other improvements upon land held jointly must be borne solely by the person making them, the improvements themselves enuring to the benefit of the estate. A court of equity will, however, when decreeing partition, assign to the tenant who made the improvements that part of the estate upon which they were made, or make some other equitable arrangement: *Town* v. *Needham*, 3 Paige 546; *Green* v. *Putnam*, 1 Barb. 507.

(2). *Contribution to redeem an estate from a mortgage or other lien.*—At the common law, the writs *de contributione* would always lie where lands held jointly were charged with a suit which the lord sought to enforce against one tenant solely. These writs were founded on the Statute of Marlebridge, 52 H. 3, c. 9, which provided, "if any inheritance, whereof but one suit is due, descends unto many heirs as with parceners, whoso hath the eldest part of the inheritance shall do the suit for herself and fellows, and the others shall be contributaries according to their portions." With respect to feoffees, there could not, from the nature of the case, be any statutory provision as to who should do the suit, and it was therefore left to the agreement of the parties; if they could not agree, the lord could sue any one, who could compel the others to come in and defend with him by means of an *audita querela:* Fitzherbert's N. B. 162 b.; *Harbert's Case*, 3 R. 11 b. These writs were commonly used when lands were charged with the payment of an ancestor's or grantor's debt by recognisance or statutes

merchant, and many instances of this application are given in *Harbert's Case*, 3 R. 11 b. This case declared what may be regarded as the fundamental principle of contribution, that whenever persons stand in *equali jure*, they must bear rateably all burdens. Another principle equally fundamental is that in the case of a mortgage the debt is the principal, and the land only collateral security for its payment. On these two principles depends the modern law of contribution to redeem a mortgage. It may, perhaps, be more conveniently discussed under two divisions.

(*a*). With reference to grantees.

b). With reference to heirs or devisees.

(*a*). If the mortgagor alien his whole estate to different purchasers by deeds taking effect simultaneously, the purchasers would then all stand in *equali jure*, and would contribute rateably towards the redemption. If, however, the mortgagor alien only part of his estate, the portion retained by him is primarily liable, the debt being the principal. If, now, he grant this remainder of the estate to a second purchaser, the portion thus subsequently granted would still be primarily liable, as such second grantee would take the estate as his grantor had it, or, to state the rule in its usual form, "the lands are charged in the inverse order of alienation." This rule, the justice of which was ably vindicated by Chancellor KENT (*Cheeseborough* v. *Millard*, 1 Johns. Ch. 409), may now be regarded as settled law in most of the states.[1] The only question is, do the parties stand in *equali jure?* Clearly they do not. The first purchaser buys, as he supposes, an unencumbered estate. The second stands in the position of his grantor, and can no more compel the first to contribute than could the grantor himself.

(*b*). The case of heirs or devisees presents no difficulty. All stand in *equali jure*, and any one compelled to pay the whole debt in order to save his estate, is subrogated to the position of the mortgagee, and holds the mortgage as equitable assignee till the others redeem by contributing their proportions.

A tenant for life is bound to assume only those burdens which enure to the benefit of his estate. Thus, he must pay taxes, they

[1] See *Cowden's Estate*, 1 Penna. St. 267, where the subject is discussed by KENNEDY, J., and the authorities cited by Story's Eq., § 1233 *b*, in opposition to the rule are shown to have no application, with perhaps an exception: 1 Younge & Colyer Ch. 401.

being imposed for yearly benefits; but he can obtain contribution from the reversioner for assessments imposed for permanent improvements: *Cairns* v. *Chaubert*, 3 Edw. Ch. 312. He is therefore obliged to pay only the interest of encumbrances while his estate lasts, and contribution between him and the reversioner on redemption is based upon this principle. The old rule was that he should pay one-third of the debt (*Flud* v. *Flud*, Freeman 210), but the more exact modern rule is that he pays "what the present worth of annuity equal to the interest would amount to computed for as many years as he has chances of life, as given by the annuity tables:" 1 Washburn Real Prop., p. 917. A dowress of course pays an amount equal to one-third of the interest, ascertained by the same rule.

As between an heir and a devisee, the lands not disposed of by will are primarily liable, "the heir sitting in the seat of his ancestor:" *Graham* v. *Dickinson*, 3 Barb. Ch. 169.

III. Contribution between Owners of Contiguous Property.

Contribution may in some cases be enforced between owners of contiguous property, or of personal property subjected to a common risk, when an act is done by one for the common benefit. The only instance of this in the law of personal property is the rule known as

A. *General Average.*—When property on the sea is in danger of destruction in consequence of some marine peril, and a sacrifice of some part of such property is voluntarily made for the purpose of saving the remainder, the property thus saved contributes by this rule its proportion of the loss sustained by the owner of that sacrificed. The justice of this rule is obvious, and its "wisdom and equity will do honor to the state from which it has been derived as long as maritime commerce shall endure:" Abbott on Shipping, p. 605. Its origin was the ancient law of Rhodes, and from thence it was adopted into the Roman law. One of the earliest reported cases in the English law is that of *Hicks* v. *Palington*, F. Moore 297 (22 Eliz.), where it is stated as a rule of the civil law. It was, however, recognised long anterior to this, as shown by the message sent by Edward I., A. D. 1285, to the Cinque Ports: Rymer Fœdera, p. ii. p. 654.

There are three essentials to bring a loss within this rule: It

must have been voluntary, necessary, and successful. Anciently, when a jettison of goods was made, it was usual for the master to consult with his crew as to its propriety, but this rule is abrogated by modern law. It was never considered absolutely essential to the bringing of a loss within the rule, but was merely considered as furnishing good evidence of its necessity: Abbott on Shipping, p. 471. In cases of extreme danger, there being no time for such consultation, the imminency of the peril would justify an "irregular" jettison: Ibid.

All property saved, whether ship, cargo, or freight, contributes towards the average; and, if either be sacrificed, the loss constitutes a claim for contribution. By the Rhodian law, even the effects and clothes of those on board contributed, nothing being excepted save provisions and instruments for the defence of the ship (3 Kent Com. p. 240); and such was also the rule of the old English law.[1]

In estimating the value upon which this contribution is to be based, the ship's value at the time she was lost is estimated by the aid of the best available evidence (*Simonds* v. *White*, 2 B. & C. 805), although various rules for approximation have been proposed: 1 Caines 573; 2 S. & R. 229. The cargo is valued at the net price it would have yielded at the port of discharge: *Rogers* v. *Mech. Ins. Co.*, 1 Story 609. The value of the ship's equipments is considered as being two-thirds of their original value: *Strong* v. *N. Y. Fire Ins. Co.*, 11 Johns. 323.

It would seem that expenses incurred in seeking repairs should fall within the rule, they being for the benefit of cargo and ship: *Padelford* v. *Boardman*, 4 Mass. 548; *Greeley* v. *Tremont Ins. Co.*, 9 Cush. 421.

B. *Contribution between Owners of Contiguous Real Estate.*— At the common law, there was the writ *de domo reparanda*, by which a tenant of one part of a house to compel a tenant of another part to repair that part in which he lived. Thus, the tenant of the lower part could compel the tenant of the upper to repair the roof. Several instances of its application are reported, although its exact extent is not well settled: Fitzherbert, N. B.

[1] See cases cited in Vin. Abr., tit. *Contribution and Average*. The message of Edward I., cited above, enumerates the following among the articles liable to contribute: "Monile, zona et ciphus argenteus, et anulus magistri navis, in digito suo portatus."

127; Keilway 98; 11 Mod. 7; *Tenant* v. *Goldwin*, 2 Ld. Raymond 1089. It was said by PARSONS, C. J., that it would still lie, but this appears doubtful: *Loring* v. *Bacon*, 4 Mass. 575; *Cheeseborough* v. *Greene*, 10 Conn. 318. It was not, however, a writ of contribution, the expense of the repairs falling solely on the defendant. Equity will now, however, consider all such expenses as a common charge, since both tenants share in the benefit: *Campbell* v. *Mesier*, 4 Johns. Ch. 334; 10 Conn. 318. The subject is, however, usually regulated by statute.

Party-walls.—Whenever a party-wall is in need of repairs, and one owner refuses to join the other in making them, equity will, in the absence of any statutory regulation, compel the former to contribute his share of the expense. This was the rule of the civil law (Domat, Civil Law, B. I., tit. 12, § 4), and is well established as the rule in equity: *Campbell* v. *Mesier*, 4 Johns. Ch. 334; *Partridge* v. *Gilbert*, 15 N. Y. 601; *Sherrerd* v. *Cisco*, 4 Sandf. (N. Y. Superior Ct.) 480. Chancellor KENT extended the rule to a case where the wall being in a ruinous condition, was torn down and rebuilt (*Partridge* v. *Gilbert*, *supra*); but the validity of this application has been doubted in 15 N. Y. 601, and 4 Sandf. 480. These cases differed somewhat from *Campbell* v. *Mesier*, and cannot be regarded as overruling it. In these cases the buildings were destroyed by fire, and the easement in the wall was of course extinguished by its destruction. And since one owner could not compel the other to rebuild, the reciprocity of obligation, which is the necessary basis of a claim for contribution, no longer existed. Where, however, as in *Campbell* v. *Mesier*, in repairing a wall it is found to be so ruinous that it is necessary to tear it down and rebuild, the case only differs from ordinary repairs in the fact of their being more extensive.

Division Fences.—This case is usually regulated by statute, but aside from this, equity would always decree contribution, whenever the erection of such fences could be regarded as a benefit to both estates. Thus, it is an equal benefit to a railroad company, and to the owner of the contiguous land, that the cattle of the latter should not stray upon the road. In the absence, therefore, of statutory regulations, equity would consider the expense of building a division fence between the road and the contiguous land as constituting a common charge: *In the Matter of the Rens. and Saratoga Railroad*, 4 Paige 556.

H. K. C.