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## Comments

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## COMMENTS

### THE DOCTRINE OF EQUITABLE ADOPTION

Without exception, the several states have enacted adoption statutes which, by their express terms purport to furnish the exclusive method through which the adoption of a child may be perfected.<sup>1</sup> Nevertheless, equity has allowed inroads into the exclusiveness of the adoption statutes in certain situations, the typical circumstances leading to such result being as follows: The natural parents (P) of child (C) enter into an agreement with another party (T), under which P promises to surrender parental control and custody of C to T, and in exchange T promises to adopt C. T, having failed during his lifetime to perfect a statutory adoption of C, dies intestate; and C, desiring to take a natural child's intestate share of T's estate, brings a suit in equity for specific performance of the contract to adopt.

Under such facts, an imposing body of law has developed which stands for the following proposition: A contract to adopt, whether written or oral, which is substantially or fully performed by the child and natural parents (or those standing in *loco parentis*), but which is not fully performed by the adopting parent during his lifetime, will be enforced when equitable.<sup>2</sup>

<sup>1</sup> 4 VERNIER, AMERICAN FAMILY LAWS § 254 (1936); MADDEN, PERSONS AND DOMESTIC RELATIONS § 106 (1931). See for example art. 46a, TEX. REV. CIV. STAT. (Vernon, 1936).

<sup>2</sup> *Benefield v. Faulkner*, 248 Ala. 615, 29 So. 2d 1 (1947); *Sheffield v. Barry*, 153 Fla. 144, 14 So. 2d 417 (1943); *Thompson v. Riggs*, 193 Ga. 632, 19 S.E. 2d 299 (1942); *Winkelmann v. Winkelmann*, 345 Ill. 566, 178 N.E. 118 (1931); *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907); *Snuffer v. Westbrook*, 134 Kan. 793, 8 P. 2d 950 (1932); *Re Furtle*, 197 Minn. 1, 265 N.W. 818 (1936); *Niehaus v. Madden*, 348 Mo. 770, 155 S.W. 2d 141 (1941); *Holloway v. Jones* (Mo. Supp.), 246 S.W. 587 (1922); *Tuttle v. Winchell*, 104 Neb. 750, 178 N.W. 750 (1920); *Barney v. Hutchison*, 25 N.M. 82, 177 P. 890 (1918); *Winne v. Winne*, 166 N.Y. 263, 59 N.E. 832 (1901); *Gates v. Gates*, 34 App. Div. 608, 54 N.Y. Supp. 454 (1898); *Eggstaff v. Phelps*, 99 Okla. 54, 226 Pac. 82 (1924); *Crilly v. Morris*, 19 N.W. 2d 836 (S.D. 1945); *Jones v. Guy*, 135 Tex. 398, 143 S.W. 2d 906 (1940); *Garcia v. Quiroz*, 228 S.W. 2d 953 (Tex. Civ. App. 1950); 17 TEX. L. REV. 339 (1932); 11 CHIC. KENT REV. 307 (1933); 16 MINN. L. R. 578 (1932); 18 VA. L. REV. 449 (1932); 17 ST. LOUIS L. REV. 362 (1931).

Contra: *Clarkson v. Bliley*, 185 Va. 82, 38 S.E. 2d 22 (1946); *Shearer v. Weaver*, 56 Iowa 578, 9 N.W. 907 (1881); cf. *Chehak v. Battles*, 133 Iowa 107, 110 N.W. 330 (1907), in which the Iowa court repudiates *Shearer v. Weaver* on this point; *Re Estate of Tag-*

While the foregoing principle has found acceptance in the majority of American jurisdictions where the question has been considered,<sup>3</sup> a few states have declined to extend the hand of equity in such cases.<sup>4</sup> One of the grounds asserted in behalf of the minority holding is that the adoption statutes furnish the sole means through which an unnatural status of parent and child may be established.<sup>5</sup> However, since the entire concept of adoption was unknown at common law,<sup>6</sup> it would seem that in the absence of statutes authorizing adoption, a contract to adopt would be impossible to perform, and hence would be unenforceable. It is the adoption statutes which make recognition of the contract possible.<sup>7</sup>

It is clear that the doctrine of equitable adoption is inapplicable when suit is instituted during the adopting parents' lifetime.<sup>8</sup> The relationship of parent and child is one predicated upon love and trust. Public policy dictates that the nature of this association should not be disturbed by forcing it upon an unnatural and unwilling parent, and this public policy is held to control over any equities which might exist in favor of the child. The doctrine thus far has been utilized only to protect the child's property interest in the deceased adopting parent's estate. Most American jurisdictions provide this protection by specifically enforcing the contract to adopt.<sup>9</sup> Others, including Texas, hold that the natural heirs of

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*gart, Boland v. Taggart*, \_\_\_\_\_ Cal. \_\_\_\_\_, 213 Pac. 504 (1923); *Jordan v. Abney*, 97 Tex. 296, 78 S.W. 486 (1904); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921); cf. *Jones v. Guy*, supra, wherein the *Jordan* and *Bridgewater* cases are overruled; *Carter v. Capshaw*, 249 Ky. 483, 60 S. W. 2d 949 (1933); *St. Vincent's Infants Asylum v. Central Wisconsin Trust Co.*, 189 Wis. 483, 206 N.W. 921 (1926).

<sup>3</sup> *Supra*, note 2. All of the commentators there cited, with the exception of the one writing in 17 St. Louis L. Rev. 362, recognize this as the weight of authority. Apparently through oversight, the excepted note would limit the application of the doctrine to Missouri; this article was written in 1931, at which time the basic holding had already been established in a number of American jurisdictions.

<sup>4</sup> *Supra*, note 2, cases cited as contra to the general rule.

<sup>5</sup> *Boland v. Taggart*, 190 Cal. 493, 213 P. 504 (1923); *Clarkson v. Bliley et al*, 185 Va. 82, 38 S.E. 2d 22 (1946).

<sup>6</sup> 4 VERNIER, AMERICAN FAMILY LAW § 254 (1936); MADDEN, PERSONS AND DOMESTIC RELATIONS § 106 (1931).

<sup>7</sup> *Wall v. McEmery*, 105 Wash. 445, 178 Pac. 631 (1919); *Ball v. Brooks*, 173 N.Y. Supp. 746 (1918). Both of these cases hold that an adoption contract is unenforceable in the absence of statutes authorizing adoption.

<sup>8</sup> *Erlanger v. Erlanger*, 171 N.Y. Supp. 1084 (1918).

<sup>9</sup> See Notes, 27 A.L.R. 1325 (1923); 142 A.L.R. 84 (1943); 171 A.L.R. 1326 (1927).

the adopting parent are estopped to deny that the adoption was consummated.<sup>10</sup>

Even within those jurisdictions which agree as to the theory upon which relief is predicated, there is discord as to what factors constitute the prerequisites for equitable intervention. A discussion of these factors will be facilitated by dividing the general rule into its component parts, to-wit: (1) A contract to adopt, (2) whether written or oral, (3) which is substantially or fully performed by the child and natural parents (or those standing in *loco parentis*), but which is not fully performed by the adopting parent during his lifetime, (4) will be enforced when equitable.

### I. A CONTRACT TO ADOPT

While the courts have based their holdings upon either specific performance of a contract to adopt or upon estoppel, it would seem that neither rationale thoroughly explains the doctrine of equitable adoption. We should recognize at the outset that this is a field apart unto itself. An analysis of the cases in this area reveals that the courts are more concerned with protecting the child's interest than with the technical categorization of the theory through which this protection is afforded. If the child has performed his filial duties to the adopting parents, equity is moved to consider "that done which should have been done." Nevertheless, the majority of American courts speak in terms of specific performance, and require the existence of an express contract to adopt, before they will grant relief in these cases. Furthermore, the courts spend a great deal of time in sustaining the validity of the contract itself against defenses relative to the Statute of Frauds and public policy. Thus, it seems not amiss to consider the holdings in terms of the technical requisites of a contract.

#### *Consideration*

Assuming a valid offer and acceptance, the primary question in this section is whether or not a contract to adopt is supported by adequate consideration. The cases generally hold that the natural

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<sup>10</sup> See Notes, 27 A.L.R. 1365 (1923) ; 142 A.L.R. 122 (1943) ; 171 A.L.R. 1326 (1947).

parents' surrender of the child under the terms of the contract, coupled with the ensuing filial companionship and obedience afforded the promisor by the child, provide adequate consideration for the promise to adopt.<sup>11</sup> As was stated in *Godine v. Kidd*:<sup>12</sup>

... who would question the worth, adequacy and sufficiency of the consideration received by the adopting parents? Lives that are drear and blank are thus often times cheered and animated... [by the] contributions of youthful love and affection and companionship to childless old age.

Thus the courts view the problem of consideration retrospectively from the time the suit was brought, their paramount concern being the actions of the parties subsequent to the making of the contract. In so doing, the courts are really testing the appropriateness of the remedy of specific performance, rather than the validity of the contract at its inception. Theoretically, it would seem that the question of adequacy of consideration should be determined as of the time the contract was made; and it seems clear that a sufficient consideration is found in the mutual promises on the part of the natural parents and the adopting parents. In exchange for the promise to adopt, the natural parent promises to give up parental control and custody of the child. This, without more, would probably not justify the extraordinary relief of specific performance, but it would seem to constitute sufficient consideration for the contract.

### *Parties*

Having established the existence of the contract itself, we now turn to an investigation of those who may be parties thereto. While the usual parties to the contract are the natural parents and the adopting parents, it is obvious that anyone standing in *loco parentis* could take the place of the natural parents.<sup>13</sup> Thus, such a contract between a foundling home and an adopting parent has been upheld.<sup>14</sup>

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<sup>11</sup> *Winkelman v. Winkelman*, 345 Ill. 566, 178 N.E. 118 (1931); *Savannah Bank & Trust Co. v. Wolff*, 191 Ga. 111, 11 S.E. 2d 766 (1940); *But cf. Fargoson v. Pope*, 197 Ga. 848, 31 S.E. 2d 37 (1944).

<sup>12</sup> 19 N.Y. Supp. 335 (1892).

<sup>13</sup> *Fisher v. Davidson*, 271 Mo. 195, 195 S. W. 1024; *Johnson v. Superior Court*, 102 Cal. App. 178, 283 Pac. 331 (1929).

<sup>14</sup> *Re Firle*, 197 Minn. 1, 265 N.W. 818 (1936); *Bland v. Bouy*, 335 Mo. 967, 74 S.W. 2d 612 (1934); *But cf. Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986 (1913).

The courts are vague as to the relation of the child to the agreement. For the most part, they speak in terms which classify the child as a third party beneficiary of the contract,<sup>15</sup> but at the same time enforcement is held to be contingent upon the child's "performance,"<sup>16</sup> which requirement would seem to be foreign to the theory of third-party beneficiaries. For example, the early case of *VanDyne v. Vreeland*<sup>17</sup> stated,

It is objected that this agreement cannot be enforced by the child, because he was not a party to it. But he was the party for whose benefit the agreement was made. . . . [T]he most valuable portion of the consideration . . . has been rendered by the [child] himself.

A clear analysis of the problem would seem to be that the child is a party to the contract (as distinguished from a third party beneficiary). His status as such arises from the fact that the natural parent, acting as the child's agent, implies a promise that the child will perform the functions of a child toward the adopting parents. It is true that the obligations of the child could not be enforced; damages, if any, occasioned by a breach of the obligation are doubtlessly too conjectural to permit recovery at law, and equity would not force an unnatural relationship of parent and child upon unwilling parties. Nevertheless, it is clear that the failure on the part of the child to perform his obligation under the contract would constitute failure of consideration, at least to a degree which would prevent specific performance of the contract.<sup>18</sup>

An interesting problem is raised in the case of *Gamache v. Doering*.<sup>19</sup> Here, the agreement was alleged to have been made between the adopting mother (a single woman), and the "child," who was an adult at the time of the agreement. The court said that, although the statutory method permits the adoption of an adult, the fact of the "child's" having reached her majority prior to the time of the agreement is a "circumstance contrary to the

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<sup>15</sup> *Hilt v. Hooper*, 203 S.W. 2d 334 (Tex. Civ. App. 1947); *Van Dyne v. Vreeland*, 12 N.J. Eq. 142 (1858).

<sup>16</sup> See PERFORMANCE, *infra* Part III.

<sup>17</sup> 12 N.J. Eq. 142 (1858).

<sup>18</sup> See PERFORMANCE, *infra* Part III.

<sup>19</sup> 354 Mo. 544, 189 S.W. 2d 999 (1945).

theory of equitable adoption—the protection of a child who had no choice or will with respect to the establishment of so vital a relationship and [this] circumstance weighs heavily against her claim, if it is not destructive of it.”<sup>20</sup>

While the contract to adopt is tripartite in nature, it is clear that equitable enforcement of the contract is available only to the child<sup>21</sup> or his representatives;<sup>22</sup> for as indicated in the *Gamache* case,<sup>23</sup> *supra*, the very basis of the theory of equitable adoption is the protection of the child. Williston, in his treatise on the law of contracts, states that “. . . an increasing line of cases sustains the bargain when it is to the advantage of the child,”<sup>24</sup> and indicates elsewhere in the same section, that equitable relief is not available in the converse situation.

### *Public Policy*

It has been contended that contracts to adopt are void as violative of public policy, in that (1) the State legislatures, through the adoption statutes, have defined the only method of adoption consistent with public policy, and/or (2) such a contract amounts to a bartering of the child by the natural parent for a pecuniary advantage, albeit to the child.

Both of these contentions have found some judicial support.<sup>25</sup> In upholding the exclusiveness of the adoption statutes, the Supreme Court of Appeals of Virginia found “[i]t . . . clear . . . that equity cannot consummate, or treat as consummated, an adoption

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<sup>20</sup> *Id.* at 1001.

<sup>21</sup> As noted, *supra*, the doctrine of equitable adoption is applicable only after the adopting parent's death; thus, it seems reasonable to conclude that the adopting parent could not enforce the contract. Furthermore, the very reason for equity's intervening in these cases is to protect the child; thus, the courts would not be moved to aid the natural parent, if in his own behalf, he instituted suit for specific performance of the contract.

<sup>22</sup> *McWilliams v. Pair*, 151 Ga. 168, 106 S.E. 96 (1921).

<sup>23</sup> 354 Mo. 544, 189 S.W. 2d 999 (1945).

<sup>24</sup> 6 WILLISTON, CONTRACTS § 1744A (2d ed. 1937).

<sup>25</sup> As to the exclusiveness of the statutes see: *Re Reimer*, 145 Wash. 172, 259 Pac. 32 (1927); *St. Vincent's Infant Asylum v. Central Wisconsin Trust Co.*, 189 Wis. 483, 206 N.W. 921 (1936); *Clarkson v. Bliley*, 185 Va. 82, 38 S.E. 2d 22 (1946); *Carter v. Capshaw*, 249 Ky. 483, 60 S.W. 2d 959 (1933). As to policy against bartering children see: *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921) (overruled by subsequent Texas cases).

which has stopped short of the decree by which alone the status of parent and child is established. Every consideration of public policy that has induced our [courts] to deny the validity of common law marriage operates with equal . . . force against recognizing a contractual adoption."<sup>26</sup> *Hooks v. Bridgewater*,<sup>27</sup> an early Texas case which has been overruled by subsequent cases, contained language illustrative of the second public policy argument, to-wit:

[A contract to adopt] . . . should be held void as a matter of public policy. A parent has no property interest in his child and should not be permitted to deal with his child as property . . . The custody of a child is not a subject matter of a contract, and therefore can constitute no consideration for a contract.

Most American courts, however, give greater weight to another public policy, viz: that which calls for the protection of the best interests of the child who had no active role in selecting the method to be utilized in perfecting the adoption, and who has fully performed the obligations of a child to the adopting parent.<sup>28</sup> Texas is presently committed to this view.<sup>29</sup>

The majority view appears to be well founded in principle; for inasmuch as these contracts are enforced only to protect the property interest of the child and not to establish the inter-vivos relationship of parent and child, it would seem that equitable intervention does not contravene the exclusive nature of the adoption statutes. Adoption contracts seem directly analogous to contracts to will property to a particular person. The statute of wills provides the exclusive means through which a person can dispose of his property after death in a manner other than that provided in the statutes of descent and distribution. Yet it is well settled that an agreement to will property is a valid contract. In the absence of statutes authorizing testamentary disposition of property, however, the contract to will property would be unenforceable since the agreement would contemplate an illegal undertaking.

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<sup>26</sup> *Clarkson v. Bliley*, 185 Va. 82, 38 S.E. 2d 22 (1946).

<sup>27</sup> 111 Tex. 122, 229 S.W. 1114 (1921).

<sup>28</sup> See Note, 17 TEX. L. REV. 339, 344 (1939); 6 WILLISTON, CONTRACTS § 1744A (2d ed. 1937).

<sup>29</sup> See *Cheney v. Coffee*, 113 S.W. 2d 162 (Tex. Com. App. 1938).



Similarly, a contract to adopt, absent the adoption statutes, would be impossible to perform and would therefore be unenforceable. The adoption statutes, in effect, make the object of a contract to adopt legal. Furthermore, the natural parent receives no actual benefit under the contract or the enforcement thereof, since (1) the contract contemplates property advantage to the child only, and (2) the natural parent does not, by the contract, relieve himself of the legal obligations to support and maintain the child.<sup>80</sup> In the absence of any real benefits flowing to the natural parents, it is difficult to see how the public policy against "bartering children" is applicable here. As expressed by the Commission of Appeals of Texas,<sup>81</sup> "These acts, neither as a whole nor singly, violated any public policy of this state. . . . How could it be said that an attempt to save a helpless child violated any public policy . . .?"

## II. WHETHER WRITTEN OR ORAL

### THE STATUTE OF FRAUDS

Where the contract to adopt is oral, it has been argued that the Statute of Frauds operates to prevent its enforcement.<sup>82</sup> Two sections of the Statute have been asserted in behalf of this contention: (1) that which condemns oral contracts which cannot be performed within one year from the execution thereof;<sup>83</sup> and (2) the section which requires a writing for an enforceable contract for the disposition of land.<sup>84</sup>

The first of these sections is clearly inapplicable since the contract to adopt is one which may or may not be performed within one year. When enforcement of the adoption contract affects the disposition of real property, the applicability of the second section referred to above has some foundation, both in principle and in

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<sup>80</sup> See language in *Bridgewater v. Hooks*, 159 S.W. 1004 (Tex. Civ. App. 1913); reversed on other grounds.

<sup>81</sup> *Cheney v. Coffee*, 113 S.W. 2d 162 (Tex. Com. App. 1938).

<sup>82</sup> *Wright v. Green*, 67 Ind. App. 433, 119 N. E. 379 (1918); *Marietta v. Faulkner*, 220 Ala. 561, 120 So. 635 (1930); *Hooks v. Bridgewater*, 111 Tex. 122, 229 S. W. 1114 (1921).

<sup>83</sup> TEX. REV. CIV. STAT. (1925) Art. 3995 § 5.

<sup>84</sup> TEX. REV. CIV. STAT. Art. 3995 § 4.

judicial support.<sup>35</sup> The preponderance of authority is that such a circumstance places the contract within the Statute of Frauds, but that substantial performance by the natural parent and the child (where clearly referable to the contract) will operate to remove the bar of the Statute of Frauds.<sup>36</sup> The minority view holds that substantial performance is not sufficient to take the contract out of the prohibition of the statute.<sup>37</sup> The Texas courts have followed a circuitous route in arriving at their present position on this point, and the Texas cases are therefore illustrative of both the majority and the minority views.

In *Bridgewater v. Hooks*,<sup>38</sup> the first Texas case to deal with the problem,<sup>39</sup> it was noted that the authority in other jurisdictions was to the effect that the Statute of Frauds was not applicable. However, the court of civil appeals assumed that the Statute of Frauds did apply to this type of contract, and then turned to consider whether equity would relieve from its requirements. The court stated generally that payment of consideration and transfer of possession are not in themselves sufficient reasons to take a contract for the sale of land out of the Statute of Frauds. Furthermore, the mere fact that the consideration is in the form of personal services would not justify a different rule, for although suit under the contract would not be allowed, a remedy is available in the form of quantum meruit. However, the consideration in this case is, at least in part, of a different nature. It consists not only of personal services performed by the child, but also of the surrender of parental control and custody by the natural parent,

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<sup>35</sup> Cases cited note 32 *supra*.

<sup>36</sup> *Parks v. Burney*, 103 Neb. 572, 173 N.W. 478 (1919); *Svanburg v. Foseen*, 75 Minn. 350, 78 N.W. 4 (1899); *Cheney v. Coffee*, 131 Tex. 212, 113 S.W. 2d 162, 114 S.W. 2d 533 (1938). The case finally committing Texas to the majority view allowing equitable relief to child in these cases, viz. *Jones v. Guy*, 135 Tex. 398, 143 S.W. 2d 906 (1940), holds that the contract to adopt is not within the Statute of Frauds even though its enforcement will involve transfer of land to the child. The court reasons that this is not enforcing a parol contract for the sale of real estate "for the obvious reason that an adopted child does not inherit property in virtue of the status of adopted child alone but depends upon the intestacy of the adoptive parent, together with" the statutes of descent and distribution.

<sup>37</sup> Cases cited note 32 *supra*.

<sup>38</sup> 159 S.W. 1004 (Tex. Civ. App. 1913), reversed 111 Tex. 122, 229 S.W. 1114 (1921).

<sup>39</sup> The earlier case of *Jordan v. Abney*, 97 Tex. 296, 78 S.W. 486 (1904), dealt with the general question of equitable adoption but did not consider the affect of the Statute of Frauds since the matter was not raised by the pleadings.

and the giving of love, affection and filial loyalty by the child to the adopting parent. These items are matters which are of unquestioned, yet immeasurable value. The consideration is not compensable in money damages. There is no way to return the parties to the status quo so far as this type of consideration is concerned—the recipient is forever and irrevocably the beneficiary. The only equitable adjustment is to give effect to the agreement which occasioned the rendition of such consideration in the first instance. To hold otherwise would be to make the Statute of Frauds itself an instrument of fraud. The defendant in *Bridgewater v. Hooks* pointed out that enforcing the contract in this case would allow the disposition of land under an oral contract (since the adopting parent's estate contained realty) and that since there had been no delivery of the land under the contract, specific performance could not be granted, it being well established that, as an absolute minimum, equity will require delivery of the land, before circumventing the Statute of Frauds. The court answered that the rule requiring transfer of the land was formed in cases involving agreements for the inter-vivos sale of land, in which cases such transfer would be possible. The courts could not, it was said, have had in mind such cases as this one, when they enunciated that rule, since the contract to adopt does not contemplate delivery of the land during the lifetime of the adopting parent.

The Supreme Court reversed,<sup>40</sup> saying that the requirement of transfer of possession of the land was clearly established; that the fact that the rule does not fit the circumstances of the contract is not reason to make another rule; and, finally, that the courts did have such contracts as this one in mind when defining this rule.

Some twenty-five years later the Supreme Court, in *Cheney v. Coffee*,<sup>41</sup> adopted an opinion of the Commission of Appeals, the dictum of which relieved against the harsh requirements laid down in the *Hooks* case with regard to the Statute of Frauds and performance sufficient to remove the bar thereunder. Here, there

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<sup>40</sup> *Hooks v. Bridgewater*, 111 Tex. 122, 229 S.W. 1114 (1921).

<sup>41</sup> 113 S.W. 2d 162 (Tex. Com. App. 1938).

had been a defective adoption proceeding under an oral contract to adopt, and the children brought suit asking the court to enforce the agreement as a contract to make them heirs, as distinguished from a contract to adopt. This distinction had been recognized by the Texas courts earlier,<sup>42</sup> but at the time of this suit, the Texas rules were not entirely clear as to either type of contract. The court, while holding the contract to make an heir unenforceable, remanded the case saying that the children could state a valid cause of action on the theory of an oral contract *to adopt*. The contention that this contract would be violative of the Statute of Frauds was mentioned, but not discussed.

Finally, in *Jones v. Guy*,<sup>43</sup> the question was squarely presented and the dictum of the *Cheney* case was followed, committing Texas to the view that the Statute of Frauds will not preclude equitable adoption even where the enforcement of the agreement ultimately involves the disposition of land. Language in the case indicates that substantial performance by the child and natural parents would serve to remove the bar of the Statute of Frauds if applicable, but the holding of the court seems to be that the Statute of Frauds does not apply in the first instance.<sup>44</sup> In so holding, the Texas court does not accord with the majority view in rationale, but reaches substantially the same result as is reached in the majority of American jurisdictions.<sup>45</sup>

### *Evidence*

Because the adopting parent is usually deceased at the time the suit for performance of the adoption contract is brought, the courts have generally viewed *oral* contracts of this type with suspicion and have required strong evidence to support the existence of an alleged contract. The cases are not uniform in the language used to express this requisite. Some say that the evidence must consist of such "clear, cogent, and convincing proof" that

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<sup>42</sup> *Jordan v. Abney*, 97 Tex. 296, 78 S.W. 486 (1904).

<sup>43</sup> 135 Tex. 398, 143 S.W. 2d 906 (1940).

<sup>44</sup> See note 36 *supra*, wherein the rationale of *Jones v. Guy* is set out in detail.

<sup>45</sup> As noted earlier in the text, the majority view seems to be that the Statute of Frauds is applicable, but that substantial performance by the natural parent and child will serve to remove the bar of the statute.

all reasonable doubt is removed as to the existence of the agreement.<sup>46</sup> However, see *Daniels v. Butler*,<sup>47</sup> wherein the court seems to qualify the strong language just mentioned:

Some of the cases say that the terms and character of such a contract must be established by evidence so clear and forcible as to leave no reasonable doubt in the mind of the chancellor. We apprehend this does not mean to be beyond all reasonable doubt, as in a criminal case. A mere preponderance of the evidence is not enough, but it must be so clear and satisfactory as to convince the mind.

Other courts require that clear and satisfactory proof appear, *and* that the circumstances surrounding the inter-vivos relationship of the child and alleged adopting parent be consistent with the existence of such an agreement;<sup>48</sup> moreover, some require that the circumstances be inconsistent with any other reasonable theory.<sup>49</sup>

While the courts require clear and convincing proof, it is well settled that the evidence need not be direct;<sup>50</sup> however, the courts are very strict in considering the weight to be given circumstantial evidence in these cases. It is well settled that the mere inter-vivos relationship of the alleged adopting parent and child, standing alone, is not sufficient to prove the contract.<sup>51</sup> However, conduct of both the parent and the child is *evidentiary* of the contract's existence; e.g., while use by the child of the foster parent's name on such items as school records is not conclusive, it is evidentiary of the agreement.<sup>52</sup> A reading of the cases indicates that the strongest type of circumstantial evidence consists of statements made by the adopting parent during his lifetime, from which the

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<sup>46</sup> *Mutual Life Ins. Co. v. Benton*, 34 Fed. Supp. 859 (1940); *Burdick v. Grimshaw*, 113 N.J. Eq. 591, 168 Atl. 186 (1933); *McClellan v. Oliver*, 181 S.W. 2d 784 (Mo. 1943); *Gamanche v. Derring*, 354 Mo. 544, 185 S. W. 2d 999 (1945).

<sup>47</sup> 169 Iowa 65, 149 N.W. 265 (1914).

<sup>48</sup> *Parks v. Burney*, 103 Neb. 572, 173 N. W. 478 (1919).

<sup>49</sup> *Hutton v. Busaytis*, 326 Ill. 453, 158 N.E. 156 (1927); *Taylor v. Hamrick*, 134 S.W. 2d 52 (Mo. 1939); *Heath v. Cappel*, 163 Wis. 62, 157 N.W. 527 (1916).

<sup>50</sup> *Roberts v. Roberts*, 223 Fed. 775 (8th Cir. 1915) *certiorari denied*; *Cavanaugh v. Davis*, 149 Tex. 573, 225 S.W. 2d 972 (1951).

<sup>51</sup> *Pantel v. Bower*, 104 Kan. 18, 178 Pac. 241 (1919); *Mould v. Rohm*, 274 Ill. 547, 113 N.E. 991 (1916); *Garcia v. Saenz*, 242 S.W. 2d 230 (Tex. Civ. App. 1951); *Stillman v. Austin*, 148 S.W. 2d 573 (Mo. 1941).

<sup>52</sup> *Stillman v. Austin*, *supra* note 51.

agreement may be inferred.<sup>53</sup> Similarly, ineffectual adoption proceedings have been held to constitute evidence of an agreement, though not sufficient, standing alone, to prove its existence.<sup>54</sup>

The application of the general principles are too varied and complex to be treated at length herein. Perhaps the only general statement upon which it is safe to rely is found in *Johnson v. Eriksson*<sup>55</sup> wherein the court says, "... relief should not be cautiously granted and each case must rest on its own facts."

### III. PERFORMANCE

Even where a valid contract to adopt has been established, the question remains whether the extraordinary remedies of equity should be granted. Where there has been substantial performance by the natural parent and child under the contract, and where such performance is clearly referable to the contract, courts of equity have seen fit to enforce the agreement.<sup>56</sup> In fact, the substantial performance by the natural parent and the child is the very basis of equitable intervention in these cases and as such it is an absolute prerequisite to the relief sought.<sup>57</sup>

#### *By the Natural Parent*

The natural parent (or those standing in *loco parentis*) are obligated, under the terms of the usual adoption contract, to surrender their custody of and control over the child to the adopting parent. It is clear that both of these obligations must be fulfilled if equity is to enforce the contract against the adopting parent's estate. Surrender of parental custody and control does not, however, require that there be a complete absence of contact between the natural parent and child;<sup>58</sup> for example, where the natural and adopting parents are related, a close relationship remaining

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<sup>53</sup> *Baker v. Payne*, 198 S.W. 75 (Mo. 1917); *Parks v. Burney*, 103 Neb. 572, 173 N.W. 478 (1919); *Benefield v. Faulkner*, 248 Ala. 615, 29 So. 2d 1 (1947).

<sup>54</sup> *Corison v. Williams*, 208 Pac. 331 (Cal. 1922); *Walsh v. Fitzgerald*, 67 S.D. 623, 297 N.W. 675 (1941).

<sup>55</sup> 71 S.D. 268, 23 N.W. 2d 799 (1946).

<sup>56</sup> Cases cited note 2 *supra*.

<sup>57</sup> *Glasscock v. Kelly*, 238 Ala. 593, 192 So. 586 (1939); *Jaffee v. Jacobson*, 48 Fed. Supp. 859 (1940).

<sup>58</sup> *Garcia v. Quiroz*, 228 S. W. 2d 953 (Tex. Civ. App. 1950).

between the natural parent and child would not be inconsistent with the terms of the contract. Furthermore, assertions of parental control by the natural parent on one or two instances subsequent to the surrender of custody of the child has been held not to preclude the granting of equitable relief.<sup>59</sup>

### *By the Child*

The child's obligations under the contract to adopt would seem to be only those which are incident to the normal parent-child relationship. The cases do not clearly define the extent to which these filial duties must be performed by the child if equity is to intervene and give effect to the agreement. The question has usually been presented in cases where either (1) the adopting parent dies within a relatively short period of time following execution of the agreement;<sup>60</sup> or (2) the child, while living with the adopting parent, has been guilty of misconduct which gives rise to the assertion that he has not acted as a good and faithful child.<sup>61</sup>

Where the child lives with the adopting parent for only a short time prior to the latter's death, it is obvious that the equities accrued to the child's credit are less imposing than in the case where the greater portion of the child's minority has been spent in the adopting parent's home. Most courts which have considered the problem have held that while time is not necessarily the controlling factor in such situations, it is an element to be considered;<sup>62</sup> and where the duration of the child's performance under the agreement was so short that the child's status was not materially affected, equity will not afford a remedy.<sup>63</sup> There can, of course, be no rule of thumb as to what length of time would be sufficient, and in principle at least it seems clear that other equities may intervene to counteract the brevity of the relationship.

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Jaffee v. Jacobson*, 48 Fed. 21 (1891); *Savannah Bank & Trust Co. v. Wolf*, 191 Ga. 111, 11 S.E. 2d 766 (1940).

<sup>61</sup> *Lansdell v. Lansdell*, 144 Ga. 571, 87 S. E. 782 (1916); *Soelzer v. Soelzer*, 382 Ill. 393, 47 N. E. 2d 458 (1943).

<sup>62</sup> *Savannah Bank & Trust Co. v. Wolff*, *supra* note 60.

<sup>63</sup> *Bell v. Elrod*, 150 Ga. 709, 105 S. E. 241 (1920); (distinguished in *Savannah Bank & Trust v. Wolf*, *supra*, the court there holding that the child's status had been materially affected); *Allen v. Porter*, 181 Ga. 102, 181 S.E. 659 (1935); *Jaffee v. Jacobson*, 48 Fed. 21 (1891).

"Performance as a child" does not require an unerring sensitivity to one's filial obligations. The adopting parent could not reasonably have expected the child to be free from faults when he entered into the contract; nor does equity exact perfection from the child before it will grant him relief.<sup>64</sup> However, it has been contended that the child can be so derelict in his duties to the adopting parent as to render it improper for equity to intervene in his favor.<sup>65</sup> No cases have been found wherein individual acts of misconduct have been held sufficient to bar equitable relief. The mere disobedience, indolence, or unappreciative nature of the child, without more, will not operate to deny the child his right to enforcement of the contract.<sup>66</sup> The courts apparently consider a breach of filial responsibility substantial only when it actually affects the parent-child relationship.<sup>67</sup> In considering whether the child's conduct has been destructive of the relationship, the courts have given a great deal of weight to the adopting parent's reaction to the alleged misconduct. Thus, while it seems obvious that the adopting parent's intention could not be controlling, the courts have indicated that where his intention to dissolve the relationship is justified by the child's conduct, equity will not enforce the agreement.<sup>68</sup> There are, of course, instances where the acts of the child, standing alone, would be destructive of the relationship. For example, in *Boros v. Ball*,<sup>69</sup> the child, after having lived with the adopting parent for several years, left the adopting parent's home with an expressed intention to abandon his filial duties. The court held that this was inconsistent with the parent-child relationship, and was destructive of the child's equities under the contract. The granting of specific performance in these cases is discretionary, and it should not be allowed unless the child is affirmatively shown to be possessed of compelling equities in his favor.<sup>70</sup> In applying this general principle, the courts seem to re-

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<sup>64</sup> *Garcia v. Quiroz*, 228 S.W. 2d 953 (Tex. Civ. App. 1950).

<sup>65</sup> *Soelzer v. Soelzer*, 382 Ill. 393, 47 N.E. 2d 458 (1943); *Garcia v. Quiroz*, supra note 64.

<sup>66</sup> *Chamblee v. Wayman*, 167 Ga. 821, 146 S.E. 851 (1929).

<sup>67</sup> *Lansdell v. Lansdell*, 144 Ga. 571, 87 S.E. 782 (1916); see *Re Hack*, 166 Minn. 35, 207 N.W. 17 (1926).

<sup>68</sup> See *Tuttle v. Winchell*, 104 Neb. 750, 178 N.W. 755 (1920).

<sup>69</sup> *Lansdell v. Lansdell*, 144 Ga. 571, 87 S.E. 782 (1916).

<sup>70</sup> Note 8 supra.



quire a sustained relationship of parent and child, which has not been justifiably dissolved by the parent, nor abandoned voluntarily by the child.

#### IV. ENFORCEMENT

##### *Specific Performance*

It is clear that equity will not grant specific performance to enforce an inter-vivos relationship between the adopting parent and child.<sup>71</sup> As applied thus far, the doctrine affects only the property interests of the child, giving him, or his representatives, a right to share in the estate of the adopting parent; the interest which the child gets in this type of case is that of a natural child, and, as such, it is subject to defeasance either by the adopting parent's will or by his disposition of his property during life.

If, under a decree specifically enforcing a contract to adopt, the child is limited to sharing in the adopting parent's estate, it would seem that equity is actually providing a property *substitute for* specific performance. Thus, to determine whether the relief granted is really specific performance of the contract to adopt, it is necessary to go beyond the scope of the situations actually considered in the cases.

Suppose, for example, that the adopting parent dies intestate and leaves surviving him two natural sons and the "adopted" child. The "adopted" child secures a decree specifically enforcing the contract to adopt and is adjudged to be entitled to a child's intestate share in the adopting parent's estate. Subsequently, the father of the adopting parent dies intestate, leaving the two natural grandsons and the "adopted" grandchild as survivors. Query: Can the adopted child participate in this estate?

Logically, if the contract to adopt was specifically enforced (and thus deemed to have been performed), it would seem that the "adopted" child should be entitled to share in the "grandfather's" estate (assuming that the rights of the adopted child are, as they are in Texas, equal to the rights of a natural child).

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<sup>71</sup> 228 Iowa 779, 292 N.W. 789 (1940).

However, no cases have been found in those jurisdictions which utilize the specific performance rationale in which this question has been presented. Nor can the solution be found in the general language of the cases which grant the child the right to share in the estate of the adopting parent. And while, as indicated, it seems logically to follow from a decree of specific performance that the child can take as an heir of the adopting parent's relatives, the result will probably be to the contrary when the question is presented to the courts; for the general tenor of the cases seems to be that the remedy of specific performance gives effect to all property interests in the adopting parent's estate which are incident to the status of a child, but does not, in reality, perfect the status which may be artificially created only by compliance with the adoption statutes. If the child does not acquire the *status* of an adopted child by reason of the decree, then the statutes of descent and distribution would afford no basis under which the adopted child could claim as an heir of the relatives of the adopting parent.

The question has arisen in a jurisdiction applying the estoppel rationale. *Shaeffer v. Shaeffer*<sup>72</sup> and *Caulfield v. Noonan*<sup>73</sup> are cases in point. Both hold that the child's claim is limited to the adopting parent's estate and that only the adopting parent and his privies are estopped to deny that the adoption was perfected. This result seems to be a sound one when the problem is viewed as one of estoppel, for it is difficult to see how the actions of the adopting parent could estop those not claiming under him.

It is arguable that where the child seeks to participate as a representative of the adopting parent, he should be entitled to do so even under the estoppel rationale. Consider, for example, the following hypothetical situations:

(1) The adopting parent (A) dies intestate, leaving his father (F), his brother (B) and the adopted child (C) surviving him. Equity decrees that C is entitled to A's entire estate. Subsequently,

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<sup>72</sup> 229 Iowa 955, 295 N.W. 466 (1940).

<sup>73</sup> *Holloway v. Jones* (Mo. Supp.) 246 S.W. 587 (1922), wherein the court utilizes the estoppel rationale to protect the child's interest; *Dillmann v. Davison*, (Mo. Supp.) 239 S.W. 505 (1922), wherein the court grants specific performance of a contract to adopt.

F dies intestate. B claims the entire estate as F's sole heir; C asserts that he is entitled to one-half of F's estate as A's representative.

(2) A dies leaving F, B, C and one natural son (S) surviving him. C is granted a child's intestate share in A's estate. Subsequently, F dies intestate. B claims one-half of F's estate, and S claims the other one-half as A's sole representative. C asserts that he is entitled to share A's one-half of F's estate with S.

It seems clear that C's claim in the first situation is not justified; for the actions of A should not be held to estop F or B. The second situation, however, presents a stronger case for C. In this instance it is clear that B is entitled to only one-half of F's estate and that either S will take the other half alone, or he will share it with C. Thus to justify C's claim, it is necessary to estop only S from denying C's status as an adopted child; and since S's right to share in F's estate is dependent upon the extent to which A could have participated in F's estate, thereby making S's claim one *under* A, it would seem permissible to hold S estopped by the actions of A. Note that this reasoning would not apply where F died intestate, leaving no children but only natural grandchildren and C surviving him, because the grandchildren take in their own rights and not as representatives of a deceased member of a living class. S's claim would not be *under* A and S should not be estopped by A's actions.

### *Estoppel*

While the great majority of American jurisdictions base relief upon specific performance of a contract, it would seem that fewer obstacles are faced in granting relief under the broad concept of estoppel. The contention that the contract to adopt is invalid on the grounds of public policy and the Statute of Frauds—which contention has often proved troublesome to the courts—would have no application where relief is granted through estoppel. On principle, recovery by the child would not require the showing of a contract, but only that the child was led to believe or allowed by the adopting parent to believe that he was to inherit from the

alleged "parent" as a child; but as a practical matter the courts usually find an agreement, expressed or implied, under which the adopting parent was obligated to perfect the adoption.

In at least one jurisdiction, the fact that this theory of action is available is held not to preclude an action based on the theory of specific performance, i.e. recovery would appear to be available to the child under either specific performance or estoppel.<sup>74</sup> Absent a holding to the effect that specific performance entitles the child to share in the estate of the adopting parent's relatives, it would seem that there are few, if any, real differences in the *results* which flow from the two theories. However, it is clear that the *requirements* for relief by way of estoppel are less stringent than the prerequisites for specific performance. The principal example of such difference, of course, is the fact that no contract is necessary under the theory of estoppel as applied in most jurisdictions. Thus, the theory followed by a particular jurisdiction may have a substantial effect on the rights of the child.

### *Texas*

The history of the Texas rule on this topic affords an interesting study in the processes of the common law. Without recognizing the apparent conflict with several earlier cases which held unenforceable a contract to adopt, and relying heavily on *Cubley v. Barbee*<sup>75</sup> which held the natural heirs of an adopting parent estopped to deny the validity of defective adoption proceedings, the Texas Supreme Court, in *Jones v. Guy*<sup>76</sup> held that an oral contract to adopt would be enforced in favor of the child as against the natural heirs of the adopting parent. The court, in *Cubley v. Barbee*, noted that in many jurisdictions relief is granted upon a theory of specific performance where the plaintiff is in a position "analogous to" the child in the *Cubley* case, and they then announced that:

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<sup>74</sup> 123 Tex. 411, 73 S. W. 2d 72 (1934).

<sup>75</sup> 135 Tex. 398, 143 S.W. 2d 906 (1940).

<sup>76</sup> *Howell v. Thompson*, 190 S.W. 2d 597 (Tex. Civ. App. 1945); *Price v. Price*, 217 S.W. 2d 905 (Tex. Civ. App. 1949); *House v. House*, 222 S.W. 2d 337 (Tex. Civ. App. 1949); *Cavanaugh v. Davis*, 149 Tex. 573, 235 S.W. 2d 972 (1951); *Garcia v. Saenz*, 242 S. W. 2d 230 (Tex. Civ. App. 1951).

This seems also to be an available remedy in this state.

However, we are of the opinion that the real classification of the remedy is that of estoppel. In those cases which designate the proceedings as suits for specific performance, the courts generally recognize that performance cannot be decreed within the usual meaning of that term. Of course there is a specific performance in the sense that the naked legal title to property may have been taken by the apparently legal heirs, which the court may divest out of them and vest in the adopted heir. However, the technical classification here is of no consequence. The defendants in error are plainly estopped from asserting the invalidity of the deed of adoption and from asserting that such deed was not in fact filed as required by the statute.

While the Texas courts purport to follow the estoppel rationale, it is clear that relief will be granted only when there has been either an express contract to adopt<sup>77</sup> or defacto compliance with the adoption statutes.<sup>78</sup> Thus, the Texas rule emerges as a hybrid which predicates relief upon the broad concept of estoppel but which attaches to that relief the same prerequisites as exist in jurisdictions granting relief in the form of specific performance.

## V. CONCLUSION

Under the majority view, a contract to adopt, whether written or oral, which is substantially or fully performed by the child and natural parents (or those standing in *loco parentis*), but which is not fully performed by the adopting parent during his lifetime, will be enforced when equitable. Two means have been utilized to provide the relief to the child: (1) specific performance, and (2) estoppel. Most jurisdictions applying the latter theory do not require the existence of an agreement to adopt, but the Texas courts, while they purport to base relief on estoppel, hold that a contract to adopt is required before equity will intervene.

*Jess T. Hay*

*Ronald M. Weiss*

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<sup>77</sup> *Cubley v. Barbee*, 123 Tex. 411, 73 S.W. 2d 72 (1934).

A MODERN TEST FOR CRIMINAL RESPONSIBILITY  
OF THE MENTALLY AFFLICTED

Since the advent of modern criminal jurisprudence, judges, lawyers and doctors have struggled with the problem presented by the mental element involved in the commission of every crime. The path leading from behavior denoting normal mental processes to that denoting a complete lack of mental comprehension is a shaded one, the problem being to determine at what point along the path the shade deepens to such an extent as to blot out the criminal responsibility of the person committing an act designated as contrary to the law of the jurisdiction in which it is committed. The judicial light meter now in use places that point at "knowledge of right and wrong as to the act committed," it being the task of the triers of fact to determine when along the path the meter reflects the requisite degree of darkness to excuse under any given set of facts. These triers of fact are guided along the path by witnesses, both expert and lay, having a knowledge of the landmarks which point up the path. Each of these guides may express an opinion as to when and/or if the requisite point is reached, but the decision of the fact finder is conclusive upon the matter. The meter is based on a rule, as are most measuring instruments, and it is the purpose of this discussion to determine the soundness of the rule and thus measure the accuracy of the meter.

The rule by which criminal responsibility is determined is most frequently stated as follows: The accused is responsible for the crime if he has sufficient mental capacity to understand the nature of the particular act or acts constituting the offense and to know whether they are right or wrong.<sup>1</sup> The statement of the rule presents no particular difficulty. As is the case in most fields of law, it is the application of the rule to particular fact situations that presents the challenge.

The earliest recorded standard of man's responsibility was the "wild beast" test, requiring that to be amenable to punishment

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<sup>1</sup> *Stout v. State*, 142 Tex. Cr. R. 537, 155 S.W. 2d 374 (1941); *Thomas v. State*, 55 Tex. Cr. R. 293, 116 S.W. 600 (1909).

a man must be able to distinguish good and evil. He could escape if he "doth not know what he is doing, no more than . . . a wild beast."<sup>2</sup>

That criterion was supplanted by the generally accepted "right and wrong" test which was expounded by a group of learned English judges<sup>3</sup> as their opinion of the law regarding the excuse of crimes committed by one of unsound mind, following the decision of the now famous case of *The Queen v. M'Naghten*.<sup>4</sup> M'Naghten was acquitted of the murder of Edward Drummond, the private secretary of the Prime Minister, upon a showing that he labored under the delusion that he was being persecuted by the Prime Minister and others of the party in power. Following the publication of this opinion the courts of England and the vast majority of the American courts have applied the right and wrong test in all cases where a question of mental capacity has arisen.<sup>5</sup>

The Texas courts early adopted the rule in *M'Naghten's* case and continue its application to date,<sup>6</sup> though defense attorneys are constantly attempting to broaden the rule or to modify its application. The position of the Texas courts at the present time is clearly set forth by Judge Graves in the case of *Ross v. State* in these words:

Mere mental deficiency or derangement, though it may constitute a form of insanity known to and recognized by medical science, does not excuse one for a crime. The insanity that excuses for crime is that known as the "right and wrong test," that is, the capacity of the accused to distinguish right from wrong in respect to the act charged as a crime at the time of its commission and the probable consequences of his act.<sup>7</sup>

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<sup>2</sup> GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 138-139 (1925).

<sup>3</sup> Tindal, C. J. and Coltman, Erskine, and Cresswell, JJ. of the Court of Common Pleas; Lord Denman, C. J. and Patteson, Williams, Coleridge and Wightman, JJ. of the Court of Queen's Bench; and Lord Abinger, C. B. and Parke, Alderson, Gurney and Rolfe, BB. of the Court of Exchequer.

<sup>4</sup> 8 Eng. Rep. 718 (1843).

<sup>5</sup> CLARK & MARSHALL, CRIME § 84 (5th ed. 1952).

<sup>6</sup> *Parsons v. State*, \_\_\_\_\_ Tex. Cr. R. \_\_\_\_\_, 271 S.W. 2d 643 (1954); *McGee v. State*, 155 Tex. Cr. R. 639, 238 S.W. 2d 707 (1950); *Ross v. State*, 153 Tex. Cr. R. 312, 220 S.W. 2d 137 (1948); *McCaine v. State*, 1952 Tex. Cr. R. 108, 211 S.W. 2d 190 (1948); *Carter v. State*, 12 Tex. 500 (1854).

<sup>7</sup> 220 S.W. 2d 137, 144 (1948).

An interesting example of an attempt to broaden the right and wrong test is the doctrine of insane delusion. The person committing the act is perfectly capable of distinguishing right from wrong as to any given fact situation but is incapable of ascertaining what is the true fact situation. In cases of this type the law requires that the accused be judged as if the facts as they appear to him were actually true. The early Texas case of *Merritt v. State*,<sup>8</sup> in discussing the English view in such situations, gives these illustrations:<sup>9</sup>

If under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self defense he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The court proceeds to adopt the English rule and this view has since been reflected by the Texas cases dealing with this particular segment of the defense of insanity.<sup>10</sup> This places a heavy burden upon the mentally defective person—he must not only be laboring under an insane delusion, but must also take care that the delusion is such as would, if true, constitute a defense to the offense charged.

Another example of an attempt to broaden the right and wrong test is the doctrine of irresistible impulse. The person committing the act is capable of distinguishing between right and wrong as to the act charged but is incapable of making a choice between the two. An inner force so strong as to completely dominate the will of the person compels him to commit the act knowing that it is wrong.<sup>11</sup> The American courts have split on the adoption or rejection of the irresistible impulse theory of defense.<sup>12</sup> Those courts that adopt it do so on the theory that a person acting under

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<sup>8</sup> 39 Tex. Cr. R. 70, 45 S.W. 21 (1898).

<sup>9</sup> *Id.* at p. 22.

<sup>10</sup> *Coffee v. State*, 148 Tex. Cr. R. 71, 184 S.W. 2d 278 (1944); *Alexander v. State*, ..... Tex. Cr. R. ...., 8 S.W. 2d 176 (1928); *Morris v. State*, 98 Tex. Cr. R. 63, 255 S.W. 744 (1923); *Kirby v. State*, 68 Tex. Cr. R. 63, 150 S.W. 455 (1912).

<sup>11</sup> This should be clearly distinguished from the impulse stemming only from the emotions.

<sup>12</sup> CLARK & MARSHALL, *CRIME* § 86 (5th ed. 1952).



such impulse loses his volition and becomes a mere tool of his obsession. He lacks the criminal intent necessary to commit crime.<sup>13</sup>

Those which reject the theory seem to do so in the interest of public safety, fearing the practical results of enlarging the gap through which those who have committed crimes may escape. There are three classes of restraints which act to control free impulse—religious restraint, the restraint of the conscience, and the restraint provided by law. Of the three the last is probably the strongest. To remove this restraint by recognizing a theory such as the defense of irresistible impulse would be to take away the force which would have made the impulse resistible; i. e., the impulse would be irresistible only if the punishment were not at hand. If the person is so obsessed as to be incapable of distinguishing the nature of the act, the right and wrong test will free him from punishment; if he is not driven to that extreme this view does not recognize his right to indulge his impulses at the expense of society.<sup>14</sup> The law does not require that the accused be able to *choose* between right and wrong; if he can *distinguish* them he will be punished if he does that which is wrong.

The Texas courts have refused to recognize the irresistible impulse theory of defense.<sup>15</sup> Texas thus aligns itself with the present American majority view.<sup>16</sup>

Attempts to have the courts recognize insanity due to the use of intoxicating liquor or narcotics as a defense to crime do not represent attempts to broaden the right and wrong test since the test is inapplicable in cases where the insanity is voluntarily produced.<sup>17</sup> Insanity due to the use of intoxicants is of two kinds—temporary insanity resulting from the recent use of such stimulants, and settled insanity, sometimes called *delirium tremens*, resulting from long and persistent excesses. The former type as a defense to

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<sup>13</sup> See Note, 70 A.L.R. 663 (1931).

<sup>14</sup> *Id* at p. 675.

<sup>15</sup> *Ross v. State*, 153 Tex. Cr. R. 312, 220 S.W. 2d 137 (1948); *Carnes v. State*, 101 Tex. Cr. R. 273, 275 S.W. 1002 (1925); *Thomas v. State*, 55 Tex. Cr. R. 293; 116 S.W. 600 (1909); *Cannon v. State*, 41 Tex. Cr. R. 467, 56 S.W. 351 (1900).

<sup>16</sup> See Note, 70 A.L.R. 659 (1931).

<sup>17</sup> CLARK & MARSHALL, CRIME § 90 (5th ed. 1952).

crime is dealt with by statute in most jurisdictions as it is in Texas.<sup>18</sup> The general purport of such statutes is that temporary insanity as a result of drunkenness does not constitute a defense to crime but may be offered by the accused in mitigation of the penalty in the event of conviction. In those jurisdictions in which murder is divided into degrees the evidence of temporary insanity due to drunkenness will usually be admissible to reduce the degree of the offense charged.<sup>19</sup>

The first Texas statute dealing with temporary insanity as a result of intoxication was passed by the legislature in 1881.<sup>20</sup> It was in substance the same as the present statute and forbade the excusing of crime on the basis of such a defense. Three early Texas cases,<sup>21</sup> relying upon an earlier federal case,<sup>22</sup> construed the statute as being inapplicable to those crimes in which intent to commit the crime was specifically required. They reasoned that the fact of intoxication such as to produce temporary insanity would not excuse the crime, but would show that no crime was in fact committed, the intoxicated person being incapable of having any criminal intent. The Court of Criminal Appeals overruled these cases in the case of *Evers v. State*<sup>23</sup> in these words: "Though it is a general rule that insanity is an excuse for crime, there is one exception to the rule, and that is, where the crime is committed by a party in a fit of intoxication, though the party is bereft of his reason by drunkenness, and therefore is insane as from any other cause."<sup>24</sup> The Texas courts have followed the *Evers* case and have specifically stated that even where the crime charged requires a specific intent on the part of him who commits it, drunkenness inducing temporary insanity will not excuse, though it may mitigate the penalty.<sup>25</sup>

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<sup>18</sup> VERNON'S ANNOTATED PENAL CODE Art. 36 (1939).

<sup>19</sup> CLARK & MARSHALL, CRIME § 96 (5th ed. 1952).

<sup>20</sup> Acts 1881, p. 9.

<sup>21</sup> *Lylé v. State*, 31 Tex. Cr. R. 103, 19 S.W. 903 (1892); *Reagan v. State*, 28 Tex. App. 227, 12 S.W. 601 (1889); *Loza v. State*, 1 Tex. App. 488 (1883).

<sup>22</sup> *Hopt v. People*, 104 U.S. 631 (1881).

<sup>23</sup> 31 Tex. Cr. R. 318, 20 S. W. 744, 18 L.R.A. 421 (1892).

<sup>24</sup> *Id.* at p. 748.

<sup>25</sup> *Forbes v. State*, 143 Tex. Cr. R. 180, 157 S.W. 2d 900 (1941); *Adams v. State*, 140 Tex. Cr. R. 319, 144 S.W. 2d 889 (1940); *Martinez v. State*, 137 Tex. Cr. R. 434, 128 S. W. 2d 398 (1939); *Clinton v. State*, 132 Tex. Cr. R. 303, 104 S. W. 2d 39 (1937).

Where long, persistent use of intoxicants or narcotics has resulted in that type of settled insanity known as *delirium tremens*, continuing beyond any periods of intoxication, there is seemingly unanimous acceptance of the principle that the one so afflicted is absolved of criminal responsibility.<sup>26</sup> This type of insanity is the remote result of drinking and is voluntarily sought by no one; whereas temporary insanity is a direct result of intoxication and is eagerly pursued by those who drink immoderately.<sup>27</sup> It is to be noted that the courts apply the same rules to this type of insanity as to insanity resulting from other causes—in Texas, the right and wrong test.

The American courts have failed to keep pace with the evolution of medical knowledge concerning the behavior of the human being. The rules and tests applied by most courts today originated at a time when very little was known of the drives and motives which direct human behavior, and have been applied without change through the years. The courts have stood their ground and allowed the waters of progress to flow beneath their feet without giving heed to their course.

A step forward in correlating medical knowledge with courtroom practice was taken by the United States Court of Appeals for the District of Columbia in the recent case of *Durham v. United States*.<sup>28</sup> Durham was convicted of housebreaking by the District Court for the District of Columbia, sitting without a jury. His sole defense was insanity. He had been previously adjudged insane and committed to an institution; his entire history was one of mental instability. Evidence at the trial showed he was released from an institution two months prior to the commission of the act for which he was convicted. His mother and a psychiatrist testified that he suffered from hallucinations. After the commission of the crime he was again pronounced insane and was committed for a period of sixteen months, at the end of which time the trial occurred, resulting in his conviction.

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<sup>26</sup> See Note, 12 A.L.R. 895 (1921).

<sup>27</sup> *Duke v. State*, 61 Tex. Cr. R. 441, 134 S.W. 705 (1910).

<sup>28</sup> 214 F. 2d 862 (1954).

The court of appeals reversed the conviction on the ground that the trial judge incorrectly applied the rules as to burden of proof on the defense of insanity.<sup>29</sup> However, the contention on which most effort was spent by counsel for the appellant and an *amicus curiae* present in the case was that the existing tests of criminal responsibility are obsolete and should be superseded. In a well written opinion which thoroughly discusses the history and reasoning of the existing criteria, and cites a great many texts on the subject of insanity and its relation to criminal acts, the court discards the existing tests and adopts a revolutionary standard.

The *Durham* rule is a model of conciseness. It is simply this: An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.<sup>30</sup>

The court defines the terms in which the rule is couched as follows, "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."<sup>31</sup>

The test in the *Durham* case encompasses the right and wrong test, the insane delusion test, the irresistible impulse test, and in addition allows the jury to consider evidence of melancholia and other symptoms of mental abnormality. It is analogous to rules of pleading which allow the pleader to point up ultimate issues rather than detailed evidentiary matter. Under this view the jury no longer is required to find the existence of specific symptoms of mental illness but is allowed to look for the ultimate—whether the act was caused by or was a result of mental disease or defect.

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<sup>29</sup> The court stated the usual presumption of sanity and then found there has been no testimony as to the defendant's mental state on the date of the act complained of to rebut the presumption. The federal rule is that whenever "some evidence of mental disorder is introduced" the burden is on the state to establish sanity beyond a reasonable doubt. *Tatum v. United States*, 190 F. 2d 612, 615 (D.C. Cir. 1951). Both the mother and a psychiatrist testified as to facts which satisfied the requirement of "some evidence."

<sup>30</sup> *Durham v. United States*, 214 F. 2d 862, 874 (D.C. Cir. 1954).

<sup>31</sup> *Id.* at p. 875.

It is interesting to speculate as to the applicability of this test to temporary insanity resulting from the recent use of intoxicating liquor. Insanity of this type has always been considered by the courts as separate and apart from true insanity and not within the realm of the tests for responsibility applied to those supposedly suffering from disease or defect of the mind. Thus it would seem that the statutes and rules on this particular defense would be unaffected by the change of the test for criminal responsibility of mentally afflicted persons.

In applying the *Durham* test the trial judge will apprise the jury that in order to acquit they must find two things: (1) that the accused is suffering from a mental defect or disease, which terms he must define; and (2) that the act had a casual connection with the mental defect or disease. If the jury fails to find either, assuming a preliminary finding that the act was done by the accused, it must return a verdict of guilty. The task of the jury in this instance is no more difficult or impossible of performance than is the task they undertake in finding the nature of an injury in a personal injury case, and with correct direction from the trial judge no difficulty should be encountered in securing a verdict reflecting the weight of the evidence.

That the test used in the *Durham* case is practicable and has achieved just results is witnessed by the fact that the courts of New Hampshire have applied the same test since 1870.<sup>32</sup> The New Mexico Supreme Court in the recent case of *State v. White*<sup>33</sup> recognizes the need for liberalization of the right and wrong test and adopts a more limited statement of the *Durham* test.

Having reviewed the past and the present it is necessary to look briefly into the future of the law with regard to the mental element in the commission of crime. In the light of the excellent example set by the courts of New Hampshire, New Mexico, and the District of Columbia, and considering the widespread and prolonged criticism of the various "symptoms" tests of criminal responsibility, it is difficult to see how the right and wrong test with its

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<sup>32</sup> *State v. Jones*, 50 N.H. 369 (1871); *State v. Pike*, 49 N.H. 399 (1870).

<sup>33</sup> \_\_\_\_\_ N.M. \_\_\_\_\_, 270 P. 2d 727 (1954).

myriad complexities and modifications can long survive. Psychologists have cried for its abolition for a century and the jurists have from time to time joined in the plea. However, few have been able to offer an acceptable substitute. It is submitted that the New Hampshire rule as advocated by the *Durham* case is that substitute.

The application of the test will require many changes, sociological as well as judicial. The corrective mental institutions must be enlarged to accept the added burden to be placed upon them. The psychiatrist must conscientiously accept his enhanced duty to the court and society. The judge must take care that the jury understands its proper function. Counsel for the State and the defense must maintain a high ethical standard due to the enhanced opportunity to perpetrate a fraud on the court. It is submitted that it would be both wise and expedient to do away with the present "battle of the experts" system of determining sanity in which each side presents its expert witness whose knowledge and opportunity to observe the accused may have been limited by any number of actions taken by the opponent. Instead, the State could provide one or more competent psychiatrists, chosen at random from a list provided it by the local medical association, give that person ample time to observe the accused in a surrounding conducive to informative study, and then present him as the court's witness with counsel for both sides having an opportunity to examine him thoroughly as to his conclusions.

The *Durham* test is to be commended for its ease of application and its recognition of medical advances. It allows the court the advantage of free use of expert medical opinion and removes the restriction requiring a specific determination of isolated symptoms of mental affliction. It is, of course, fraught with all the dangers inherent in allowing a jury to determine matters about which they know little, but this objection was raised in connection with allowing juries to determine when an injury is of a permanent nature, and whether oil is being drained from a particular tract, and

other like situations and each time the courts have found it not to be fatal.<sup>84</sup>

Society has long called for a change in the treatment the law affords its members who are mentally afflicted. A progressive and workable answer to that call has been made and should be given the ear of every court in the nation.

*Hubert Genty, Jr.*

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<sup>84</sup> Texas Employers' Ins. Ass'n v. Hierholzer, 207 S.W. 2d 178 (Tex. Civ. App. 1947); Southern Underwriters v. Schoolcraft, 139 S.W. 2d 330 (Tex. Civ. App. 1940); Humble Oil & Refining Co. v. Strauss, 243 S.W. 528 (Tex. Civ. App. 1922).