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Case Notes

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CASE NOTES

TORTS—IMMUNITY OF A CHARITABLE ORGANIZATION—APPLICABILITY AS TO DUTY IMPOSED BY CITY ORDINANCE

Plaintiff was injured when she tripped and fell on a defective sidewalk adjoining property owned by a charitable organization. The city had provided, by ordinance, that the owner of the abutting property maintain and repair the sidewalk. Lower court gave judgment for the plaintiff and granted defendant charitable corporation's motion for judgment notwithstanding the verdict. *Held*: Affirmed. A charitable corporation may not be held liable for its negligence, even though the negligence is in violation of a municipal ordinance. *Bond v. City of Pittsburgh*, 84 A.2d 328 (Pa. 1951).

A charitable organization, though not generally liable for its negligence, is liable for the violation of an ordinance. *Wilson v. Evangelical Lutheran Church of Reformation*, 202 Wis. 111, 230 N.W. 708 (1930). Exceptions to non-liability have been made conditional upon an ordinance designed to preserve public safety and convenience. *Hord v. City of Ft. Myers*, 153 Fla. 397, 13 So.2d 809 (1943). A charitable corporation is liable for violations of an ordinance relating to safety devices. *Susman v. Y.M.C.A. of Seattle*, 101 Wash. 487, 172 Pac. 554 (1918); *Philadelphia v. Pennsylvania Hospital*, 143 Pa. St. 367, 22 Atl. 744 (1891) (streets and highway repair); *Wilkinsburg v. Home for Aged Protestant Women*, 131 Pa. 109, 18 Atl. 937 (1890) (footwalk maintenance); *Wilson v. Evangelical Lutheran Church of Reformation*, *supra*, (unlighted stairways); *Kellog v. Church Charity Foundation*, 112 N.Y.S. 566 (1908) (negligence in operation of ambulance); *Bruce v. Central Methodist Church*, 147 Mich. 230, 110 N.W. 951 (1907) (defective scaffold); *Abston v. Waldon Ocademy*, 118 Tenn. 24, 102 S.W. 351 (1907) (failure to provide fire escapes). A charitable corporation is liable for violations of ordinances created to preserve the public health. *Blackman Health Resort v. Atlanta*, 151 Ga. 507, 107 S.E. 525 (1921). The charitable institution must obey an ordinance created for the promotion of public morals. *State v. Woodruff*, 153 Fla. 84, 13 So.2d 704 (1943); *Gitlow v. New York*, 268 U.S. 652, 45 S.Ct. 625, 69 L. Ed. 1138 (1924). An ordinance tending to promote the general welfare of the community creates liability for a non-conforming charitable group. *Berea College v. Commonwealth*, 123 Ky. 209, 94 S.W. 623 (1906); *McMasters v. State*, 21 Okla. Crim. Rep. 318, 207 Pac. 566 (1922). Ordinances designed to abate a public nuisance apply to charitable corporations. *Rosehill Cemetery Co. v. Chicago*, 352 Ill. 11, 185 N.E. 170 (1933); *Jones v. City of Moultrie*, 72 Ga. App. 282, 33 S.E.2d 561 (1945). Furthermore, an ordinance designed to preserve public safety, convenience, health, morals or general welfare, applies to all political, social, or religious organizations. *Hord v. City of Ft. Myers*, *supra*. A minority view is that a charitable corporation is not liable even in violation of a city ordinance. *Quinlan v. St. Joseph's Church, Troy*, 291 N.Y.S. 394 (1936); *Jackson v. Goodwill Industries*, 46 Ga. App. 425, 167 S.E. 702 (1933).

The fictions manufactured to allow tort immunity for charitable organi-

zations seem to be fading out. A majority of the courts hold such groups liable when the ordinance of a city casts a specific duty upon the group. The holding in the principal case is now one of a minority. The liability, denied in the principal case, is being extended to allow those injured because of the violation of an ordinance to recover against a charitable organization.

LEAH FARB CHANIN

TORTS—WRONGFUL DEATH—RIGHT OF SURVIVOR TO SUE

Defendant shot and killed his wife. Plaintiff, his stepdaughter, sued him under the Mississippi wrongful death statute which in effect stated that where death of one person is caused by another, a right of action inures to a member of deceased's immediate family if deceased could have recovered had he survived. Defendant contended that this action could not be maintained as his marriage relation precluded his wife from suit and her survivor was likewise barred. Judgment for plaintiff and defendant appealed. *Held*: Affirmed. Daughter could bring death action against stepfather even though mother would not have been able to sue stepfather for assault had she lived. *Deposit Guaranty Bank & Trust Co. v. Nelson*, 54 So.2d 476 (Miss. 1951).

At common law there was no right of action either by husband or wife against the other for a personal tort. *Thompson v. Thompson*, 218 U.S. 611, 31 S.Ct. 111, 54 L. Ed. 1180, 30 L.R.A. (N.S.) 1153 (1910). The common law principle of non-liability for a tort committed by either spouse was based on the doctrine that husband and wife were one person. *Leonardi v. Leonardi*, 21 Ohio App. 110, 153 N.E. 93 (1925). This rule arose to preserve the unity of man and wife and the peace and tranquility of the home *Austin v. Austin*, 136 Miss. 61, 100 So. 591, 33 A.L.R. 1388 (1924). By virtue of emancipation acts first enacted in 1844 and subsequently adopted in all American jurisdictions, a married woman became endowed with the separate ownership and control of her own property and the right to sue and be sued. PROSSER, TORTS § 99 (1941). But in the matter of personal torts the majority view is that neither spouse may sue the other for assault regardless of what the statutes provide. *Thompson v. Thompson*, *supra*. This view has been criticized by some of the leading legal writers, McCurdy. *Torts Between Persons In Domestic Relation*, 43 HARV. L. REV. 1030 (1930); PROSSER, *supra*. The courts have considered the danger of fictitious and fraudulent claims by a wife against her husband, *Abbott v. Abbott*, 67 Me. 304, 24 Am. Rep. 27 (1877), but fraud should not be presumed in a familial relationship. McCurdy, *supra*. The minority view holding that spouses may sue eath other for personal torts has a substantial following. MADDEN, PERSONS AND DOMESTIC RELATIONS, § 69 (1931). The majority view has prevailed because of its historical background and nothing more. *Courtney v. Courtney*, 184 Okla. 395, 87 P.2d 660 (1938). At common law where A's tortious act caused the death of B the tort died with B. *Huggins v. Butcher*, 1 Brownl. 205, Yelv. 89 (1607). But the development of the law gave rise to a more liberal trend, highlighted by

Lord Campbell's Act of 1846 (9 & 10 Vict., c. 93), giving next of kin the right to sue for wrongful death. This act has been called "the product of an enlightened public conscience." *Soden v. Trenton & Mercer County Traction Co.*, 101 N.J.L. 393, 127 Atl. 558 (1925). The Mississippi Death Statute follows the general practice of allowing recovery by next of kin only where deceased could have recovered had he lived. MISS. CODE, § 1453 (1942). Courts applying similar statutes have denied a right of recovery against the estate of the husband for wrongful death, *Wilson v. Barton*, 153 Tenn. 250, 283 S.W. 71 (1925); *Hovey v. Dolmage*, 203 Iowa 231, 212 N.W. 553 (1927), while others have upheld the right to sue. *Robinson v. Robinson*, 188 Ky. 49, 220 S.W. 1074 (1920); *Welch v. Davis*, 101 N.E.2d 547 (Ill. 1951).

The instant case is one of first impression in Mississippi. In his opinion Commissioner Ethridge says, "The reasons for the rule of immunity between husband and wife do not exist where the husband kills his wife and thus destroys the marital relationship." The court attempts to follow precedent in finding that the common law disability of a wife to sue a husband still exists, then goes on to say that the disability has been extinguished because the marital relation has been destroyed. By virtue of MISS. CODE, § 452 (1942), husband and wife may sue each other. It seems reasonable to assume that a disability on the part of the wife to sue did not in fact exist. The court has thus reached a desirable end in an awkward manner.

BERTRAM H. RAPOPORT

TORTS—FALSE IMPRISONMENT—ACCOMPLISHED BY BLOCKING DRIVEWAY

Plaintiff was delinquent on a furniture loan made by defendant. Defendant's agent came to plaintiff's home to collect or reposses furniture and parked his car so as to block the exit from plaintiff's driveway, telling plaintiff in abrupt and gruff manner that she must stay there until truck arrived to remove the furniture. Plaintiff asked on two occasions if she might leave. The agent refused permission and she concluded from his attitude that he would not remove his car if requested to do so. Plaintiff was pregnant and fearful of her condition, which was known to agent. It appears that the agent left plaintiff's premises, during the period of her detention, and went next door to obtain food for himself. The truck arrived three hours after the agent's arrival and took the furniture. The agent then left. Trial court found for the defendant. On appeal, *Held*: Reversed. Words or conduct furnishing a reasonable apprehension on the part of one restrained that he will not be allowed to depart is sufficient to support a finding of false imprisonment, even though there is no actual physical restraint. *Schanafelt v. Seaboard Finance Co.*, 239 P.2d 42 (Calif. 1951).

False imprisonment always includes at least a technical assault. *Hoffman v. Clinic Hospital*, 213 N.C. 669, 197 S.E. 161 (1938). A technical assault is defined as a threat or attempt to interfere with one's sense or feeling of physical security and to put one in fear for his safety. *State v. Barkas*, 191 Utah 574, 65 P.2d 1130 (1937). An actual physical restraint,

whether by force or fear, is also essential to a false imprisonment. *Sinclair Refining Co. v. Meek*, 62 Ga. App. 850, 10 S.E.2d 76 (1940). Submission must be to reasonably apprehended force where no force or violence is actually used. *Parrish v. Boysell Mfg. Co.*, 211 N.C. 7, 188 S.E. 817 (1936). There is not the essential constraint of liberty, if a way of escape, available without peril of life or limb, is left open. *Furlong v. German-American Press Ass'n.*, 189 S.W. 385 (Mo. 1916). The fact that one considers himself restrained is not sufficient unless he apprehends a resort to force upon an attempt to assert his liberty. *Hoffman v. Clinic Hospital, supra.* To constitute false imprisonment by words alone, the words must be such as the person allegedly imprisoned feared to disregard. *Meinecke v. Skaggs*, 123 Mont. 308, 213 P.2d 237 (1949). Submission to the mere verbal directions of another, unaccompanied by force or threats of any character, cannot constitute false imprisonment. *S. H. Kress & Co. v. Demont*, 224 S.W. 520 (Tex. 1920).

It does not appear that any threat, nor words which might have led the plaintiff to a reasonable belief that violence or force would have been used to prevent her departure, were used by the defendant's agent in the instant case. Further, the agent left plaintiff in order to procure food for himself, apparently leaving plaintiff unguarded with a safe and certain way of escape open to her, in addition to those which were afforded by the lack of physical restraint upon her. While some courts hold that one may be falsely imprisoned merely by being deprived of his means of transportation, it is submitted that the end attained in the instant case exceeds the designed aim and purpose of the rules relating to false imprisonment. While interests wrongfully invaded in all cases are entitled to protection, modern law provides adequate remedies, suitable to the facts and circumstances, which more nearly accomplish justice for all concerned without resorting to a warping of the formula to fit the facts.

DANIEL J. PIPPIN

TORTS—MENTAL SUFFERING—RECOVERY OF DAMAGES FOR MENTAL ANGUISH CAUSED BY WITNESSING INJURY TO ANOTHER

Plaintiff's petition alleged that he purchased a bottled soft drink, which contained a decomposed foreign substance, and gave it to a fellow employee who drank it and was made violently ill, being seized with great bodily pain and other physical symptoms so severe as to cause plaintiff to suffer great mental and physical shock. Petition dismissed on the ground that it did not state a cause of action. *Held*: Affirmed. Recovery may not be had for mental anxiety and anguish which is not produced by, connected with, or the result of, some physical suffering or injury to the person enduring the mental anguish. *Van Hoy v. Oklahoma Coca-Cola Bottling Co.*, 235 P.2d 948 (Okla., 1951).

The right to maintain an action may not be predicated upon a mental or emotional disturbance alone. *Southern Express Co. v. Byers*, 240 U.S. 612, 36 S.Ct. 410, 60 L. Ed. 825 (1916). There may be recovery for mental suffering when there is a "technical impact", *Dulieu v. White*, 2 K.B. 669

(1901), or when physical injury accompanies the mental suffering, *Morcelle v. Teasley*, 72 Ga. App. 421, 33 S.E.2d 836 (1945), or when the act complained of was an intentional or wilful wrong. *Digsby v. Carrol Baking Co.*, 76 Ga. App. 656, 47 S.E.2d 203 (1948). The rule denying the right to maintain an action is most frequently applied in cases where the act complained of is caused by the defendant's negligence. *Francis v. Western Union Telegraph Co.*, 58 Minn. 252, 59 N.W. 1078, 25 L.R.A. 406 (1894). A few courts have allowed recovery when the negligence of the defendant was the proximate cause of the mental suffering to the plaintiff. *Orlo v. Connecticut Co.*, 128 Conn. 231, 21 A.2d 402 (1941). When the emotional disturbance was caused by another's danger, or sympathy for another's suffering, the courts have quite generally not allowed recovery. *Hinnant v. Tide Water Power Co.*, 189 N.C. 120, 126 S.E. 307 (1925). There have been exceptions even to this rule, *Cohen v. Ansonia Realty Co.*, 162 App. Div. 791, 148 N.Y. Supp. 39 (1914), but to come within the ambit of these cases, the plaintiff himself must have been within the zone of apprehensible physical danger and the endangered third person must be a member of the plaintiff's family. *Waube v. Warrington*, 216 Wis. 603, 258 N.W. 497, 98 A.L.R. 394 (1935). The English courts have allowed recovery when the plaintiff was not within the zone of danger. *Hambrook v. Stoke Bros.*, 1 K.B. 141 (1925).

This court followed the majority rules laid down in previous cases and refused recovery since the act complained of was a result of negligence and is based on mental suffering caused by witnessing injury to another. It seems, however, as in other cases of negligence the courts should look to the duty to use due care, the test of which is found in the foreseeability of harm that may result if not exercised. By that it is not meant that one charged with negligence must be found to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, whether the ordinary man in the defendant's position, knowing what he knew or should have known, would anticipate that harm of the general nature which resulted was likely to result. If this line of reasoning had been followed in the instant case the same result would probably be reached. When, however, the anxiety is not for a third person and the negligence of the defendant caused the mental suffering to the plaintiff, unaccompanied by physical injury, this line of reasoning might allow recovery in some instances where the courts now deny it. Undoubtedly one, if not the principal, reason why recovery has been denied in cases of this nature is the feeling that fright and similar emotional disturbances are subjective states of the mind and difficult properly to evaluate. Therefore, to permit recovery in such cases would open a wide field for fictitious claims with which the law cannot satisfactorily deal. Certainly it is a very questionable position for the courts to take, that because of the possibility of encouraging fictitious claims, compensation should be denied those who have actually suffered serious injury through the negligence of another. "All in all, it is fair to say that the courts have already given extensive protection to feelings and emotions. They have shown a notable adaptability in redressing the more serious invasions of the important interest of personality. No longer is it even approximately true that the

law does not pretend to redress mental pain and anguish when the unlawful act complained of causes that alone. If a consistent pattern cannot yet be clearly discerned in the cases, this but indicates that the law on the subject is in a process of growth." 49 HARV. L. REV. 1067.

WALLACE E. HARRELL, JR.

CONFLICT OF LAWS—CONTRACTS—LAW GOVERNING VALIDITY, NATURE AND INTERPRETATION

Plaintiffs entered into an oral contract of employment, in Georgia, with the defendant company, which was to be performed in the state of Washington. The defedant's agent stated that the employment would last from three to five years. The plaintiff's had been in the employ of the defendant company six months when they were discharged without cause, and they sued on the contract. Defendant, by special plea, set up the statute of frauds as a defense, in that the oral contract was not to be performed within one year from the date of making. Plaintiffs demurred on the ground that the contract should be governed by the laws of Georgia, and under such laws the contract was valid. Demurrer sustained, and defendant appealed. *Held*: Reversed. Although the contract was made in Georgia, the validity, nature and obligation of the contract will be governed by the laws of the state where the contract was to be performed. *Dissent*: The statute of frauds relates to remedy and not to substance, and the law of the forum should apply regardless of where the contract is to be performed. *Guy F. Atkinson Co. v. Fimian*, 68 S.E.2d 236 (Ga. App. 1951).

The general view is that the law of the place where the contract was made governs its nature, validity and interpretation, unless it appears that the parties intended to be bound by the law of some other jurisdiction. *Jansson v. Swedish American Line*, 185 F.2d 212 (1st Cir. 1950). The place of making of a contract is where the last act is done which is necessary to bring a binding agreement into being. *Burtis v. Butler Bros.*, 228 S.W.2d 938 (Tex. 1950). Some jurisdictions follow the theory that where a contract is to be performed in a place other than where it was made, the place of performance governs all substantive matters connected with the contract. *Pratt v. Sloan*, 41 Ga. App. 150, 152 S.E. 275 (1930). A few courts take the view that contracts will be governed by the law which was intended by the parties. *Connecticut General Life Ins. Co. v. Boseman*, 84 F.2d 701 (5th Cir. 1936). This intention may be expressed, implied or presumed. *Mayer v. Roche*, 77 N.J.L. 681, 75 Atl. 235 (1909). Under the intention theory, the parties' selection of which law is to govern their contract is limited to a jurisdiction which has a real connection with the contract. *Owens v. Hagenbeck Wallace Shows Co.*, 58 R.I. 162, 192 Atl. 158 (1937). The parties in their selection must act in good faith. *Castleman v. Canal Bank & Trust Co.*, 171 Miss. 291, 156 So. 648 (1934). The place of contracting or performance governs all matters of substantive law affecting a contract, but the law of the forum controls all matters of procedure. *Mutual Life Ins. Co. of New York v. Froehlich*, 60 F. Supp. 902 (D.N.J., 1945). By the term "substantive law" is meant that part of the law which creates, defines and regulates rights, as opposed to "adjective or procedual law" which pre-

scribes the method of enforcing the rights or obtaining redress for their invasion. *Maurizi v. Western Coal & Mining Co.*, 321 Mo. 378, 11 S.W.2d 268 (1928). Many jurisdictions have established the view that the statute of frauds is a procedual matter rather than one of substance, and the law of the forum should control its operation. *Obear v. First National Bank*, 97 Ga. 587, 25 S.E. 353 (1895).

The rules which determine the law governing the construction, validity and interpretation of contracts are in hopeless conflict, as between the law of the place of making, place of performance, or that intended by the parties. The majority opinion in the principal case followed the place of performance theory, although the modern tendency seems to favor the governing of the contract by the laws of the place where it was made. The dissent in the principal case was based on the holding in *Obear v. First National Bank, supra*, and the rule laid down in that case still appears to be the law in Georgia today. The majority opinion ,however, made no mention of the *Obear* case, and held that the statute of frauds was a matter of substance rather than procedure. It seems that the *Obear* case was binding on the court and the dissent should have prevailed.

GEORGE S. CARPENTER, JR.

ADOPTION—DISCRETION—ABUSE OF DISCRETION BY TRIAL COURT IN DENYING ADOPTION

Child was placed with petitioner by the mother nine days after its birth in November, 1943. The child has enjoyed excellent care in petitioner's home as evidenced by testimony of witnesses, scholastic record and general health. The real mother has twice consented to adoption and the only opposition is on the part of the State Department of Social Welfare on the grounds that the petitioner is unstable because of six prior marriages and eleven months served in the Missouri State Prison on a charge of being an accomplice to murder. Since 1939 petitioner has had no police record and married her present husband in 1940. Lower court denied petition for adoption and petitioner appealed. *Held*: Reversed. Where the only opposition to the adoption was that of the Welfare Department and their objections were solely on the ground of alleged instability of adoptive mother because of events occurring eleven years prior to petition, refusal to grant petition was abuse of discretion when the evidence showed that the best interests of the child would be served by allowing the adoption. *Adoption of Lingol*, 237 P.2d 57 (Cal. 1951).

Adoption was know to the ancients of Greece and Rome but unknown to the common law of England, and exists in this country only by virtue of statute. 1 AM. JUR., *Adoption* § 3 (1936); *Helms v. Elliott*, 89 Tenn. 446, 14 S.W. 930, 10 L.R.A. 535 (1890). The Welfare of the child is the primary consideration in providing for his adoption. *Eggleston v. Landrum*, 210 Miss. 645, 50 So.2d 364 (1951). The court must be satisfied that the best interests and welfare of the child will be promoted by the Adoption. *Anderson v. Barkman*, 72 A.2d 709 (Md. 1950). The burden of proof is upon the petitioner to establish facts justifying adoption. *Mastrovich v. Mavric*,

66 S.D. 577, 287 N.W. 97 (1939). Considerable liberality should be allowed in inquiring into the fitness and character of petitioners seeking to adopt. *Dodt v. Werner*, 340 Ill. App. 224, 91 N.E.2d 452 (1950). In the absence of showing of an abuse of discretion on the part of the trial judge, his decision will not be disturbed on appeal, 2 CJ.S., *Adoption* § 41, and the appellate court should not weigh the evidence or substitute its discretionary judgment for that of the trial court. In re *Martin's Adoption*, 76, Cal. App. 2d 133, 172 P.2d 552 (1946). The lower court may use the discretion according to the circumstances of the particular case, the child's welfare being the chief consideration. *State ex rel Hardesty Sparks*, 28 Tenn. App. 329, 190 S.W.2d 302 (1945). Parental love and affection as well as material and economic factors must be considered. In re *Hogue*, 41 N.M. 438, 70 P.2d 764 (1937). The review on appeal is limited to determining whether there is any evidence to support findings and ultimate conclusions of the lower court. In re *Davies Adoption*, 353 Pa. 579, 46 A.2d 252 (1946). Findings of a county judge who saw and heard witnesses are persuasive on appeal. In re *Mayfield*, 158 Ore. 409, 76 P.2d 984 (1938). The appellate court cannot review the merits, but it may inspect the record to ascertain whether the lower court exceeded its legal discretion. In re *Young*, 259 Pa. 573, 103 Atl. 344 (1918). Conclusion of State Department of Public Welfare that child's best interests required that adoption not be granted is entitled to great weight. *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947). The chancellor can authorize adoption of child over the arbitrary refusal of the county home or the Welfare Department to consent to the adoption. *Lewis v. Louisville and Jefferson County Children's Home*, 309 Ky. 655, 218 S.W.2d 683 (1949).

On first blush it would appear that the appellate court here was in the minority in reversing the lower court who found in favor of the State Welfare Department, but upon a deeper examination of the case it seems the appllate court was justified in reversing if it was of the opinion that the lower court abused its discretion. However, cases in which the recommendations of the Welfare Department are not followed are relatively rare as such approval or disapproval is usually the deciding factor.

C. WALLACE WHITE

CORPORATIONS—INHERENT AUTHORITY OF CHAIRMAN OF BOARD OF DIRECTORS TO MAKE CONTRACTS

Plaintiff contracted with the chairman of the board of directors of defendant corporation to procure a purchaser for certain corporate property. The plaintiff alleged that he fully performed and that the defendant refused to pay the agreed commission. The defendant demurred generally on the ground that no facts had been alleged which indicated the authority of the chairman of the board of directors to make the contract. Demurrer sustained. *Held*: Affirmed. The chairman of a board of directors does not have inherent authority to make contracts for the sale of corporate property. *Rothberg v. Manhattan Coil Co.*, 66 S.E.2d 390 (Ga. 1951).

There is little authority on the powers of the chairman of a board of

directors. In many instances, the chairman of the board is also the president of the corporation, and, when a question of his authority arises, the courts usually discuss only the authority that inheres in the office of president. The courts generally hold that the president, by virtue of his office, has no greater power than any other director to act for the corporation and bind it in dealings with third persons. *Baum v. Nord*, 88 Ind. App. 647, 164 N.E. 294 (1928). He is not ipso facto in control of corporate property. *Nicky Bros. v. Lonsdale Mfg. Co.*, 149 Tenn. 391, 258 S.W. 776 (1924), and by virtue of his office alone he has no authority to contract for the sale of corporate property not manufactured, produced, or held by the corporation for sale. *Brown v. Bass*, 132 Ga. 41, 63 S.E. 788 (1908). Property interest of a corporation can only be transferred by the board of directors or some agent duly authorized to act for it. *Dickinson Island Land Co. v. Hill*, 210 Mich. 53, 177 N.W. 142 (1920). An agent, however, may acquire a power to bind the corporation through implied authority or through a course of dealing. *Hale-Georgia Minerals Corp. v. Hale*, 83 Ga. App. 561, 63 S.E.2d 920 (1951); *Lindale Co-Operative Store v. Ailey*, 32 Ga. App. 30, 122 S.E. 718 (1924). For instance, an agent has implied authority to perform all acts which are incidental and necessary to carrying on that part of the business of the corporation for which he is responsible. *Slagle v. Peyton*, 182 La. 358, 162 So. 12 (1935). Some courts have held that contracts entered into by the president are binding on the corporation if the directors have intrusted him with the management of the corporation over a long period of time. *Potts-Thompson Liquor Co. v. Potts*, 135 Ga. 451, 69 S.E. 734 (1910); *Newton v. Social Circle Cotton Mill Co.*, 174 Ga. 320, 162 S.E. 667 (1932). And there seems to be a modern trend toward holding that contracts or acts of a president in the ordinary course of business will be presumed to have been performed within his authority unless the contrary be shown. *Electronics Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947).

The principal case follows the general rule that officers of a corporation do not, by virtue of their offices, have authority to conduct corporate business. Their authority is restricted to duties granted in the charter, bylaws, or resolutions of the board of directors. Even if this court had been inclined to follow the modern trend, the chairman still would not have had authority to enter into the contract here because the contract was not in the ordinary course of business. The court was, therefore, correct in sustaining the demurrer.

JOHN T. OGLESBY

TORTS—CONTRIBUTORY NEGLIGENCE—RAILROADS

Plaintiff's husband was killed while driving a truck, at night, by striking a three-foot platform attached to the front of a railroad engine. Deceased had decreased his speed and was attempting to go around the engine which was parked at the crossing. The trial court overruled the railroad's demurrer to the petition an dthe railroad brought error. *Held*: Reversed. The truck driver's negligence in failing to avoid injury was the sole proximate cause of death and the widow could not maintain the action. *Atlantic Coast Line R. Co. v. Dolan*, 67 S.E.2d 243 (Ga. 1951).

In all actions against a railroad company for damages done to persons or property, proof of injury inflicted by running of locomotives or cars shall be prima facie evidence of want of reasonable skill and care on part of servants of the company in reference to such injury. GA. CODE ANN., S. 94-1108 (Supp. 1951). However, this is only a rule of evidence and can be overcome by the introduction of evidence of the exercise of reasonable skill and care on the part of servants of the railroad. *Atlantic Coast Line R. Co. v. Martin*, 79 Ga. App. 194, 53 S.E.2d 176 (1949). See also *Western and Atlantic R. v. Gray*, 172 Ga. 286, 157 S.E. 482 (1931). Where damages are proved to have been from operation of railroad cars, a presumption of negligence arises against the railroad, and the injured party may recover unless the railroad carries the burden of showing damage was caused by plaintiff's negligence, or railroad was not negligent, or, if so, the injured party could have avoided injury by exercising ordinary care. *Collier v. Pollard*, 60 Ga. App. 105, 2 S.E.2d 821 (1939). However, a motorist's contributory negligence will not bar recovery from the railroad for his death in a crossing collision unless his negligence is equal to or greater than negligence of train operators. *Gay v. Sylvania Central R. Co.*, 79 Ga. App. 362, 53 S.E.2d 713 (1949). Negligence and diligence have been considered by Georgia courts as questions exclusively for the determination of the jury. Where the injured party slowed to fifteen miles per hour, expecting a train, and then collided with a parked train, the court said that it could not hold, as a matter of law that the petition failed to show negligence by the defendant railroad, nor that it affirmatively appeared that the plaintiff, if negligent, was so negligent as to be barred from a recovery. *Central of Ga. Ry. Co. v. Heard*, 36 Ga. App. 332, 136 S.E. 533 (1927). In *Southern Ry. Co. v. Lowry*, 59 Ga. App. 109, 200 S.E. 553 (1938), the injured stopped the auto and then started up, striking the railroad car. The court affirmed a verdict for the plaintiff, saying that "questions as to diligence and negligence, including contributory negligence (proximate cause), being peculiarly for the jury, we cannot say that the jury were not authorized to find a verdict for the plaintiff." A gradual withdrawal from this judicial attitude regarding the highway-railroad intersection type of injury is manifested in the more recent decisions. Where an auto struck a train the court affirmed sustaining of a general demurrer, holding that plaintiff's injuries were, as a matter of law, caused solely by negligence on the part of the driver of the auto in which plaintiff was riding as a guest. *Hallman v. Powell*, 60 Ga. App. 339, 4 S.E.2d 104 (1939).

Today, the failure of the railroad to install safety devices, such as lights, watchmen, gates, etc., is not indicative of negligence by the railway and does not preclude the auto driver from being the sole proximate cause of his injuries when colliding with a train at a crossing. *Evans v. Georgia Northern R. Co.*, 78 Ga. App. 709, 52 S.E.2d 28 (1949). Georgia, it appears, is becoming less inclined to allow juries to be the sole arbiters between her citizens and the railroads. The appellate courts, albeit belatedly, are rapidly destroying this source of "smart money," long regarded as the most vulnerable of the corporations so afflicted. The principal case seems to be a continuation of this trend.

JOHN M. ROBBINS

TORTS—NEGLIGENCE—LIABILITY OF INNKEEPER FOR ACTS OF TRANSIENT GUESTS

The plaintiff, an innocent passerby, sued to recover damages for injuries sustained when she was struck by flying fragments of a bottle thrown from a third floor window of the defendant's hotel by a sailor guest. The hotel clerk had been informed twice by other guests that the sailor guests were causing a loud disturbance. He warned the sailors once to cease the disturbance, and receiving no further complaints from the other guests, he took no more action. From a judgment of involuntary dismissal at the conclusion of the plaintiff's case, the plaintiff appealed. *Held*: Reversed. Evidence presented questions for the jury as to whether the hotel clerk was negligent in failing to do more than warn guests after being repeatedly advised that they were causing a disturbance and whether such negligence was the proximate cause of the injury to the plaintiff. *Holly v. Meyers Hotel & Tavern, Inc.*, 83 A.2d 460 (N.J. 1951).

At common law, subject to certain exceptions, the tenant, and not the landlord of a building, is prima facie liable for injuries occurring to third persons through negligent acts of the tenant. *Keely v. O'Conner*, 106 Pa. 321 (1884). This is true for example where a child of a tenant negligently knocks a stone from a building onto a passerby. *Scullin v. Dolan*, 4 Daly (N.Y.) 163 (1871). The fact that the owner occupies a part of the house raises no presumption of liability against him for an injury to third persons through negligence of the tenant. *Wolk v. Pittsburgh Hotels Co.*, 284 Pa. 545, 131 Atl. 537 (1935). However, an innkeeper must protect strangers from acts of his transient guests while in the hotel if he knows, or if, as a reasonable man, he could have foreseen, the acts of the guests, *Brunner v. Seelbach Hotel Co.*, 133 Ky. 42, 117 S.W. 373 (1909); *Gore v. Whitmore Hotel*, 229 Mo. App. 910, 83 S.W.2d 114 (1935). The question arises as to the narrow zone between the right of a transient hotel guest to the free enjoyment of his room and the right and duty of the inkeeper to remove him when he causes a disturbance. The contract right of a transient guest in a hotel includes the right to immunity from rudeness, personal abuse, and unjustifiable interference of the innkeeper. *Frewen v. Page*, 238 Mass. 499, 131 N.E. 475 (1921). However, when a guest in a hotel creates a disturbance, and no longer acts with due regard to others, the proprietor may expel him. *Hutchins v. Durham*, 118 N.C 457, 24 S.E. 723 (1896). The doctrine of res ipsa loquitur does not apply in an action against a hotel for injuries sustained by a third party when hit by an object falling from the hotel unless the plaintiff can show exclusive control of the hotel over the falling object and that the object would not have fallen had the innkeeper used ordinary care. *Larson v. St. Francis Hotel*, 83 Cal. App. 2d 210, 188 P.2d 513 (1948). An innkeeper is under no duty to inspect for bottles or other articles left on window sills by transient guests, and is not liable for the injury to third persons through their falling unless he knows or should have known of such conditions, and then only if he fails to take immediate steps to remedy the danger. *Wolk v. Pittsburgh Hotels Co., supra.* An innkeeper cannot be held liable for an injury caused by a guest's throwing a bottle off a roof garden if the guest had not been bois-

terous and if it was not foreseeable that he would throw the bottle, *Bruner v. Seelbach Hotel Co., supra.*

The question in this case seems to be whether or not the concept of foreseeability should be extended to include the liability of an innkeeper for injuries to third persons through the acts of his transient guests. The great majority of the courts have held, along with this case, that the doctrine of foreseeability should be extended in determining the liability of the innkeeper for negligence.

CHARLES DENT BOSTWICK

CONTRACTS—RESTRAINT OF TRADE—INTERPRETATION OF REASONABLENESS

Ancillary to the sale of a barber shop to plaintiffs, the defendant, an employee, was required to sign along with his father, the owner, an agreement that he would not engage in the trade of barbering within a certain radius for a fixed period of time. Plaintiff sues for an injunction restraining the defendant from practicing the trade of barber in the town of Newington. There was no finding that the defendant was active in the management of the barber shop or that the public had been led to believe that the barber shop was either in whole or in part owned by defendant. Lower court held for defendant. On appeal, *Held*: Affirmed. In no event could the covenant be valid unless it was reasonably necessary for the fair and just protection of the good will of the business sold, and no such necessity had been shown. *Domurat v. Mazzaccoli*, 84 A.2d 271 (Conn. 1951).

A covenant in restraint of trade between employer and employee is valid only where the restraint is reasonably necessary for the protection of the business. *R. L. Guttridge, Inc. v. Wean*, 8 N.J. Super. 450, 73 A.2d 284 (1950). A covenant between the seller of a business and the buyer is valid only on the same condition. *Wood v. McKinney*, 205 Ga. 370, 53 S.E.2d 684 (1950). Courts make a distinction in cases where they must determine the reasonableness of a restrictive covenant as between buyer and seller and those covenants ancillary to an employment contract. *Orkin Exterminating Co. of South Ga. v. Dewberry*, 204 Ga. 794, 51 S.E.2d 669 (1949). Restrictive covenants of employment are tested by the same standard of reasonableness of the restraint as are similar covenants in a contract of sale, but covenants of the former sort are not viewed by the courts with the same indulgence. 17 C.J.S. 636, *Contracts*, § 254. Greater scope as to permissible restraint in contract between vendor and vendee than between employer end employee is recognized. *Betten Co. v. Brauman*, 218 Wis. 203, 260 N.W. 456 (1935). In contracts for sale, the restrictions add to the value of what the vendor sells and the vendee buys, and the parties are more nearly on a parity in ability to negotiate than in the case of such restrictions in a contract between employee and employer. *Samuel Stores, Inc. v. Abrams*, 94 Conn. 248, 108 Atl. 541 (1919). Public policy requires that a man be able to sell in the most advantageous manner; therefore, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271, 46 L.R.A. 122 (1898).

The courts consider restraint reasonable where it covers the territory of business sold; or in the case of an employee, restraint covering personal contracts. This allows greater restraint between vendor and vendee than employer and employee although the same standard, that of reasonableness, is applied. After noting that the exact question of whether a covenant not to enter a competing business made by a mere employee of the seller of a business is binding on the employee has not before been presented to any court of last resort in the country, the court properly held the restraint unreasonable. Even less restraint should be permitted here than in employer and employee contracts. The defendant is not in the position of the vendor who increases the value of the business sold or the employee who increases the value of his services by the restriction. The defendant has restricted the use of his labor, skill and talent with no benefit flowing to himself. Any such covenant made by an employee in similar circumstances should be held unreasonable.

JACK G. MCKAY

HUSBAND AND WIFE—TENANCY BY ENTIRETY—EVICTION OF MOTHER-IN-LAW

Plaintiff husband and his wife were the owners of a family dwelling house as tenants by the entirety. Plaintiff husband sued in ejectment to evict defendant, plaintiff's mother-in-law, from his home, and for injunctive relief and damages resulting from the defendant's presence in the home and for withholding of possession thereof from plaintiff. *Held*: The complaint states a cause of action for eviction but not for damages. *Fine v. Scheinhaus*, 109 N.Y.S.2d 307 (Supp.Ct. 1952).

An estate by the entirety is an estate held by husband and wife together during their lifetime, and after the death of either, by the survivor so long as the estate lasts. 26 AM. JUR., *Husband and Wife*, § 66 (1940). The married women's property acts operated only upon property which was exclusively the wife's, and were not intended to destroy the legal unity of husband and wife, or to change the rule of the common law governing the effect of conveyances to them jointly. *Beach v. Hollister*, 3 Hun. (N.Y.) 519 (1875). *Contra*: *Robinson's Appeal*, 88 Me. 17, 33 Atl. 652, 51 Am. St. Rep. 367, 30 L.R.A. 331 (1895), stating that the rule of the common law creating estates by the entirety is irreconcilable with both the letter and the spirit of the married women's acts. A conveyance to a husband and wife as such, creates an estate by the entirety. *Bertles v. Nunan*, 92 N.Y. 152, 44 Am. Rep. 361 (1883); *Hiles v. Fisher*, 144 N.Y. 306, 39 N.E. 337, 30 L.R.A. 305, 43 Am. St. Rep. 762 (1895). The parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, with the right of survivorship still existing as at common law. *Buttlar v. Rosenblath*, 42 N.J.Eq. 651, 9 Atl. 695, 59 Am. Rep. 52 (1887); *Hiles v. Fisher*, *supra*. *Contra*: *McCurdy v. Canning*, 64 Pa. St. 39 (1870), holding that the rents and profits follow the nature of the estate and can neither be disposed of nor changed except by the joint act of both husband and wife. The wife

is entitled to occupy the whole of the real estate held by the entireties to the exclusion, during her natural life, of a purchaser on execution sale of her husband's interest, so long as there are no rentals received therefrom. *Finnegan v. Humes*, 163 Misc. 840, 298 N.Y.S. 50 (Sup.Ct. 1937), *mod'd and aff'd as mod'd*, 252 App. Div. 385, 299 N.Y.S. 501 (Sup.Ct. 1937), *aff'd*, 277 N.Y. 682, 14 N.E.2d 389 (Ct. App. 1938); *McCurdy v. Canning, supra.* "The property belongs as much to the wife as to the husband, and she has just as clear, undoubted, and equitable a right to the use and enjoyment of the property during the existence of the marriage, as she has to succeed to the estate upon the death of her husband." *Chandler v. Cheney*, 37 Ind. 391, 408 (1871).

In an action of ejectment the plaintiff must prove that the defendant actually ousted him or did some other act amounting to a total denial of his right of possession. N.Y. CIVIL PRACTICE ACT, § 1004 (1920). To maintain an action of ejectment between persons having a common or joint interest, there must be an ouster of the person seeking relief. *Finnegan v. Humes, supra; Gilman v. Gilman*, 111 N.Y. 265, 18 N.E. 849 (1888). While parties are living together as husband and wife, neither can oust the other as a squatter. *Cipperly v. Cipperly*, 104 Misc. 434, 172 N.Y.S. 351 (County Ct. 1918). The husband may still be the head of the family without being in any legal sense the possessor or actual occupant of the house or land in or upon which the family reside. *Martin v. Rector*, 101 N.Y. 77, 4 N.E. 183 (1886). The husband may, without joining the wife, maintain an action of trespass against a stranger for injury to an estate held by the entirety. *Fairchild v. Chastelleux*, 1 Pa. St. 176, 44 Am. Dec. 117 (1845). The husband may, without joining the wife, maintain an action for damages to the realty, although title to the realty be in the husband and wife as tenants by the entirety. *Sheridan Gas, Oil & Coal Co. v. Pearson*, 19 Ind. App. 252, 49 N.E. 357, 65 Am. St. Rep. 402 (1898); *West v. Aberdeen, etc., R. Co.*, 140 N.C. 620, 53 S.E. 477, 6 A. & E. Anno. 360 (1906).

In the principal case, it would seem that the mother-in-law could occupy the premises so long as she did not deny the plaintiff his right of possession in the home, and so long as her daughter consented to her occupancy. Such questions present issues of fact, and in an action of ejectment all issues of fact must be tried by a jury unless a jury trial is waived or a reference is directed. N. Y. CIVIL PRACTICE ACT, § 425 (1920). It would also seem that the law applicable to estates by the entirety could be improved in New York by legislation. The husband and wife are no longer one person in the eyes of the law. This assumption formed the fictitious basis of the rule relating to such estates. The basis for the rule was thus removed by the married women's property acts; therefore the rule itself should fall. The Court in the principal case says that the state of the law relating to such estates in New York is uncertain. The legislature of the state could easily remedy this situation by abolishing estates by the entirety altogether and enacting legislation whereby a conveyance to husband and wife would create the same estate in the parties as if it had been made before coverture.

MAX REGINALD MCGLAMRY

DOMESTIC RELATIONS—DIVORCE—JURISDICTION DETERMINED BY TELEPHONE CONVERSATION

Plaintiff sued her husband for divorce on grounds of abandonment and non-support. Defendant was domiciled in Missouri, but was in the Navy and stationed in California. They were married in Arizona on October 9, 1949, but due to the shortage of housing accommodations it was necessary for her to return to Tennessee. From then until the bill for divorce was filed, he did not communicate with her or send her any part of the government allotment he was receiving. In May, 1950, while in Tennessee, she telephoned the defendant in California and he stated their marriage was a mistake, that he did not love her, and would not live with nor support her, and asked her to get a divorce. A month later the defendant went to Tennessee and reaffirmed his statement made over the telephone. The Chancellor found that neither of the parties was a resident of Tennessee and dismissed the bill for lack of jurisdiction and the plaintiff appealed. *Held*: Reversed. The defendant in the course of the telephone conversation effected an act of abandonment in Tennessee, and such act having occurred within the state, and the plaintiff being a bona fide citizen of Tennessee when the bill was filed, the statute requiring two years of residence before filing the bill was not applicable. *Holman v. Holman*, 244 S.W.2d 618 (Tenn. 1951).

Abandonment or desertion consists of two essential elements, the end of cohabitation, and the offending party's intent to desert. *Miller v. Miller*, 153 Md. 213, 138 A. 22 (1927). The actual separation and the intent must be present at the same time, and abandonment is complete when the two coincide. *Crumlick v. Crumlick*, 164 Md. 381, 165 Atl. 189 (1933). A refusal of a wife living in one state by mutual agreement to live with her husband in another state gives a cause of action for divorce in the husband's state at the time of the refusal. *Snook v. Snook*, 234 Ky. 314, 28 S.W.2d 1 (1930). The question in the principal case was whether the act of abandonment was completed in California, where the words were spoken, or in Tennessee, where they were heard .Decisions in other fields of law on the completion of an act are in hopeless confusion. A telephone call from Honolulu to California in a conspiracy to violate the White Slave Traffic Act is sufficient to constitute an overt act and the defendant could be tried in California, even though he was not physically within the jurisdiction at the time of the act. *Smith v. United States*, 92 F.2d 460 (9th Cir. 1937). Criminal libel is composed of two elements, the writing of the prohibited words and the publication of the writing, and the crime is not completed where the words are formulated, but at the point where they are heard or read by a third person. *Hachney v. Commonwealth*, 186 Va. 888, 45 S.E.2d 241 (1947). In legal contemplation a person in one state shooting at a man in another accompanies the bullet until it strikes, and only be tried in the second state. *Simpson v. State*, 92 Ga. 41, 17 S.E. 984, 22 L.R.A. 248, 44 Am. St. Rep. 75 (1893). The act is nothing more than an attempt until the bullet comes into contact with the body. *States v. Hall*, 114 N.C. 909, 19 S.E. 602, 28 L.R.A. 59, 41 Am. St. Rep. 822 (1894). In the field of contracts, the majority view is that an offer is accepted and the contract is complete when the acceptance is telegraphed or deposited in a mail box. *Burton v. United*

States, 202 U.S. 344, 36 S.Ct. 688, 50 L. Ed. 1057, 6 Am. Cas. 362 (1906); *Morello v. Growers Grape Products Ass'n.*, 82 Cal. App. 2d 365, 186 P.2d 463 (1947). But the Tennessee courts have implied that the receipt of the acceptance is necessary since under a Post Office Regulation change made in 1913, the acceptor does not lose control of the acceptance because he can withdraw it from the mails after depositing it. *Trader's National Bank v. First National Bank*, 142 Tenn. 229, 217 S.W. 977, 9 A.L.R. 382 (1920). Acceptance over the telephone is of the same effect as if the acceptance had been mailed or telegraphed. *Carow Towing Co. v. The "Ed. McWilliams,"* 46 D.L.R. 506 (1919). One view is that acceptance by telephone is the same as an oral acceptance when the parties are in the presence of each other. RESTATEMENT, CONTRACTS, § 65.

It appears that in most fields of law, the results of the act must take effect before the act itself is completed. An exception is in the field of contracts, and as has been pointed out, the Tennessee courts follow this principle even in contracts law. It is submitted that the Court in this case properly held that the act of abandonment completed when the plaintiff heard the defendant's words, *i.e.*, in Tennessee. Regardless of when the intent to abandon plaintiff arose in the defendant's mind, it was not manifested until she heard the words. And the courts have no way of ascertaining an intent until it is manifested.

WILLIAM K. BUFFINGTON