RECENT CASES

CARRIERS—FREIGHT SHIPMENT—NOTICE TO CONSIGNEE.—SEABOARD AIR LINE RY. CO. v. DIXON, 79 S. E. (GA.), 1118.—*Held,* that where shipments of lumber in car load lots were consigned to a person at a named city, and were transported to their destination over the railroad on which they were shipped, and the consignee was given notice and afforded due opportunity to receive and unload the lumber, the liability of the railroad company as a common carrier ceased.

The cases are hopelessly in conflict as to the precise moment when the liability of a railroad company as a common carrier ends, and the liability of a warehouseman begins. Three different rules are recognized in the decisions, known as the Massachusetts, New Hampshire, and New York rules. The Massachusetts rule holds that the liability of the company terminates when the transit is ended, and the goods deposited safely on the platform or in the warehouse of the road. *Norway Plains Co. v. B. & M. R. R. Co.,* 1 Gray (Mass.), 263. This rule has been followed in other jurisdictions. *R. R. Co. v. Pound,* 111 Ga., 6; *Schumacher v. R. R. Co.,* 207 Ill., 199; *R. R. Co. v. Reyman,* 73 N. E., 587; *Mohr v. R. R. Co.,* 40 Ia., 579; *Herf & Frerichs Chem. Co. v. R. R. Co.,* 100 Mo. App., 164; *Chalk v. R. R. Co.,* 85 N. C., 423; *Steamship Co. v. Smart,* 107 Pa. 492; *Spears vs R. R. Co.,* 11 S. C., 158. The so-called New Hampshire rule holds that placing the goods in the warehouse alone, does not discharge the company from liability as a common carrier, until the consignee has had a reasonable time after their arrival to inspect and take them away, in the ordinary course of business. *Moses v. B. & M. R. R. Co.,* 32 N. H., 523. This conclusion also has been followed by many courts. *Tallahasse Falls Mfg. Co. v. R. R. Co.,* 128 Ala., 167; *R. R. Co. v. Nevill,* 60 Ark., 375; *R. R. Co. v. Newlarger & Bro.,* 67 Kans., 846; *Wald v. R. R. Co.,* 92 Ky., 645; *Maignan v. The Railroad,* 24 La. Ann., 33; *Winslow v. The Railroad,* 42 Vt., 700; *Berry v. R. R. Co.,* 44 W. Va., 538; *Backus v. R. R. Co.,* 922 Wis., 393. Under the New York rule the law is stated to be that the liability of the company as a common carrier continues until the consignee has been notified of the arrival of the goods and has had a reasonable time in the ordinary course of business, within which to remove them. *Fenner v. Buffalo & St. L. R. R. Co.,* 44 N. Y., 505. This rule has received judicial sanction in other jurisdictions. *Walters v. R. R. Co.,* 139 Mich., 303; *Pinney v. R. R. Co.,* 19 Minn., 257; *R. R. Co. v. Fuqua & Horton,* 84 Miss., 490; *R. R. Co. v. Hatch,* 52 Ohio St., 408. Statutes have been passed in some states adopting this rule. See *Collins v. R. R. Co.,* 104 Ala., 390; *Cavallaro v. R. R. Co.,* 110 Cal., 348; *R. R. Co. v. Naive,* 112 Tenn., 239; *R. R. Co. v. Haynes,* 72 Tex., 175. This is also the rule in England and Canada. *Mitchell v. R. R. Co.,* L. R. 10 Q. B., 256; *Richardson v. C. P. R. R. Co.,* 19 Ont. Rep., 369. The great weight of authority, both in this country and in England, sustains the New York rule. It would seem to be the better of the three, in that, even when the goods have been safely deposited in a warehouse, they are still in the custody, and under the control, of the carrier, with the same oppor-

tunities to embezzle them, as when in transit. The same reasons, therefore, upon which are based the severe accountability of the carrier for the safety of the goods while they are strictly in transit, would seem to require that the company should be the custodian of the goods as carrier, until they had either tendered them to the consignee, or had, after notifying him of their arrival, given him a reasonable time within which to take them away. The principal case is in accord with this conclusion.

CARRIERS—TRANSPORTATION OF BAGGAGE—RELATION OF CARRIER AND PASSENGER.—ALABAMA GREAT SO. RY. V. KNOX, 63 So. REP., 538.—Where a passenger purchases a ticket from one point to another over a carrier's line and checks his baggage thereon, it is not necessary, in order to create the relation of carrier and passenger with reference to the baggage, so as to render the carrier liable as such for the loss thereof, that the passenger should accompany the baggage either on the same train, or at all.

A traveller is not entitled to have his personal baggage carried in consideration of fare paid by him, unless it is on same train which carries him, is the general rule. Angell, *Carriers,* Sections 107, 110; *II Redf. Railroads* (4th edition), 39; Thompson, *Carriers,* 521, Section 8. In *Hutchinson on Carriers,* Vol. 3, page 1516, the rule is stated: "If that which would have been baggage had it been accompanied by the owner should be accepted when owner does not become a passenger, the carrier would not be responsible for it as baggage." The rule is so laid down in most of the cases. *Glaso v. N. Y. Central,* 36 Barb., 557; *Wilson v. Grand Trunk,* 56 Me., 60; *Bomar v. Maxwell,* 28 Tenn., 621; *Merrill v. Grinnell,* 30 N. Y., 594; *Tewes v. Steamship Co.,* 85 N. Y. S., 60; *Collins v. Railroad,* 10 Cushing, 506. In *Marshall v. Pontiac Railroad,* 126 Mich., 45, it was held that the company became a mere gratuitous bailee of baggage when the owner did not accompany it. In *Beer v. Railroad,* 67 Conn., 417, in an opinion written by Baldwin, J., it was held the company was not even responsible as gratuitous bailee, when, through a mutual mistake, the baggage was checked without the owner's having bought, or intending to buy a ticket. In *Elvira Harbeck,* 2 Blatchf., 366, however, it was held the company was a bailee for hire, and must exercise due care. In *Shaw v. Northern Pacific,* 40 Minn., 110, the company was held liable as a common carrier for baggage shipped on a later train than the owner took. However, this was for the company's convenience. In *McKibben et als. v. Wisconsin Central Railroad,* 100 Minn., 270, the general rule is criticized but the decision is on another point. The only case in harmony with *Alabama Great So. Ry. v. Knox,* is *Larned v. Central R. R. of N. J.,* 79 Atl., 289 (1911), in which there is a *per curiam* decision without discussion. In view of modern conditions, it would seem that this is better than the rigid, technical rule established when it was necessary, for the carrier's protection, that the traveller be on the train that carried his baggage, and in most cases it would appear that the carrier is estopped by his conduct from claiming the strict application of the rule. Unquestionably the overwhelming weight of authority is against the principal case, but there have been few adjudications of the point in recent years and the

authority of the principal case and *Larned v. Central R. R. of N. J., supra,* might now be decisive in many jurisdictoins.

CONDUCT OF JUDGE—COMMENTS ON EVIDENCE.—STATE v. OVERTON, 88 ATL., 689 (N. J.).—*Held,* that it is always the right and often the duty of the judge to comment on the evidence and give the jury his impressions of its weight and value, and such comment is not assignable for error as long as the ultimate decision on disputed facts is plainly left to the jury.

The prevailing American rule is that instructions bearing on the weight of evidence are erroneous. *Harkey v. State,* 43 Tex. Crim., 100; *Burt v. State,* 72 Miss., 408; see *State v. Main,* 69 Conn., 123. So an instruction that the evidence of a certain witness should be received with a great deal of care was properly refused. *Hronek v. People,* 134 Ill., 139. An instruction that greater weight should be given to the evidence of those witnesses whose means of knowledge was superior was error. *Muncie Pulp Co. v. Keesling,* 166 Ind., 479. An instruction that the preponderance of evidence is not to be determined merely by the number of witnesses on each side is error. *McCoy v. Milwaukee St. Ry. Co.,* 82 Wis., 215, 52 N. W., 93 (and cases there cited). But if the erroneous instruction is followed by another and correct one, then the jury is not misled and there is no error. *Garske v. Ridgeville,* 123 Wis., 503. The English rule is that the judge may charge on matter of fact, it is stated by Lord Hale in his *History of the Common Law,* that the jury is to have the benefit of the observation of the judge both in point of law and in point of fact by way of direction. 2 *Hale Hist. Com. Law* (5th ed.), 147-156. The courts seem to be in much greater accord on the proposition that the judge cannot instruct upon the weight of evidence than they are on the question of whether he can comment on it in any way, whether in the charge or not. In South Carolina, which is the only state having a constitutional provision against charging the jury on matter of fact, it has been held that a comment on the weight of evidence is erroneous even if the judge specifically states that the jury is not to be bound by his opinion. *State v. White,* 15 S. C., 381. And some courts go so far as to hold that the judge cannot use any language in the hearing of the jury that can be construed into an expression of opinion on the weight of evidence. *State v. Shuff,* 9 Idaho, 115. He cannot assist the jury to remember whether certain evidence was offered or not. *State v. Foster,* 40 Atl., 939 (Del.); affirmed, 43 Atl., 265; see also *U. S. v. Briggs,* 19 D. C., 585. He cannot state the evidence in his charge. *State v. Atkins,* 49 S. C., 481; *contra, Redding v. Ry. Co.,* 5 S. C., 69. There is a formidable line of authority opposing the doctrine just stated and holding that a judge may comment on the evidence within certain limits. He may make such comments as will enable the jury to see the relevancy and pertinency of the evidence to the particular issue involved. *People v. Fanning,* 131 N. Y., 659. He may sum up the evidence. *Driskill v. State,* 7 Ind., 338. And make such comment as his judicial discretion may dictate. *State v. Valentine,* 71 N. J. L., 552. But not to the prejudice of either party. *People v. Bonds,* 1 Nev., 33; *State v. Stowell,* 60 Iowa, 535. He should recalll and collate the testimony. *State v. Gratton,* 95 Me., 364. And

it is error not to do so. *State v. Brainard,* 25 Iowa, 572. If there is no conflict, the judge may assume the evidence to be true and charge upon it directly without any hypothesis. *Byron v. State,* 117 Ala., 80. It is not error for the judge to refuse to charge the jury that they are not absolutely bound by the opinion of the court on matter of fact. *People v. Hawkins,* 106 Mich., 479. The better rule seems to support the principal case, the courts in accord are of greater number than those contra and are in the older states.

COPYRIGHT—INFRINGEMENT—EQUITY.—DAVIES V. BOWES, U. S. DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, Nov., 1913.—Plaintiff employed by and having been assigned the copyright privileges of the *Evening Sun,* wrote and published a short story under the caption, "News of the Theatres". The story was cast in the form of an actual occurrence to make it more "striking". One Kenyon, on reading the story, thought it was the statement of an actual occurrence, and from it constructed a play called "Kindling". Defendant produced the play. Plaintiff brought this action for infringement of copyright. *Held,* one who publishes news as fiction cannot obtain a valid copyright.

It is well established in England that a newspaper is a subject of copyright. *Cote v. Newspaper Co.,* 58 L. J. Rep., 288; *Trade Auxiliary Co. v. Protective Association,* 58 L. J., 293. In the United States the contrary doctrine appears to prevail. *Claton et al. v. Stone et al.,* Fed Case, 2872; *Tribune Co. of Chicago v. Associated Press,* 116 Fed., 126; *Harper v. Shoppel,* 26 Fed., 519. But news is not a subject of copyright. *State ex rel Star Pub. Co. v. Associated Press,* 159 Mo., 410. That which is designed to convey information or to explain is a proper subject for copyright. *Amberg File & Index Co. v. Shea, Smith & Co.,* 82 Fed., 314; *Baker v. Selden,* 101 U. S., 99. There can be no copyright in a publication whose effect is to encourage crime, or is indecent and pernicious *per se,* or in a dramatice composition which is grossly indecent and calculated to corrupt the morals of the people. *Martinetti v. Maguire,* 1 Deady, 216; *Richardson v. Miller,* 3 L. & Eq. Rep., 614. Where there is a false pretense as to authorship, such transaction is a fraud on the public and defeats the copyright. *Byron v. Johnston,* 2 Meriv., 29; *Seeley v. Fisher,* 11 Sim., 581. While this decision may be sound in denying the plaintiff a right to recover damages, it is clearly erroneous in holding that the plaintiff obtained no valid copyright, and is without authority to support it. In view of the authorities cited, the plaintiff would clearly be entitled to a copyright, but having obtained a copyright and having published his work as an account of an actual occurrence and without any notice of his copyright, or that it was only fiction, he ought not now be heard to complain.

HUSBAND AND WIFE—CONTRACTS OF WIFE—BINDING EFFECT.—WARDEN ET UX. V. MIDDLETON ET AL., 161 S. W. (ARK.), 151.—*Held,* a married woman was not personally liable on a note executed by her for her hus-

band's accommodation for the purchase price of a jack in which she had no interest.

At common law a married woman could not bind herself by a contract. *Pollock On Contracts,,* 4 ed., pp.. 148, 149. The right to make contracts has been conferred by statute, and courts have construed such statutes strictly. If a note is given by husband and wife in payment of money loaned the husband, the wife is not liable on the note unless it can be affirmatively shown that the consideration for the note passed to the wife; *Fisk v. Mills,* 104 Mich., 433; or was for the benefit of her separate estate. *March, Price & Co. v. Clark,* 14 Fed., 406. A married woman cannot enter into contracts of securityship. *Cummings v. Martin,* 128 Ind., 20; *Westervelt v. Baker,* 56 Neb., 63. Hence a wife cannot bind herself on a note given as security for her husband. *Kelso v. Tabor,* 52 Ba., 125. If the consideration for a note was received by her husband, or went to pay his debts or liabilities for which neither she nor her separate were bound, it will be held a contract of securityship and not binding on the wife. *Way v. Peck,* 47 Conn., 27; *Vogel v. Lechner,* 102 Ind., 55; *Saulsbury v. Weaver,* 59 Ga., 254. But some courts have held that if she contracted as principal in fact, she is bound, though it is not shown that the consideration was beneficial to her or her separate estate. *Potter et al. v. Sheets et al.,* 5 Ind. App., 506. It is well settled in New Hampshire that where a married woman gives her note in return for a loan to her husband to enable him to pay his debts or to engage in business, she is liable. *Iona Savings Bank v. Boynton,* 69 N. H., 77; *Jackson v. Holt,* 64 N. H., 478. Georgia in the case of *Rood v. Wright,* 124 Ga., 489, followed the New Hampshire rule, although in an earlier case, *Veal v. Hurt,* 63 Ga., 728, the contrary was held. Massachusetts has extended the New Hampshire rule and held she is liable as an accommodation indorser. *Middleborough Nat. Bank v. Cole,* 191 Mass., 168; *Binney v. Globe Nat. Bank,* 150 Mass., 574. The holding of the principle case illustrates the slowness of the courts in extending to married women the rights the legislatures intended to confer. While the weight of authority is doubtless in accord with this decision, yet there seems to be a tendency in the opposite direction. With the advent of women more and more into political and commercial life this decision probably would not be generally followed.

LANDLORD AND TENANT—INJURY DUE TO FAILURE TO REPAIR—COVENANT TO REPAIR—GUEST.—MESHER V. OSBORNE, 34 PAC., 1092 (WASH.).—*Held,* that where a landlord covenanted to repair the demised premises there arose the antecedent duty to inspect the same for concealed dangers, and he is charged with knowledge of what a reasonable inspection on his part would have discovered; hence, where a child fell through the top of a concealed cesspool while playing on the premises, and such defect would have been discovered by the landlord upon reasonable inspection, he was liable as for a tort.

It is conceded that a guest of the tenant is so far identified with him that his right to recover is the same as the tenant's. *Davis v. Pacific Power*

Co., 107 Cal., 563; *Wilcox v. Zane,* 167 Mass., 302; *Fisher v. Jansen,* 128 Ill., 549. But as to the landlord's liability on his covenant to repair as regards injuries to a stranger there is conflict. Some courts are of the opinion that the covenant to repair will not inure to the benefit of a stranger to it and no tort liability as to such stranger will ensue for a breach. *May v. Ennis,* 78 N. Y. App. Div., 552; *Burdick v. Cheadle,* 26 Ohio St., 393; *Davis v. Smith,* 26 R. I., 129. The other view, supported by the weight of authority, is to the effect that the landlord's liability is for negligence, and the covenant being a mere matter of inducement, he is liable for want of due care in not making repairs. *Boyce v. Snow,* 187 Ill., 181; *Campbell v. Portland Sugar Co.,* 62 Me., 552; *Barron v. Liedhoff,* 95 Minn., 474; and for defects which existed at the time he parted with the control as well as those arising later. *Moody v. New York,* 43 Barb. N. Y., 282; *Davenport v. Buckman,* 10 Bosw., 20; *Cheetham v. Hampson,* 4 T. R., 318. Nevertheless, adopting the latter ruling, the courts have established the general proposition, apparently contrary to the principal case, that whether the landlord's duty to make repairs arises out of contract or by operation of law, actual notice of the defect must be brought home to him, or the fact proved that it existed for so long a time that he is chargeable with constructive notice, in order to hold him liable. *Gately v. Campbell,* 124 Cal., 520; *Greene v. Hague,* 10 Ill. App., 598; *Galvin v. Beals,* 187 Mass., 250; *Vorrath v. Burke,* 63 N. J. L., 188; *Idel v. Mitchell,* 158 N. Y., 134; *Tredway v. Machin,* 91 L. T. R. (N. S.), 310. The English decisions go even further in holding that though there be a covenant to repair, express notice is necessary, *Tredway v. Machin, supra,* and that means of knowledge is immaterial, *Hugall v. McLean,* 53 L. T. R., 94. Following this idea, some cases in this country hold that a covenant to repair means to repair only within a reasonable time after notice. *Spellman v. Bannigan,* 36 Hun. (N. Y.), 174; *Sieber v. Blanc,* 76 Cal., 173. And others, that though the defendant agreed to repair, yet if he did not and the plaintiff knew that fact, there can be no recovery. *Shackford v. Coffin,* 95 Me., 69. A contrary rule obtains in a few jurisdictions. There it is held that if it is the landlord's duty to repair, he is liable for want of due care in not repairing, whether he has notice or not of the defect; *Leydecker v. Brintnall,* 158 Mass., 292; *Wilber v. Follansbee,* 97 Wis., 577; *Wertheimer v. Saunders,* 95 Wis., 573; especially if the locus in question be a common way, *Lindsay v. Leigton,* 150 Mass., 285; or if the tenant did not know of the defect and the landlord knew or by the exercise of due care could have known. *Sternberg v. Wilcox,* 96 Tenn., 163; *Hines v. Wilcox,* 96 Tenn., 325. The Canadian view is that notice is immaterial, for it is the landlord's duty to inspect the premises from time to time to see if they need repair, and he is charged with what he might have discovered. *Troude v. Meldrum,* 21 Que. Sup. Ct., 75. It is to be noted that in examining the cases cited in 24 Cyc., 1120, and elsewhere as supporting the general rule that the landlord must have notice; in thirteen cases out of fifteen there was no covenant to repair, and that fact was mentioned by the court as a material circumstance in deciding the case. Thus it would seem that the holding of the principal case at least states a debatable proposition in spite of the general assumption to the contrary. See XXIII *Yale Law Journal,* 2, 184.

LANDLORD AND TENANT—INJURIES FROM DEFECTIVE CONDITIONS—LIABILITY OF LANDLORD—COVENANTS.—MORODER v. FOX, 143 N. W., 1040.—*Held,* that a lease of the first floor and part of the basement of a three-story building contained an agreement by the lessee to take all necessary precautions to prevent damages to any of the water pipes upon "said premises" and to let the water out of the pipes whenever it should be necessary to do so to prevent it from injuring pipes and property. There was but one set of water pipes, and the turn-off was located in the basement. It was held "said premises" referred to the leased premises only and that the lessor, knowing the second floor was vacant and unheated, and that the water pipes supplying the third story with water were uncovered and unprotected from frost, was negligent in allowing them to remain so in the winter, and was liable for damages to lessee's goods caused by the bursting of pipes, as a result of the water freezing.

As between different tenants under a common landlord, the question is always one of negligence in the use of the premises. *Eakin v. Brown,* 1 E. D. Smith, 36; *Steinway v. Biel,* 47 N. Y. S., 678; *Levy v. Korn,* 61 N. Y. S., 1109; *Toole v. Beckett,* 67 Me., 544. Where water in a tenement house overflows to injury of personal property of tenant in lower floor, he has no remedy over against his landlord, without proof that the overflow was due to the landlord's negligence. *Becker v. Bullowa,* 73 N. Y. S., 944. In *Bernhard v. Reeves,* 6 Wash., 424, it was held there was no presumption the leak was due to the negligence of the user. *Greco v. Bernheimer,* 40 N. Y. S., 677, *contra.* In the principal case, the questions are as to the defendant's negligence, and the plaintiff's contributory negligence. In *Buckley v. Cunningham,* 105 Ala., 449, the plaintiff was refused a remedy under a similar state of facts, even though, in that case, there was no covenant by the plaintiff. The defendant had control of the upper room in which the leakage occurred, but the only stop-cock was on the pavement, and it was held equally the duty of plaintiff to have the water cut off. *Taylor v. Bailey,* 74 Ill., 178, accord. In *Ortmayer v. Johnson,* 45 Ill., 460, the plaintiff had agreed to turn off the water from a master stop-cock in the basement and was refused a remedy in an action against upper tenants who had left a faucet open and flooded the lower premises. *Priest v. Nichols,* 116 Mass., 401, is the strongest case in support of the decision in *Moroder v. Fox,* but the facts of the latter case seem to negative the defendant's negligence, inasmuch as he had taken a covenant from the plaintiff and imposed upon him the duty of preventing such leaks. Actionable negligence is further negatived by the fact that under all the circumstances of this case the plaintiff seems to have been equally at fault.

LIMITATION OF ACTIONS—ACKNOWLEDGMENT—NEW PROMISE OR PART PAYMENT.—FIRST NATIONAL BANK OF OXFORD v. KING ET AL., 85 S. E. (N. C.) 251.—*Held,* that where a debtor, to secure his note, left collaterals with a bank and constituted the cashier his agent, in case of default, to sell and apply the proceeds to the note, and promised to pay any deficiency, a sale and application of the proceeds by the cashier amounted to a volun-

tary payment by the debtor sufficient to interrupt the statute of limitations. Clark and Hoke, JJ., *dissenting.*

Where a voluntary payment on a debt barred by the statute is made by the principal it operates to lift the bar. *Garrett v. Reeves,* 125 N. C., 529. The payment must be made by the debtor or by someone duly authorized by him to make it. *Murdock v. Waterman,* 145 N. Y., 55. By someone who has agreed in writing with the debtor to pay the debt. *Huntington v. Chesmore,* 60 Vt., 566. By one who could be compelled to pay. *In re Frisby,* 43 Ch. Div., 106. By one who has answered the debt. *Cockfield v. Farley,* 21 La. Ann., 521. Or by a stranger who makes it at the request and in the presence and with the consent of the debtor. *Chapman v. Boyce,* 16 N. H., 237. The above cases refer to cash payments, but it has been held that where the debt has been barred by the statute a cash payment of money as security for the debtor is not sufficient. *Jones v. Jones,* 23 Ark., 212. Nor is the allowance of a dividend from an assigned estate. *Walter A. Wood, etc. Co. v. Harris,* 212 Pa., 452. But that the application of the proceeds of a life insurance policy assigned to the creditor is sufficient to toll the statute; see *In re Conlan,* L. R. 29 Ir., 199. Where the president of an insolvent corporation, with the consent of its stockholders, turns over its assets to a committee of its creditors to be divided equitably among them, it was held that a payment by them would not avoid the statute, as it would not raise any new promise on the part of the corporation. *Kilton v. Providence Tool Co.,* 22 R. I., 605. Many jurisdictions recognize the rule that the effect of leaving collaterals with the creditor by the debtor as part payment of the debt, the proceeds to be applied to the debt is sufficient to interrupt the statute. *Haven v. Hathaway,* 20 Me., 345; *Taylor v. Foster,* 132 Mass., 30; *Sornberger v. Lee,* 14 Neb., 193; *New York Fire Ins. Co. v. Tooker,* 4 N. J. L., 334; *Fletcher v. Brainard,* 75 Vt., 300. But the collaterals must be realized on within a reasonable time. *Porter v. Blood,* 5 Pick., 54. And if the collaterals were delivered after the delivery of the note, then there will be a suspension of the statute from the date of the delivery of the collaterals. *Acker v. Acker,* 81 N. Y., 143. The case of *Boulder Nat. State Bank v. Rowland,* 1 Colo. App., 468, is directly in point with the principal case; there it was held that under such circumstances the statute would be interrupted. While in New York it was held that such payment would not revive the debt if the time intervening between the delivery of the collateral and the collecting and crediting of the proceeds exceeds the time limited by the statute. *Harper v. Fairley,* 53 N. Y., 442. Especially where there is no present agreement that the proceeds shall be so applied. *Good v. Ehrlich,* 67 Kan., 94; *Crow v. Gleason,* 141 N. Y., 489 (reversing 20 N. Y. S., 590). There must at least be notice to and assent by the debtor of the application of the proceeds. *Eaton v. Lehan,* 63 N. H., 619. The rule in Minnesota is that not even notice to and failure of the debtor to object will make the payment available to suspend the statute if the collaterals are delivered at the time of delivery of the note. *Wolford v. Cook,* 71 Minn., 77. The whole reason for the doctrine in the principal case seems to be that the debtor intends to pay the debt and waive the bar and it is hard to justify cases where the

collaterals are delivered at the time the debt is incurred and where the statute is declared raised upon the sale and application of the proceeds after the debt has been barred. In such cases it is held that the right to take advantage of the statute is waived from the beginning and it is going very far when it is said that such an intention exists in the mind of a debtor who takes collaterals to a bank and appoints the cashier his agent to secure the debt with the collaterals. The principal case, however, accords wih the numerical weight of authority.

MASTER AND SERVANT—INJURY TO MINOR EMPLOYE—CHILD LABOR LAW.—ELK COTTON MILLS v. GRANT, 79 S. E., 836 (GA.).—*Held,* the employment of a minor under the prescribed age in a factory, in disobedience of the statute prohibiting such employment, is negligence *per se,* and, if any injury to such child proximately result from the employment, a right of action in its favor arises.

In general it is the duty of the master to use all reasonable diligence, care and caution in providing for the safety of his servants. *Frank v. Otis,* 15 N. Y. St. Rep., 681. The mere employment of a minor about dangerous work without his parents' consent, is not negligence *per se,* so as to render the employer liable. *Penn. Co. v. Long,* 94 Ind., 250; *Tex. & P. Ry Co. v. Carlton,* 60 Tex., 397. Under statutory provisions, however, there is a conflict as to whether or not such employment constitutes negligence *per se. Ash v. Verlenden,* 154 Pa., 246, held inexperience and want of knowledge must be shown. *Belles v. Jackson,* 4 Pa. Dist. R., 194; *White v. Witemann Co.,* 131 N. Y., 631, accord. In New York the last named case overruled *Cook v. Lalance Grosjean Co.,* 33 Hun., 351, which held, in harmony with the principal case, that such employment was negligence *per se. Nickey v. Stender,* 164 Ind., 189; *American Car Co. v. Armentraut,* 214 Ill., 509; *Queen v. Dayton,* 95 Tenn., 458; *Ornamental Iron Co. v. Green,* 108 Tenn., 161, held there was negligence *per se.* A similar devision in *Lee v. Sterling Co.,* 93 N. Y. S., 560, was reversed in 101 N. Y. S., 78. The case of *Elk Cotton Mills v. Grant* accords with the majority view, which seems to be based on a reasonable interpretation of the statute. The theory of the case is that the violation of a statutory duty is equivalent to a violation of a common law duty, and there arises a consequenial liability for the proximate results of such violation.

PLEADINGS—ALTERNATE ALLEGATIONS—ELECTION.—LOUISVILLE & N. R. R. Co. v. STRANGE'S ADMX., 161 S. W. (KY.), 239.—In an action for the death of the carrier's servant, plaintiff, not knowing whether the train at the time of her intestate's death was engaged in interstate or intrastate commerce, but that one or the other was true, sought to join a cause of action at common law with one under the Federal Employers Liability Act. Defendant moved that plaintiff be required to elect whether she would proceed under the state or Federal law. *Held,* the rights and liabilities of the parties under the Federal and state law being essentially different, defendant was entitled to compel plaintiff to elect under which she would proceed. Nunn, J., *dissented.*

At common law less particularity was required where the facts lay more in the knowledge of the opposite party than of the party pleading. Heard, *Civil Pleading,* pp. 264, 265. The common law rules of pleading have been modified or changed by the introduction of the Code System. Two causes of action may be set forth in different counts provided they are all of the same character, that is, all sound in tort or in contract. *Southern Ry. Co. v. Chambers,* 126 Ga., 404. When the plaintiff has two or more grounds of recovery in the same cause of action, there is a conflict of authority whether he must elect on which ground he will proceed. If the plaintiff knows on which ground he is entitled to recover, he must elect. *Harris v. Wabash Ry. Co.,* 51 Mo. App., 125; *Matz v. Chicago & A. R. R. Co.,* 88 Fed., 770 If it is not necessary to protect the plaintiff's rights to set forth his cause of action in different counts, he must elect. *Bishop v. Chicago & N. W. R. R. Co.,* 67 Wis., 610. But if the allegations are so clear that no unreasonable burden is placed on the defendant, plaintiff is not bound to elect. *Forrester v. Reliable Transfer Co.,* 118 Pac. (Wash.), 753. If there is a fair and reasonable doubt of the plaintiff's ability to safely plead his cause of action in mode only, he is not bound to elect. *Wilson v. Smith,* 61 Colo., 299. But some authorities hold that after the plaintiff's evidence is all in, then he must elect on which count he will go to the jury. *Carroll v. United Rys. Co. of St. Louis,* 137 S. W. (Mo.), 303; *Knopf v. Chicago, B. & Q. R. R. Co.,* 131 S. W. (Mo.), 707. There is considerable authority to the contrary. *Luken v. L. S. & M. S.,* 154 Mich,. 550; *Devine, Adm. v. Chicago & Calumet River R. R. Co.,* 158 Ill.. 550. The practice of allowing or disallowing a motion to elect is a matter within the sound discretion of the court. *Manders v. Croft,* 3 Colo. App., 236; *Plummer v. Mold,* 22 Minn., 15; *Keer v. Hayes,* 35 N. Y., 331. Some jurisdictions do not require an election, although the grounds of liability and the measure of damages in each count are different. Where a carrier was charged on the separate grounds of carrier and of warehouseman, the plaintiff was not bound to elect. *Whitney v. Chicago, etc. Ry. Co.,* 27 Wis., 327. Where the declaration was laid in two counts, one under one statute and the other under another statute, and the rights under one were inconsistent with the rights under the other, and the measure of damages was different in each case, the plaintiff was not bound to elect. *Carbary v. Detroit United Rys.,* 157 Mich., 683; *Ely v. Same,* 162 Mich., 287. The principal case illustrates the tenacity with which courts adhere to the old common law system of pleading. The decision is not in accord with the weight of authority and is repugnant to the spirit of the Codes.

SCHOOLS AND SCHOOL DISTRICTS—TEACHERS—REMOVAL.—PEOPLE EX REL. PEIXOTTO V. BOARD OF EDUCATION OF N. Y., 144 N. Y. S., 87.—Greater New York, Charter Sec. 1093, provides that a teacher may be removed for misconduct, insubordination, neglect of duty and general inefficiency, while the by-laws of the school board provide that a teacher's absence may be excused when caused by serious personal illness, death in the teacher's immediate family, compliance with the requirements of the court, and quarantine established by the board of health. *Held,* that as a female

teacher might marry without being subject to removal, the charter grounds being exclusive, and as serious personal illness will, under by-laws, excuse absence, the absence of a married female teacher on account of maternity does not constitute neglect of duty authorizing dismissal.

It has been held that a school board cannot arbitrarily exercise power of dismissal. *School District No. 94 v. Gautier,* 13 Okl., 194. In New York a by-law providing that if a female teacher should marry, her place would be vacant, was held void as in conflict with the charter, the provisions of which are exclusive. *People v. Maxwell,* 117 N. Y., 494 (reversing *People v. Maxwell,* 87 App. Div., 131. This decision is fundamental, for it leaves for the principal case only the decision of whether or not maternity is such an illness as is contemplated by the by-law in regard to "serious personal illness". Illness includes any attack less than a disease. *Conn. Mut. Co. v. Union Trust,* 5 Sup. Ct. (N. Y.), 119. At early common law, maternity was held not to be illness. In *Reg. v. Walker,* 1 F. & F., 534, illness from confinement was declared to be an ordinary state, and not such illness as contemplated by the statute, which provided for the absence of witnesses "so ill as not to be able to travel". *Reg. v. Wilton,* 1 F. &. F., 309; *Archbolds Crim. Cas.* (18th ed.), p. 267, accord. The contrary, however, and what seems now the settled rule, was held in *Reg. v. Stephenson,* 9 Cox C. C., 156; *Queen v. Wellings,* 3 Q. B. D., 426. *People v. Board of Education* adopts this view as being in accord with the intention of the legislature and refuses to imply, as a condition of the contract, that it should be terminable in the event of the relator's giving birth to a child. The court intimates that the validity of such a condition, if expressed, would be questionable. The gravamen of the case is, that if a teacher cannot be removed because of her marriage (*People v. Maxwell, supra*) she cannot be removed because of an act which is a natural incident of her marriage.