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Recent Decisions

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ment. The suggestion that the state have a right to a change of venue seems to have no validity, since, if the people of a defendant's own county will not convict him, it is probable that he ought not be convicted, and a man should not be tried in a foreign county. The idea that the defendant's plea of insanity be tried by the court alone seems to really be a denial of the right to trial by jury, because it removes from the jury's consideration one of the recognized defenses. Perhaps, the making of bail bonds a lien upon the property of the surety might cure some of the abuses in that system, but the officers who approve such bonds already have the power to require that sureties shall be financially responsible. A better way would be to require all state's attorneys to take judgments of forfeiture promptly when the defendant fails to appear. As to the last proposal, any respectable court would refuse to take a minor's plea of guilty unless the minor was advised to so plead by parent or guardian, without any statute requiring it. However, one cannot fail to observe that the very introduction of such bills is an indictment of the administration of the criminal law.

William M. Cain.

RECENT DECISIONS

ACTION—EJECTMENT—GENERAL DENIAL—EFFECT OF EQUITABLE DEFENSE.—Whitman, the defendant, purchased real estate and entered into possession giving mortgage; Siravo, the plaintiff, bought said mortgage and now sues to oust the defendant. The defendant pleaded the general issue and offered as evidence the testimony of the grantor to prove that the plaintiff is a trustee, in that he, plaintiff, was asked by the defendant to purchase said mortgage and defendant would reimburse him, plus a reasonable fee for services. *Held,* not admissable. *Siravo v. Whitman,* 151 Atl. 893 (R. I. 1930).

The plaintiff here seeks to oust the defendant because he has failed to pay the mortgage due. Taking the facts thus far it is evident that the plaintiff has a legal right to seek possession of the premises, but the defendant attempts to prove that he has an equitable right which defeats the plaintiff's right to possession. Both parties have an interest, which is the superior? The Rhode Island court evidently draws a distinction between courts of law and equity. Thus if a party has an equity interest against a legal right he must wait until the legal action is tried, then bring his suit into equity to adjust his rights. The English rule on this point is set out in the English Statute of 17 and 18 VICTORIA, 125 sec. 83 (1854): "allowing equitable pleas in cases at law . . . provided that such plea shall begin with the words . . . the construction is, that the equitable plea is not good unless it sets up facts." Under such a construction the defendant must follow the principles of equity procedure, and set up specially the equitable facts to be pleaded. This was undoubtedly the interpretation of this court. In an action in the nature of an action of ejectment the general issue is "not guilty" and under such an issue the defendant may offer in evidence the same matter which he could have offered in evidence under the general issue in an action of ejectment. *Lomb v. Pioneer Savings & Loan Co.,* 17 So. 670 (Ala. 1895). "We consider it too well settled, in the state of Connecticut, to be debated, at this day, that as between the mortgagor and mortgagee, or the assignee of the mortgagee, payment of the mortgage debt, after the law-day, does not affect the legal title, in courts of law . . . This was settled in our reports as early as 1805, (*Phelps v. Sage,* 2 Day 150) and has been repeatedly confirmed, and now frequently recognized since. . . . If the debt was indeed paid by the defendant, and there was no equity in the way

of obtaining a release deed, the defendant had clear remedy, by obtaining a reconveyance of the title, to defeat the action of ejectment." Ellsworth, J., in *Cross v. Robinson,* 21 Conn. 378, 386, 387 (1849). Under such defenses, whether to the court or to the jury, the trial of the issue of fact has nothing to do with the validity of the defense. *Kent v. Agard,* 24 Wis. 378 (1869); further, by the same court, it is the established law in Wisconsin, that a deed given as security, an equitable mortgage, may be set up as a defense to an action of ejectment, the equitable right of the defendant defeating the legal right of the plaintiff grantee, "exactly as in New York." Against an equitable mortgagee in possession, ejectment will not lie because of the mortgagee's equitable right of possession. *Chase v. Peck,* 21 N. Y. 581 (1860). In Oklahoma and Kansas, their respective statutes provide, ". . . the defendant under a general denial could make any defense legal or equitable. . . . if the facts were set out with all the circumstantial minuteness and fullness of detail that they usually are in equitable actions." *Rowsey v. Jameson,* 149 Pac. 880, 881 (Okl. 1915); *Hurst v. Sawyer,* 37 Pac. 817 (Okl. 1894); *Eller v. Noah,* 168 Pac. 819 (Okl. 1917); *Stout v. Hyatt,* 13 Kan. 232 (1874); *Wicks v. Smith,* 18 Kan. 515 (1877); *Taylor v. Donley,* 83 Kan. 646, 112 Pac. 595 (1911); *Thayer v. Schaben,* 79 Kan. 856, 98 Pac. 1134 (1918). The Missouri courts, as well as other courts under the code, seem to miss the purpose of the code, as evidenced from the interpretation of the law in their decisions. In *Koehler v. Rowland,* 205 S. W. 217 (Mo. 1918), the court says that an action to determine title, under REV. ST., § 2535, is an action at law, although the answer sets up equitable defenses, but asks no affirmative equitable relief. The court seems to lay stress upon the validity of the defense with respect to the mode of trial, which is not in line with the code intention or purpose. In a later case, *Chilton v. Chilton,* 297 S. W. 457 (Mo. 1927), in an action to recover the balance on the purchase price of real estate which it is alleged defendant collected and refused to pay, equitable defense setting forth trust relation with plaintiff's husband, defendant's brother, asking the court to make a finding that the defendant had fully accounted for all trust property. *Held,* to allege no facts authorizing the granting of affirmative relief to defendant; but that, equitable defense is permitted to defeat plaintiff's recovery and if facts are shown for affirmative relief the answer may convert the whole proceeding into an equitable one. This case appears to be in point with the instant case. In North Carolina, a defendant who, in an action to recover land, has by his answer set up legal title in himself, cannot set up an equitable defense upon the trial. *Rollins v. Henry,* 78 N. C. 342 (1878). In Indiana, the courts allow an equitable defense to be set up under a general denial in so far as it operates to defeat plaintiff's recovery, but the courts will not consider such defenses as bases for affirmative relief. "The statute of limitations, or any other legal or equitable defense, can be given in evidence under the general denial, without pleading it specially in actions for the recovery of real estate, acts of 1855, p 57." *Vail v. Halton,* 14 Ind. 344 (1860). The same was upheld in *East v. Pedin,* 108 Ind. 92, 8 N. E. 722 (1886), where under a statutory denial equitable facts may be given in evidence to defeat recovery. It was expressed as a sound view in *Schlosser v. Nicholsen,* 184 Ind. 283 (1915). In a later decision it was held no error, on complaint which stated a cause of equitable cognizance. *Waggoner v. Honey,* 169 N. E. 349, 350 (Ind. 1929). It seems that the tendency in this country is to extend the jurisdiction to all cases in which either of the parties is fairly entitled to a more perfect relief than he can get at law. *Hawkins v. Baker,* 14 R. I. 139, 140 (1883). This coming from such an early decision tends to show the difficulty of applying the code in it's proper interpretation. The court states the true attitude in *Church v. Brown,* 272 Pac. 512 (Wash. 1928), that all controversies between the parties arising out of or dependent upon the transaction which is the subject-matter of the action be determined and settled in one instead of several proceedings. In Oregon, for equitable defenses, the code provides counterclaims in which affirmative equitable relief may be given, whether as a bar to the law action or as further affirmative relief. *Smith Portland & Co. v. Munger,* 54 Pac. 815 (Ore. 1898); *Zeuske v. Zeuske,* 103 Pac. 648 (Ore. 1909). WALSH ON EQUITY, § 21, p. 105, 106 (1930), treats of equitable defenses to the point where he states: ". . . in actions of ejectment to recover the possession of land, there is conflict in the cases as to

whether the defendant can set up facts establishing a trust in his favor against the plaintiff as a defense to the action or as a counterclaim to establish his equitable rights against the plaintiff. In code states any facts, legal or equitable, must be admitted to bar plaintiff's action." His investigation points out that the courts should not be sticklers of form, but that they should adjudge each controversy on its merits regardless of the mode of trial unless there is such a fatal defect or improper pleading as would make it impossible to render the proper relief under the pleadings.

Joseph V. Stodola.

ATTORNEY AND CLIENT—CHARGING LIEN—RETAINING LIEN.—A summary proceeding brought by the receiver of the H. A. Stahl Properties Co. against the defendants, who formerly were attorneys for the Stahl Co. This action is to recover the amount of a draft retained by the defendants in payment for their legal services which they had rendered to the insolvent company at a time previous to its insolvency. Section 1711 of the Ohio General Code is the basis for the application for the summary order in the foreclosure proceedings, and, among other things it provides as follows: "Such attorney at law receiving money for his client and refusing or neglecting to pay it when demanded, shall be proceeded against in a summary way, on motion . . ." The defendants had a bill for professional services amounting to $20,000 against the H. A. Stahl Company. A money draft came to them for their client payable on a New York Bank; which draft the attorneys cashed and notified the Stahl Co. that they were applying the proceeds thereof to their indebtedness. *Held,* that attorneys have a lien on a client's papers in their possession for their expenses and services and also for a general balance due on costs. *Newcomb v. Krueger et al,* 173 N. E. 246 (Ohio 1930).

At law an attorney has two liens; that is the retaining lien and the charging lien. This case properly falls under the classification of a retaining lien as here the attorney is getting his services paid for by retaining property belonging to the client that he has in his possession. Apart from statute, an attorney has a common law lien upon any papers, securities, or other property delivered to him by his client in the course of, and with reference to, his professional employment, although no action or proceeding is commenced or pending. *Hartman v. Swiger,* 215 Fed. 986 (D. C., N. D., W. Va. 1914); *Scott v. Morris,* 131 Ill. App. 605 (1907); *McIntosh v. Bach,* 110 Ky. 701, 62 S. W. 515 (1901); *Hodges v. Ory,* 48 La. Ann. 54, 18 So. 899 (1895); *Northrup v. Hayward,* 102 Minn. 307, 113 N. W. 701 (1907); *In re Hollins,* 197 N. Y. 361, 90 N. E. 997 (1910); *Thompson v. Findlater Hardware Co.,* 156 S. W. 301 (Texas 1913). It has been held that an attorney could retain an insurance policy. *Curtis v. Richards,* 4 Idaho 434, 40 Pac. 57 (1895). Also, where a client is judicially declared an incompetent, and the relations of attorney and client are terminated, the attorney has a lien on the bank books in his possession pending his employment, and an order, directing their surrender to the committee of the incompetent, should direct the committee to retain in its hands a sufficient sum to satisfy the amount due the attorney on a reference. *Thompson, Bulk Oil Transports, Inc., v. Robins Dry Dock and Repair Co. et al,* 277 Fed. 25 (C. C. of A. 2d. 1921); *Smith v. Thompson,* 233 S. W. 876 (Texas 1921). The general or retaining lien of an attorney is his right to retain possession of all documents, money, or other property of his client coming into his hands professionally until a general balance due him for professional services is paid. *Modern Woodmen of America v. Cummins et al,* 268 S. W. 383 (Mo. 1925). This lien has been recognized from the earliest time and is said to have its origin partly in custom and partly in the prevention of circuity of action. *Weed Sewing Machine Co. v. Boutelle,* 56 Vt. 570, 48 Am. Rep. 821 (1884). There has been some question raised as to the correctness of the term "lien" as applied to this right. In *Dubois' Appeal,* 38 Pa. 231, 234 (1861), the court said: "In a certain sense an attorney has been said to have a lien for his fees, upon the money or papers of his client, while they are in his hands. He may deduct from money collected by him, a just compensation for collecting it, and need only pay over the balance. This however, is a right to defalcate, rather than a

lien." The retaining lien is of common law origin and the statutes providing for it and for its enforcement are merely declaratory of the common law rule. *Ahalt v. Gatewood et al,* 109 Kan. 328, 198 Pac. 970 (1921). *Longwood v. Handy,* 2 Disn. 75, 13 Ohio Dec. 47 (1858), is a decision in point with the main case, and the court, in speaking of section 1711 of the OHIO GENERAL CODE, says: "We have no doubt that the proceeding to amerce is so far penal in its character, as that it does not apply to a case where the attorney has a *bona fide* claim upon the fund collected, or acts in good faith in refusing to pay it over. The Statute undoubtedly contemplates a case where the duty of the attorney to pay over is clear."

The other kind of lien is the special or charging lien which is an equitable right to have the fees and costs due to the attorney for services in a suit secured to him out of the judgment or recovery in that particular suit, the attorney, to the extent of such services, being regarded as an equitable assignee of the judgment. *Gulf States Steel Co. v. Justice,* 204 Ala. 577, 87 So. 211 (1920); *Jacobson et al v. Miller et al,* 198 N. W. 349 (N. D. 1924). The charging lien is based on the natural equity that the plaintiff should not be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment. *Cohen v. Goldberger et al,* 109 Oh. St. 22, 141 N. E. 556 (1923). This lien is an exception to the general rule in that it lacks the element of possession which is essential to ordinary liens, and for this reason strictly speaking, did not exist at common law. The existence of the lien was recognized, however by several early English cases and it now exists in most jurisdictions either by statute or by virtue of judicial decision. *Welsh v. Hole,* 1 Doug. 238, 99 Eng. Rep. 155 (1779); *Williams v. Bradley,* 187 Ala. 158, 65 So. 534 (1914); *Compton v. State,* 38 Ark. 601 (1882); *Johnson v. McMillan,* 13 Colo. 423, 22 Pac. 769 (1889); *Hodnett v. Bonner,* 107 Ga. 452, 33 S. E. 416 (1899); *Koons v. Beach,* 45 N. E. 601 (Ind. 1896); *Hubbard v. Ellithorpe,* 112 N. W. 796 (Iowa 1907); *Brown v. Lapp,* 89 S. W. 304 (Ky. 1905); *Thayer v. Daniels,* 113 Mass. 129 (1873); *Wipfler v. Warren,* 163 Mich. 189, 128 N. W. 178 (1910); *Northrup v. Hayward,* 113 N. W. 701 (Minn. 1907); *Taylor v. Stull,* 112 N. W. 577 (Neb. 1907); *Pride v. Smalley,* 52 Atl. 955 (N. J. 1901); *In Re Regan,* 60 N. E. 658 (N. Y. 1901); *Stanley v. Bouck,* 83 N. W. 298 (Wis. 1900). In Ohio an attorney has no lien as such for his services upon a judgment which he has obtained for his client, in the absence of any contract giving him such a lien. *Diehl v. Friester,* 37 Oh. St. 473 (1882). Also in Texas the charging lien is not recognized, for under the statutes no lien on a judgment recovered by an attorney can be levied by him to secure payment for his services in procuring the judgment. *Dutton v. Mason,* 52 S. W. 651 (Texas 1899).

Kenneth J. Konop.

AUTOMOBILES—MASTER'S LIABILITY FOR SERVANT'S NEGLIGENCE.—A garage employee acting as night foreman at a garage was also employed by another person, one Lieber, to act as chauffeur for himself and family during certain hours of the day for which services he received a weekly wage. Klug, the garage owner, was carrying no employer's liability insurance, and for such reason directed his employees not to do chauffeur work for customers. At the time in question the garage employee Middleton, had been requested by the owner of the automobile to come to his home in the evening in order to take the family to the theatre and in compliance with the request, such employee did go and take the owner and his wife to the theatre and was also directed to call for them immediately after the performance, but while returning to the theatre collided with another automobile and did considerable damage to the same. Such automobile belonged to one Messick, who in turn sued Lieber the car owner, Klug the garage owner, and Middleton the garage employee, to recover damages for such negligence. The question arose during the procedure of the trial as to whether Middleton was the agent of Lieber at the time of the collision with the Messick automobile. It is by no means the law, as was assumed by Lieber that one in the general employment of another may not while so employed become the agent and be under the control of a third party. In this case, Middleton pursuant to Lieber's directions was at the time of the accident, in charge of and operating Lieber's car; and in

so doing he was under the facts, subject to the control of Lieber and not under the control of Klug, the garage owner, who had informed his employees, including Middleton, not to do any chauffeur work for any of the customers. On the whole, the general and well accepted test of one's liability for the act or omission of his alleged servant in his right and power to direct and control his imputed agent in the performance of the casual act or omission at the very instant of the act of neglect. *Held,* that at the time of the collision which resulted in the damages to Messick's car, Middleton, the driver of the other car was under the control and direction of Lieber and that therefore Lieber was responsible to Messick for the damages accruing from such accident. *Lieber v. Messick,* 173 N. E. 238 (Ind. App. 1930).

The case of *Billig v. Southern Pac. Co.,* 209 Pac. 241 (Cal. 1922), is in point. In this case the court held that one may be in the general service of one employer and nevertheless with respect to particular work, be transferred to the service of another, so as to become by agreement, or by force of circumstances the servant of the latter with all the legal consequences of such relation. Then too, in the case of *Crouse v. Lubin,* 103 Atl. 725 (Pa. 1918), the court held that a master is not liable for the acts of his servant while temporarily in the employ of another, which more or less substantiates the holding of this case. In the case of *Badertscher v. Independent Ice Co.,* 184 Pac. 181 (Utah 1919), which also appears to be in point, the court held that one may be in the general service of another and nevertheless with respect to particular service be deemed the servant of a third person, so as to render the latter liable for the servant's negligence. A majority of the states are in accord with the principal case. *Bastien v. Ford Motor Co.,* 189 Ill. App. 367 (1914); *Core v. Resha,* 204 S. W. 1149 (Tenn. 1918); *Fielder v. Davison,* 77 S. E. 618 (Ga. 1913); *Good v. Berrie,* 122 Atl. 630 (Me. 1923).

John H. Tuberty.

EQUITY—TEXAS COURT HOLDS "HOOVER DEMOCRAT" HAS NOT "CLEAN HANDS." —"He who comes into a court of equity must come with clean hands" has been an established maxim of equity jurisprudence for centuries, but the Court of Civil Appeals of Texas recently made a unique application of it, in the case of *Love v. Taylor,* 8 S. W. (2d) 795, decided July 19, 1928. In that case, Thomas B. Love, the plaintiff, brought an injunction suit against members of the Democratic executive committee commanding them to place his name upon the official ballot as a candidate for the Democratic nomination for Lieutenant Governor, at the primary election to be held July 28, 1928. It appeared from undisputed evidence that Mr. Love had been a leading figure in Texas politics for more than thirty years, during all of which period he had affiliated with the Democratic party and supported its nominees, except that in 1924 he had supported the Republican nominee for governor: but, in January 1928, he had filed with the proper committee a written request that his name be placed upon the primary ballot as a candidate for the Democratic nomination for Lieutenant Governor. Afterward, Mr. Love attended and participated in Democratic precinct and county conventions, and, in both, signed a pledge, prescribed by the state committee, that he would support the nominees of the Democratic party, at the same time, however, orally stating that he "would support such nominees to the limit his conscience would permit." Later, as a delegate, he attended the Democratic State Convention, and there publicly announced that he would not support Governor Alfred E. Smith, if he were nominated. After the national convention, Mr. Love aligned himself with the so-called "Hoover Democrats," whereupon the executive committee decided not to place his name on the Democratic ballot. Mr. Love then brought this injunction suit to compel them to do so, and both the lower court and the Texas Court of Civil Appeals refused to grant the injunction, and based their decisions upon the point that he "had not come into court with clean hands." In the course of the opinion, the latter court said:

"The maxim is as old as equity itself that 'He who comes into a court of equity must come with clean hands,' or as sometimes forcefully expressed, 'He that hath committed iniquity shall not have equity.' Pom. Eq. Jur. 397. Under

the facts of this case, which perhaps has not a parallel in the history of political parties, a man is seeking not only to participate in the councils of the party, but to have himself presented as a candidate for the second highest office in the executive department of the state, at the same time that he is entering into a conspiracy with the enemies of the party whose honors he is seeking, and endeavoring to defeat men who have already been nominated by the highest authority of the party to the two chief offices of the republic. Can he be said to come into a court asking equitable relief 'with clean hands'? He makes professions of loyalty to and faith in the Democratic Party, but his acts belie his words and besmirch his political record with insincerity and disloyalty. . . . Under the terms of both opinions in the cases cited, appellant cannot find even standing room in a court of equity. He cannot weaken or destroy his moral and legal obligation to support the nominees for president and vice president named by the National Democracy, by crossing his fingers at the time he signed the pledge and afterwards remarking in an undertone, 'I will not vote for Al Smith if he is nominated.' By no such quibbling, mental reservation or secret evasion can a man absolve himself from a solemn pledge voluntarily made by him. To uphold such a doctrine would make a football of the statutory pledge and place disloyalty upon a pedestal. The conscience so acute as to prevent a man from voting for a candidate to whom he has bound himself by a solemn obligation, is a false guide and an unwise mentor. To violate such a pledge is unconscientious, and such conduct cannot obtain aid in a court of equity."

On rehearing, the decision was affirmed.

William M. Cain.

HUSBAND AND WIFE—PRESUMPTION OF COERCION—REBUTTAL.—One Margaret Tomasello was convicted of unlawful sale of intoxicating liquor, and now appeals the case. The evidence shows that appellant was a married woman living with her husband at the time of the sale of the intoxicating liquor and that she was ordered and coerced by her husband to perform the illegal transaction and that because of such coercion she cannot be held liable for the violation of the law in regard to the sale of liquor. In the State of Indiana it is the law that a married woman who commits a crime in her husband's presence, with the exception of murder and treason, is entitled to the presumption that she performed such unlawful act through the coercion of her husband. However, the presumption may be rebutted by the evidence in the case. During the course and procedure of the trial, evidence was also presented which disclosed that the officers of the law went to an apartment in Indianapolis, where James Tomasello lived and there purchased whiskey of his wife and paid her for the same. The officers buying the drinks did not see appellant's husband around at the time of such purchase and would have readily recognized him had he been present as they knew him on sight. However, he was no where to be seen. The husband's evidence showed that he was in the house at the time of the sale and purchase of the liquor, and that he had said to his wife, "Go ahead and give them what they want." But appellant then testified that she did not sell any liquor to the officers or anyone else. The court held that the evidence did not entitle the appellant to the presumption that she was coerced by her husband at the time of the sale of the liquor to perform the unlawful act. Therefore, the evidence clearly establishes her guilt. *Held,* that a married woman, committing crime in husband's presence, except treason and murder, is entitled to rebuttable presumption that husband coerced her. *Tomasello v. State,* 173 N. E. 135 (Ind. App. 1930).

The case of *Edwards v. State,* 27 Ark. 493 (1872), is in point. In this case the court held that though the coercion of the husband is an excuse for any crime or misdemeanor committed by the wife, such coercion must appear clearly from all the facts and circumstances of the case and cannot be presumed from his presence. Then in the case of *Commonwealth v. Daley,* 18 N. E. 579 (Mass. 1888), it was held that if the husband was near enough to see, hear or know that the defendant was making unlawful sales, she was not liable, is too favorable to her and was properly refused. In the case of *Tabler v. State,* 34 Oh. St. 127 (1877), it was held that a married woman who commits a criminal act in the presence of her husband acts under his coercion is only *prima facie,* and when it is shown

that she acted voluntarily and not by coercion she alone is liable to prosecution. A majority of the states are in *accord* with the principal case. *State v. Noell,* 72 S. E. 590 (N. C. 1911); *People v. Wright,* 38 Mich. 744 (1878); *State v. Martini,* 78 Atl. 12 (N. J. 1910); *Commonwealth v. Barry,* 115 Mass. 146 (1874); *United States v. Terry,* 42 Fed. 317 (D. C., N. D. Cal., 1890); *Miller v. State,* 25 Wis. 384 (1870); *State v. Kelly,* 38 N. W. 503 (Iowa 1888); *Commonwealth v. Munsey,* 112 Mass. 287 (1873).

John H. Tuberty.

NEGLIGENCE—DEFECTIVE ARTICLE—MANUFACTURER'S LIABILITY TO THIRD PERSONS FOR SUCH DEFECT—DANGEROUS INSTRUMENTALITIES.—This is an action against the Ford Motor Co. for damages resulting from the sale by one of their dealers of a defective tractor. The plaintiff purchased a Ford tractor from a dealer and proceeded to operate the same upon his farm. While driving the tractor backwards and twisted about in his seat so he could see where he was going, the steering wheel broke and he fell from his seat and was run over by the tractor. From this accident he received a number of painful injuries. This action is brought on the ground that the steering wheel was so defective that the defendant manufacturer was liable directly to him for the injuries. As the plaintiff was a resident of the state of Kentucky and the defendant company was a resident of the state of Michigan, suit was brought in a federal court. The District Court of the United States for the Western District of Kentucky held that the defendant was not liable, but the Circuit Court of Appeals of the sixth district reversed the decision, remanded the case and *held,* that the manufacturer of an article reasonably certain to imperil life and limb when negligently made, who knows the article will be used without new tests by persons other than the purchaser, must make it carefully, irrespective of the contract. *Goullon v. Ford Motor Co.,* 44 Fed. (2d) 310 (C. C. A. 6th. 1930).

The leading case on the rule as laid down by this court is *MacPherson v. Buick Co.,* 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916 F 696 (1916). In this case the Buick Motor Car Company was held liable to a purchaser of one of their cars for a defective wheel, which broke and caused injuries. Ordinarily an automobile or motor vehicle is not considered a dangerous instrumentality; as in *Quackenbush v. Ford Motor Co.,* 167 App. Div. 433, 153 N. Y. S. 131 (1915), the court said, ". . . the modern automobile, properly equipped with brakes and assembled in harmony with the plans underlying the construction, is not inherently a dangerous machine. In the hands of a reasonably intelligent driver it involves no greater hazards to the public than a team of horses attached to a wagon." But they become dangerous instrumentalities when they are allowed to be in a defective condition. *Tannahill v. Depositors Oil etc. Co.,* 110 Kan. 254, 203 Pac. 909 (1922); *Lee v. VanBuren, Bill Posting Co.,* 190 App. Div. 742, 180 N. Y. S. 295 (1920); *Foster v. Farra,* 117 Or. 286, 243 Pac. 778 (1926); *Texas Co. v. Veloz,* 162 S. W. 377 (Tex. 1913). Upon the theory that the nature of an automobile gives warning of probable danger if its construction is defective, it is the duty of the manufacturer to make it carefully and he is liable for a breach of such duty, regardless of whether the danger therefrom is to be termed "inherent" or "imminent," not alone to the immediate purchaser but to purchasers from a dealer to whom he sells and to others making use of it, where the manufacturer knew that the car would be used by persons other than the immediate purchaser. *MacPherson v. Buick Motor Co., supra.* The cases of *Olds Motor Works v. Shaffer,* 145 Ky. 616, 140 S. W. 1047 (1911), and *Ford Motor Co. v. Livesay,* 61 Okla. 231, 160 Pac. 901 (1916), hold that a defectively constructed motor vehicle comes within the class of articles which are not inherently or intrinsically dangerous, and that the maker will not be liable to a third person who is a stranger to the contract between the maker and the purchaser, unless the maker knew that the vehicle was unsafe and dangerous and either concealed the defects or represented that it was safe and sound. Likewise, where the purchasers of an automobile have knowledge of its unsafe condition and with such knowledge invite a third person to use it, such third person cannot maintain an action in tort against the maker for a resulting injury.

In the case of *Moch Co., Inc. v. Rensselaer Water Co.,* 247 N. Y. 160, 159 N. E. 896 (1928), the plaintiff based his right to recover on the decision in *MacPherson v. Buick Motor Co., supra.* The defendant water company had contracted with the city of Rensselaer to furnish water, and negligently failed to do so at a time when the plaintiff's factory had caught fire. Chief Justice Cardoza, in his opinion, says, " 'It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all' (*Glanzer v. Shepard,* 233 N. Y. 236, 239; *Marks v. Nambil Realty Co., Inc.,* 245 N. Y. 256, 258). The plaintiff would bring its case within the orbit of that principle. The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and non-feasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as will from acts of omission as of commission in the fulfillment of the duty, thus recognized by law (*Pollock, Torts* [12th. ed.] p. 555; *Kelly v. Met. Ry. Co.,* 1895, 1 Q. B. 944). What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward (*Bohlen, Studies in the Law of Torts,* p. 87). So the surgeon who operates without pay, is liable though his negligence in the omission to sterilize his instruments (*cf. Glanzer v. Shepard, supra*); the engineer, though his fault is in the failure to shut off steam (*Kelly v. Met. Ry. Co., supra; cf. Pittsfield Cottonwear Mfg. Co. v. Shoe Co.,* 71 N. H. 522, 529, 533); the maker of automobiles, at the suit of someone other than the buyer, though his negligence is merely in inadequate inspection (*MacPherson v. Buick Motor Co.,* 217 N. Y. 382). The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good (*cf. Fowler v. Athens Waterworks Co.,* 83 Ga. 219, 222)." The distinction between the principle involved in the principal case and that involved in the case of *Moch Co., Inc. v. Rensselaer Water Co.* is clearly pointed out by Chief Justice Cardoza.

We have seen that the court in *Quackenbush v. Ford Motor Co., supra,* did not consider the automobile a dangerous instrumentality. Then too, Justice Owen of the Supreme Court of Wisconsin in *O'shea v. Lavoy,* 175 Wis. 456, 185 N. W. 525 (1921), states that "The automobile is an instrumentality of recent creation which has rapidly established itself in the desires of the people. No other agency has so effectively appealed to their favor. Nothing contributed so much to the comfort and pleasure, the welfare and happiness of the family. It has given a new idea to distances and materially enlarged the orbit of individual existence. It affords recreation which appeals to every member of the family and pleasures which may be indulged by the family unit. It is a minister of health as well as pleasure." But Justice Sutherland of the United States Supreme Court takes a different view from these other justices in the case of *District of Columbia v. Colts,* 51 S. C. 52 (1930), "An automobile is, potentially, a dangerous instrumentality, as the appalling number of fatalities brought about every day by its operation bear distressing witness. To drive such an instrumentality through the public streets of a city so recklessly 'as to endanger property and individuals' is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense."

Kenneth J. Konop.

NUISANCES—PARTICULAR ANNOYANCES—GARAGES—The plaintiff started an action in equity to restrain and prohibit the defendant from erecting a garage on a lot adjacent to his residence, on the ground that it was a strictly resi-

dential section and the erection and maintenance of a garage would constitute a nuisance. No conditions existed which would in any way detract from the residential character of the district and the city had not increased in population, nor was growth or extension of business districts toward the locality of the property in question. The garage, if erected would be kept open for public service for storage, supply station, battery service, tire repairing, and dispensing of gasoline and oil, both day and night, including Sundays. The lower court filed its findings of fact in which it was found that neither the property of the plaintiff nor that of the defendant was subject to any restriction upon its use either under the covenant or condition of any deed or similar instrument, and that the city in which the action arose had no zoning ordinance. *Held,* the garage and oil station to be erected and business to be carried on therein constitute a nuisance. Judgment was entered accordingly for the plaintiff. *Ballstadt v. Pagel,* 232 N. W. 862 (Wis. 1930).

As a general rule, a garage is not considered a nuisance *per se* nor a nuisance at common law, whether it be a private or a public garage. *People v. Ericson,* 105 N. E. 315 (Ill. 1914); *Lansing v. Perry,* 184 N. W. 473 (Mich. 1921); *Phillips v. Donaldson,* 112 Atl. 236 (Penn. 1920). However, they may be or may become nuisances by reason of attending circumstances and surroundings. Whether a particular garage is a nuisance depends upon its location, the manner in which it is kept, and other surrounding circumstances. In *Bourgeous v. Miller,* 104 Atl. 382 (N. J. 1918), it was held that a garage was not a nuisance but the facts differ from the case above inasmuch as the district in which the garage was to have been built was not strictly residential. In *Nesbit v. Riesenman,* 148 Atl. 695 (Penn. 1930), the court upholds the doctrine that a public garage in a residential district is a nuisance *per se.* In *Ladner v. Siegel,* 148 Atl. 699 (Penn. 1930), the same court held that a certain garage was not a nuisance, but again the district was not strictly residential. The court said in this case: "We further explained that the residential district described in this case was not an exclusively residential district within the meaning of the term, where the nuisance *per se* rule would apply to a building built and used as this one was." The instant case, therefore, is in line with the majority of authorities. The whole question seems to be, "Can the business be carried on at the particular place in such a way as will not unreasonably disturb those living near it?" *True v. McAlpine,* 125 Atl. 680 (N. H. 1924).

John D. Voss.

TORTS—JOINT TORT-FEASORS—CONTRIBUTION—EXCEPTIONS.—David Gordon, was indemnified by the Royal Indemnity Company, against loss by reason of claims growing out of negligence in the operation of his business as such building contractor. During the time said policy was in force, one John C. Webber sustained certain injuries as the result of the joint and concurrent negligence of David Gordon, John A. Becker, and F. William Becker and in an action to recover therefor he was awarded a judgment against those parties in the amount of $5,000. That action was for damages for the joint tort of the three parties named and the judgment was rendered against all upon that issue. After said judgment became final and conclusive, the Royal Indemnity Company paid to John C. Webber the full amount of the judgment recovered by him against the three joint tort-feasors. Satisfaction of said judgment was not entered, but John C. Webber executed an assignment of said judgment to the Royal Indemnity Company, and that assignment was recorded and an execution was issued against property formerly owned by the Beckers. Suit was brought to procure an order to sell such real estate to satisfy the claim of the Royal Indemnity Company. This suit was brought to enjoin that proceeding and to restrain the sale of the property and the enforcement of the judgment. *Held,* satisfaction of judgment against one joint tort-feasor releases all therefrom; no right of contribution exists between persons whose concurrent negligence has made them liable in damages. *Royal Indemnity Company v. Becker et al.,* 173 N. E. 194 (Ohio 1930).

This rule is in harmony with the weight of authority. In the case of *The Union Stock Yards Co. v. Chicago B. & Q. Rd. Co.*, 196 U. S. 217, 25 S. Ct. 226, 47 L. Ed. 453, 2 Ann. Cas. 525 (1904), it was held that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. *Adams v. White Bus Line*, 184 Cal. 710, 195 Pac. 389 (1921); *City of Tacoma v. Bonnell*, 65 Wash. 505, 118 Pac. 642, 36 L. R. A. (N. S.) 582, Ann. Cas. 1913 B, 934 (1911); *City of Louisville v. Louisville Ry. Co.*, 156 Ky. 141, 160 S. W. 771, 49 L. R. A. (N. S.) 350 (1913); *Owensboro City Rd. Co. v. L. H. & St. L. Ry. Co.*, 165 Ky. 683, 178 S. W. 1043 (1915); *Doles, Adm'r. v. Seaboard Air Line Ry. Co.*, 160 N. C. 318, 75 S. E. 722, 42 L. R. A. (N. S.) 67 (1912); *Adams Express Co. v. Beckwith*, 100 Oh. St. 348, 126 N. E. 300 (1919); *Penn Co. v. West Penn Ry. Co.*, 110 Oh. St. 516, 144 N. E. 51 (1924); *Du Bose v. Marx*, 52 Ala. 506 (1875); *Mashburn v. Donnenberg Co., 117 Ga.* 567, 44 S. E. 97 (1903); *McDonald v. Nugen*, 118 Iowa 512, 92 N. W. 675, 96 Am. St. Rep. 407 (1902); *McAvoy v. Wright*, 137 Mass. 207 (1884); *Savage v. Stevens*, 128 Mass. 254 (1880); *Elliott v. Hayden*, 104 Mass. 180 (1870); *Cunningham v. O'Connor*, 136 Mich. 293, 99 N. W. 25 (1904); *Parmenter v. Barstow*, 21 R. I. 410, 43 Atl. 1035 (1899); *Snyder v. Witt*, 99 Tenn. 618, 42 S. W. 441 (1897); *Brison v. Dougherty*, 3 Boxt. 93 (Tenn. 1873); *Birkel v. Chandler*, 26 Wash. 241, 66 Pac. 406 (1901); *Bigelow v. Old Dominion Copper Mining Co.*, 32 S. Ct. 641, 56 L. Ed. 1009 (1912); *Bartle v. Nutt*, 4 Pet. 184, 7 L. Ed. 825 (1830); *Hooks v. Vet*, 192 Fed. 314, 113 C. C. A. 526 (1911); *Goldsmith v. Koopman*, 152 Fed. 173, 81 C. C. A. 465 (1907); Boyd v. Gill, 19 Fed. 145, 21 Blatchf. 543 (1883). In *Dow v. Sunset Tel. Co.*, 162 Cal. 136, 121 Pac. 379 (1912), where a telephone company strung its wires too close to those of an electric light company, and the telephone wires sagged so that it came in contact with an uninsulated wire of the light company, and that company though knowing of the danger, made no effort to correct it, both the light company and the telephone company were joint tort-feasors, and as such there was no right of contribution between them. *Lomita Land Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1006 (1908); *The Hudson*, 15 Fed. 162, 167 (D. C., S. D., N. Y. 1883); *Forsythe v. Los Angeles R. Co.*, 149 Cal. 569, 87 Pac. 24 (1906); *Sparrow v. Bromage*, 83 Conn. 27, 74 Atl. 1070, 27 L. R. A. (N. S.) 209 (1910); *Bailey v. Bussing*, 28 Conn. 455 (1859); *Herr v. Barber*, 13 D. C. 545 (1883); *Central of Georgia R. Co. v. Macon R. Co.*, 9 Ga. App. 628, 71 S. E. 1076 (1911); *Wanoch v. Michels*, 215 Ill. 87, 74 N. E. 84 (1905); *Nelson v. Cook*, 17 Ill. 443 (1856); In *Illinois Central R. Co. v. Louisville Bridge Co.*, 171 Ky. 445, 188 S. W. 476 (1916), a boy who was stealing a ride on a train was made by train employees to get off, in doing which he caught his foot in a frog in the tracks of plaintiff bridge company which the defendant railroad was using and was injured. The court held that the railroad company and the bridge company were joint tort-feasors, so that the bridge company, after paying the judgment could not recover over against the railroad company, and the fact that the wrongful act of the railroad company occurred a moment before the negligence of the bridge company became operative, did not take the case out of the general rule. *Sincer v. Bell*, 47 La. Ann. 1548, 18 So. 755 (1895); *Baltimore and Md. R. Co. v. Howard County*, 113 Md. 404, 77 Atl. 930 (1910); *Booth Mills v. Boston R. Co.*, 218 Mass. 582, 106 N. E. 680 (1914); *Detroit R. Co. v. Boomer*, 160 N. W. 542 (Mich. 1916); *Mayberry v. Northern Pac. R. Co.*, 100 Minn. 79, 83, 110 N. W. 356, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754 (1907); *Avery v. Kansas City Central Bank*, 221 Mo. 71, 119 S. W. 1106 (1909); In *Johnson v. Torpy*, 35 Neb. 604, 53 N. W. 573, 37 Am. St. Rep. 447 (1892), a licensed saloon keeper, sold intoxicating liquor to a habitual drunkard, for which the wife of the latter recovered judgment against him on his bond. The judgment having been satisfied the saloon keeper sued another saloon keeper in the same village to enforce contribution on the ground that the latter had also sold liquor to the drunkard which contributed to the injury for which the wife of the latter had recovered. As the undisputed evidence shows that the husband was known to be a common or habitual drunkard at and before the sale of the liquor to him the presumption is that the plaintiff saloon keeper here knew that he was doing a wrongful act, and he is therefore not entitled to contribution from the defendant. This case holds that in determining whether one wrongdoer is entitled to contribution

from another the test is whether the former knew at the time of the commission of the act for which he has been compelled to respond that such act was wrongful. *People v. Equitable L. Assur. Soc.*, 124 App. Div. 714, 109 N. Y. S. 453 (1908); *Doles v. Seaboard Air Lines R. Co.*, 160 N. C. 318, 75 S. E. 722, 42 L. R. A. (N. S.) 67 (1912); *Fahes v. Price*, 18 Okla. 413, 89 Pac. 1123 (1907); *Smith v. Burns*, 135 Pac. 200, 142 Pac. 352, L. R. A. 1915 A 1130, Ann. Cas. 1916 A 666 (Ore. 1913); *Boyer v. Bolender*, 129 Pac. 324, 18 Atl. 127, 15 Am. St. Rep. 723 (1889); *Adams v. Waco First Nat. Bank*, 178 S. W. 993 (Tex. 1915); *Atkins v. Johnson*, 43 Vt. 78, 5 Am. Rep. 260 (1870); *Walton v. Miller*, 109 Va. 210, 63 S. E. 458, 132 Am. St. Rep. 908 (1909); *In Re Ryan's Estate*, 157 Wis. 576, 147 N. W. 993, Ann. Cas. 1916 D 840 (1914); *White v. Carolina Realty Co.*, 109 S. E. 564, 182 N. C. 536 (1921); *Nettles v. Alexander*, 169 Ark. 380, 275 S. W. 708 (1925); *Wise v. Berger*, 103 Conn. 29, 130 Atl. 76 (1925); *Jones v. Russell*, 206 Ala. 215, 89 So. 660 (1921); *O'Briant v. Pryor*, 195 S. W. 759 (Mo. App. 1917); *Hunt v. Zeigler*, 271 S. W. 936 (Tex. 1926).

Although a joint tort-feasor who has been forced to respond in damages cannot require indemnification at the hands of his co-tort-feasor there are two classes of cases which constitute exceptions to the rule: First, where the party claiming indemnity has not been guilty of any fault except technically or constructively; as where one does the act or creates the nuisance and the other does not join therein but is thereby exposed to liability. In such case the parties are not *in pari delicto* as to each other though as to third persons either may be held liable. *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N. Y. 461, 466, 31 N. E. 987, 30 Am. St. Rep. 685 (1892). The exception is frequently applied where judgment has been recovered against a master for injuries sustained by a servant's negligence or wrongful act in which the master has not participated. *Smith v. Foron*, 43 Conn. 244, 21 Am. Rep. 647 (1875); *Georgia Southern R. Co. v. Jossey*, 105 Ga. 271, 31 S. E. 179 (1898); *Grand Trunk R. Co. v. Latham*, 63 Me. 177 (1874). Second, where both parties have been at fault but not in the same fault, toward the party injured, and the party from whom indemnity is claimed was the primary and the efficient cause of the injury. *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.) 581, 3 N. Y. S. 595 (1889). Illustrations of this class are found in cases of recovery against municipalities for obstructions of the highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former the failure to remove it in the exercise of its duty to care for the safety of the public streets. The first was a positive tort and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied. *Canandaigua v. Foster*, 81 Hun (N. Y.) 147, 149, 3 N. Y. S. 686 (1894); *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152, 50 Atl. 3 (1901); *Chesapeake Canal Co. v. Allegheny County*, 57 Md. 201, 40 Am. Rep. 430 (1881); *Lowell v. Boston R. Corp.* 23 Pick. (Mass.) 24, 34 Am. Dec. 33 (1839); *Nashua Iron Co. v. Worcester R. Co.*, 62 N. H. 159 (1882). The rule was applied in the case of *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469 (1872), where the defendant contracted with the plaintiff, a municipal corporation, to keep a portion of its streets in repair, and in consequence of a defect in a street embraced in the contract, injuries were received by one who recovered judgment against the plaintiff, it was held that the latter was entitled to indemnity.

Alvin G. Kolski.

TORTS—NEGLIGENCE—LIABILITY OF VENDOR AND VENDEE FOR DANGEROUS CONDITION OF THE LAND AT THE TIME OF TRANSFER.—There are but few cases dealing with the effect of a sale of real property. In so far as there is a general rule, it seems to be that one's liability in negligence ceases when the premises pass out of one's *control* before injury results. *Baggott v. Southern Ry.*, 300 Fed, 337 (D. C., E. D. S. Car. 1924); *Wilkes v. New York Telephone Co.*, 153 N. E. 444 (N. Y. 1926); *Trustees of Village of Canandaigua v. Foster*, 50 N. E. 971, 66 A. S. R. 575 (N. Y. 1898). In *Kilmer v. White*, 171 N. E. 908 (N. Y. 1930), the appellant had been owner of an apartment house. She had leased one apartment in this house to the respondent. Subsequently the appellant conveyed the premises to R, who entered into possession. Three days after the transfer to R, respondent leaned

against the railing of the piazza in the rear of his apartment, which gave way because of its defective condition, and he fell and was injured. The evidence tended to show that the appellant had notice of the defective condition before the transfer to R, and that respondent had not discovered it before the injury. The action was originally brought against R also, but a nonsuit was granted as to him. "The case was submitted to the jury as one of negligence." It raises the question "as to the liability of the vendor for dangerous conditions existing at the time when he unqualifiedly transfers title and possession to the vendee." The New York Court of Appeals held the appellant not liable. The court said: "A proper rule applicable to such cases has been proposed in Tentative Draft No. 4 of the Restatement of the Law of Torts of the American Law Institute as follows:

'Section 222. General Rule of Non-Liability for Dangerous Conditions Existing at Time Vendor Transfers Possession. Except as stated in Section 223, a vendor of land is not subject to liability for bodily harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time that the vendee took possession.'

'Section 223. Liability for Concealed Dangerous Conditions Known to Vendor. A vendor of land who conceals or fails to disclose to his vendee any condition whether natural or artificial involving unreasonable risk to persons upon the land, is subject to liability for bodily harm caused thereby to the vendee and others upon the land in his right, after the vendee has taken possession, if

'(a) the vendee does not know of the condition or the risk involved therein, and

'(b) the vendor knows of the condition and the risk involved therein and has reason to believe that the vendee will not discover the condition or realize the risk'."

Three rules seem to be established by the authorities: (1) All obligations incident to ownership are transferred with it; (2) Liability for the wrongful *creation* of a nuisance upon the land is not terminated by alienation; and (3) If a grantor conceals a defect in a structure known to him alone and not discoverable by careful inspection, he may be liable though out of possession. See BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 85. The injury in the instant case did not result from active misfeasance but from a failure to perform an affirmative duty arising out of the ownership and possession of property. Yet the case seems to fall within the operation of the third rule. The court said that there was no duty, according to the law of New York, on the part of the vendee to inspect the premises before taking possession; but Pound, J., who delivered the opinion of the court, went on to say that a dictum in an earlier New York case had stated the rule to be: ". . . the vendee is not responsible for the dangerous condition of the premises until he has had notice thereof and a reasonable time to repair it. . . . This rule, if applicable generally, would carry the vendor's responsibility somewhat further than the restatement does, for it would be abhorrent to our notions of justice to relieve the vendor before fixing liability on the vendee." While the question of the vendee's liability was not before the court for decision, the court implied that the liability would shift to him after he has had notice of the dangerous condition and a reasonable time in which to repair it has expired. This rule is in accord with the principles set forth in the RESTATEMENT OF THE LAW OF TORTS. See TENTATIVE DRAFT No. 4, comments on pp. 190, 191. The dangerous condition in the premises in the instant case would not have been disclosed by an ordinary inspection. It is analagous to cases where the vendor actively conceals the condition of the premises, by painting it over or otherwise, or "by giving assurances that the premises are safe when he knows the contrary to be the fact." Pound, J., says: "The vendor desires to sell the property. Knowledge by the vendee of its true condition might prevent a sale." It seems reasonable to require the vendor to exercise care to disclose the dangerous condition. He realizes the risk involved therein, and has reason to believe that his vendee will not realize it. The vendor's obligation arose as an incident to his ownership. His interest would tend to prevent disclosure and to make a sale. He appreciated the extent of the risk involved therein. The result reached seems to be a desirable one.

W. D. Rollison.