a savings account, or a commercial checking account. Upon the second trial, it was shown to be a savings account, and in addition thereto there was evidence that Sam Jackson had the passbook in his possession, and that it was the custom in the banking business that, in order to withdraw funds from a savings account, the passbook must be presented. This was a material fact to be considered by the jury, in connection with other evidence, in determining whether there had been a complete renunciation of any right of Sam Jackson over the deposit. The vital question here was, whether the deposit of $12,152.42 in the name of Mary Ella Kendrick, made by her brother, Sam Jackson, was, in fact, a gift. "To make a valid gift, there must be a present intention to give, and a complete renunciation of right, by the giver, over the thing given, without power of revocation, and a full delivery of possession as a gift, inter vivos." Mims v. Ross, 42 Ga. 121(2); Clark v. Bridges, 163 Ga. 542, 136 S.E. 444. There was no evidence in either trial that Mary Ella Kendrick had ever drawn out any funds from this deposit except when she was accompanied by Sam Jackson, who wrote out the checks and applied the proceeds to his own use. Upon the second trial, it was shown that this was a savings account, that the custom in the banking business required the presentation of the passbook in order to make withdrawals, and it was undisputed that Mary Ella Kendrick had never had possession of the passbook, but that it was in the possession of Sam Jackson until his death. As between these two the deposit was under joint control; he could not have drawn out these funds without having her sign a check, nor could she have done so without his consent to produce the passbook. These were facts from which the jury were authorized to find that by the retention of this control over the funds by Sam Jackson, there was not such a complete renunciation of his dominion over it as is necessary to constitute a gift under Code, § 48–103.

In addition to the foregoing, Huckabee also testified that Sam, while in possession of the passbook said, "Yes, sir, but that is my money." Under the testimony of Huckabee previously referred to, the jury was authorized to find that, as between the alleged donor and donee there was a joint control of this deposit, and this being so, such declaration was proper to further prove and establish his adverse possession under Code, § 38–308. Such declarations to establish adverse possession are not confined to the possession of realty, but are also applicable to possession of personalty. Hansell v. Bryan, 19 Ga. 167(2), and this is true though the possession be joint. Dawson v. Callaway, 18 Ga. 573(4). Relinquishment of possession is an element essential to a gift under Code § 48–101, and any evidence going to show possession in the alleged donor was material to the issue and proper to be considered by the jury, along with other facts, in determining the issues.

209 Ga. 133

THOMAS v. HOLT et al.

No. 17804.

Supreme Court of Georgia.

April 14, 1952.

Rehearing Denied May 14, 1952.

Action by attorney for specific performance of contract by which client had allegedly agreed to give attorney 50% of whatever amount attorney might collect or cause to be collected from defendant's former husband under decree for alimony for child support. The DeKalb County Superior Court, Frank Guess, J., sustained defendant's demurrer, and plaintiff brought error. The Supreme Court, Almand, J., held that contract was beyond authority of mother in relation to payments in behalf of child, and was contrary to public policy and void.

Judgment affirmed.

1. Specific Performance ⇐55

Courts of equity will not enforce a contract if it is of such character as contravenes the policy of the law.

2. Divorce ⇐324

Statutory provisions for payments by husband of money for support of child

have purpose of relieving father of his common-law liability to support his minor child or children, and to substitute therefor, a liability by virtue of court decree, whereby father is required to contribute specified amount at fixed intervals to person having custody of such child or children. Code, §§ 30-207, 30-208, 30-215.

3. Divorce ⇐308

Where an award is made to wife of permanent alimony to be paid by husband for maintenance and support of minor child of parties who is in wife's custody, payments should be used solely for benefit of child, and in receipt and use of such money, wife acts as trustee or guardian of the minor child. Code, §§ 30-207, 30-208, 30-215.

4. Guardian and Ward ⇐28, 48

Guardians of the property of wards are trustees, whose powers over the property of their cestuis que trust are defined by law, and such powers do not include the power to execute a contract binding on the estate of wards. Code, § 49-226.

5. Attorney and Client ⇐147
Divorce ⇐302

Where decree of divorce gave custody of minor child to mother and required father to make monthly payments for support and maintenance of child, mother had no power to make contract with attorney whereby she agreed to pay him one-half of whatever sums he should collect or cause to be collected from father, but such agreement was contrary to policy of law, and was void.

6. Attorney and Client ⇐176

Where contract by which attorney was retained to collect back payments of alimony for child support due to mother from father was void, attorney had no lien or claim against any part of check in his hands which represented payment by father as alimony for support and maintenance of child.

7. Specific Performance ⇐129

Where attorney brought suit for specific performance, instead of damages for breach, of alleged contract by which mother had agreed to pay attorney 50% of any amount which he might recover from father on amount awarded as alimony for support and maintenance of minor child, attorney waived any right to claim of damages on account of alleged bad faith and stubborn litigiousness of mother.

William A. Thomas, Atlanta, for plaintiff in error.

John E. Verner, Decatur, Heyman & Abram, and Alston, Foster, Sibley & Miller, all of Atlanta, for defendant in error.

Syllabus Opinion by the Court.

ALMAND, Justice.

On August 1, 1949, William A. Thomas filed a suit in equity against Mrs. Caroline H. Holt, which in substance alleged: The defendant, on September 6, 1946, obtained a judgment for permanent alimony in DeKalb Superior Court against Nixon Howell McDougald, whereby the custody of a minor child was awarded to the defendant, and the father was required to pay to the defendant the sum of $30 per month for the support of said child. The defendant represented to the plaintiff that the father was in arrears in the payment of such permanent alimony, and she entered into a contract whereby she employed the plaintiff as her attorney to collect the past due alimony, and agreed to give him a fee of 50 percent of whatever amount he collected or caused to be collected from the defendant's former husband. Pursuant to such employment, the plaintiff, in his endeavor to collect the past due alimony, caused extradition proceedings to be taken against the former husband, and went to considerable trouble and expense in his efforts to make the former husband pay said arrearage, and as the result of such labor he received a check for $150, payable to the plaintiff and the defendant, which check he still retains, and recently, by reason of such efforts of the plaintiff, several payments on the past due alimony, as well as on the current alimony, have been made, and the defendant refuses to account to him for his one-half of the money so received. The defendant has without cause attempted to dis-

charge the plaintiff from his employment, but this was done only after the former husband had made payments on the arrearage of alimony and began to make monthly payments. The prayers of the petition were for an accounting in full, and an order and decree requiring the defendant to specifically perform her contract with the plaintiff and pay him all money due him as the same becomes due each month and the defendant receives payments of alimony; that the plaintiff be awarded judgment against the defendant for $150 damages by reason of stubborn litigiousness and bad faith; and that he have a lien on the check which he holds payable to the order of himself and the defendant.

The defendant filed a general demurrer to the petition, one ground being that the contract upon which the plaintiff sues was void as being contrary to public policy. The demurrer was sustained, and the case is here on a bill of exceptions assigning error on such order. *Held:*

[1] 1. Courts of equity will not enforce a contract if it is of such character as contravenes the policy of our law. Stricker & Co. v. Tinkham, 35 Ga. 176(3).

[2, 3] 2. The purpose and intent of the provisions in Code, §§ 30-207 and 30-215 is to relieve the father of his common-law liability to support his minor child or children, and substitute therefor a liability by virtue of a court decree, whereby he is required to contribute a specified amount at fixed intervals to the person having the custody of such child or children, and that the person receiving such amounts should use them for the support and maintenance of such child or children. Where an award is made in favor of a wife for permanent alimony in a final decree, to be paid to her by the husband for the maintenance and support of their minor child who is in the wife's custody, upon receipt of each payment she should use the same solely for the benefit of the child. In the receipt and use of such money, she acts as a trustee or guardian of the minor child. Such judgments are enforceable in the name of the mother for the benefit of the child. Code, § 30-208; Jackson v. Jackson, 204 Ga. 259, 49 S.E.2d 662.

[4] 3. Guardians of the property of wards are trustees, whose powers over the property of their cestuis que trust are defined by law, and among these powers is not included the execution of a contract binding the estate of their wards. Howard v. Cassels, 105 Ga. 412, 31 S.E. 562, 70 Am.St.Rep. 44; Code, § 49-226; Lee v. Leibold, 102 Colo. 408, 79 P.2d 1049, 116 A.L.R. 1319.

[5] 4. Where, as in the instant case, custody of the minor child was given to the mother, in a decree for divorce and permanent alimony, and the father is required to make monthly payments of alimony to her for the support and maintenance of the child, the mother has no power or authority to make a contract with an attorney at law whereby she agrees to pay him one-half of whatever sums he collects from the father by virtue of the decree. Such an agreement, being contrary to the policy of the law, is void, and a court of equity will not aid the attorney in attempting to require the mother to account to him for payments she has received from the father since his employment under the alleged contract, or as to any future payments.

[6] 5. The contract of employment between the plaintiff and the defendant, being void, the plaintiff has no lien or claim against any part of the money order or check in his hands, which represents a payment by the father as alimony for the support and maintenance of the minor child. As to the inapplicability of Code, § 9-613 to alimony cases, see Keefer v. Keefer, 140 Ga. 18, 78 S.E. 462, 46 L.R.A.,N.S., 527.

[7] 6. The instant action being one in which the plaintiff seeks specific performance of an alleged contract, and not one seeking damages by reason of an alleged breach of the contract on the part of the defendant, the plaintiff thereby waives any right to a claim of damages on account of alleged bad faith and stubborn litigiousness of the defendant. The Brunswick Co. v. Dart, 93 Ga. 747(2), 20 S.E. 631.

7. There was no error in sustaining the general demurrer and dismissing the petition.

Judgment affirmed. All the Justices concur.

209 Ga. 115

WISE v. STATE.

No. 17793.

Supreme Court of Georgia.

April 16, 1952.

Rehearing Denied May 14, 1952.

Defendant was convicted in the Superior Court, Emanuel County, R. H. Humphrey, J., of murder, and he brought error. The Supreme Court, Candler, J., held that the evidence sustained the conviction.

Affirmed.

1. Criminal Law ⇐814(17)

Charge to jury on circumstantial evidence is required only when conviction depends entirely thereon, and therefore, where State relied upon direct and positive evidence for conviction, charge upon circumstantial evidence was not required or authorized.

2. Criminal Law ⇐404(3)

A rifle admittedly used by accused in commission of homicide for which he was on trial was admissible in evidence over objection that it had not been properly and sufficiently identified as being gun used in actual killing.

3. Criminal Law ⇐778(4)

In homicide prosecution, trial court's charge on presumption of innocence was not erroneous for incompleteness.

4. Homicide ⇐250

Conviction for murder was sustained by evidence.

Napoleon Wise was indicted by a grand jury in Emanuel County for the murder of A. T. Horton, Jr. On the trial, several eyewitnesses testified for the State in substance: On the night of June 18, 1951, the deceased asked the accused to leave and stay away from his place of business because of disturbances he had created there. As the accused was leaving, he said to the deceased, "I better not catch you across the Ohoopee." A companion, speaking to the accused, said: "I wouldn't let that white man talk to me like that, I would get my gun and shoot the son of a bitch." The accused then left, but returned in 35 or 40 minutes with a rifle. The deceased was then closing for the night. The accused ran into his cafe and immediately afterwards shot him, without speaking to him. The deceased, at that time, was doing nothing to the accused, was unarmed, and unaware of his return. After the deceased fell, the accused started to shoot him again but, on being fired upon by a third person, he fled his victim's place of business. Later during the same night, the accused was arrested near Madison, Georgia. On his return to Emanuel County, and on being shown a rifle which an agent of the Georgia Bureau of Investigation had found at his home, the accused freely and voluntarily stated that it was the gun he used in the shooting and that he had let his brother have it after the shooting, getting a pistol from him. The accused offered no evidence but made a statement to the jury, in which he said that he and the deceased were friends; that he was at his place on the night of the shooting; that he and the deceased were drinking together; and that the deceased, for no reason known to him, first kicked him and then ran him down the road with an axe. He offered no excuse for his later return or for the shooting. He was convicted without recommendation and sentenced to be electrocuted. He moved for a new trial on the usual general grounds, and later amended his motion by adding other grounds complaining of the court's failure to charge upon circumstantial evidence, the admission in evidence of a rifle over his objection that it had not been properly identified, and the incompleteness of the court's charge on the presumption of innocence. His amended motion was denied, and the exception is to that judgment.