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Recent Cases

G. De G.

RECENT CASES

ACTIONS—SPLITTING CAUSE OF ACTION—JOINDER—CLAIMS ARISING OUT OF SAME TRANSACTION.—A was injured in an automobile accident and at the same time the automobile was damaged to some extent. The insurance company, having insured A's automobile, recovered in an action against the person causing the accident under the subrogation clause of the policy. Later A sues the driver of the other automobile to recover for the personal injuries to himself and is met with the defense that there was only one cause of action for injuries both to person and property and since recovery was had by the insurance company for the damage to the property, this action for personal injuries is barred. *Held.* Damages resulting from a single tort, even though such damages be partly property damage and partly personal injury damage, are, when suffered by one person, the subject of only one suit as against the wrongdoer. *Sprague v. Adams,* 39 Wash. Dec. 389, 247 Pac. 960 (1926).

There are two well defined lines of decisions on this question in the United States, with the weight of authority in favor of the decision reached in the principal case. The important question in these cases is that of determining just what a cause of action is. The English rule, which is contrary to that of the principal case, relies on the argument that the negligence of the defendant in itself constitutes no cause of action, but that the cause of action arises only out of the damage which the negligence causes. Hence this line of cases holds that when the rights of person and property are invaded, even though by the same negligent act and at the same time, two rights of action spring up in favor of the person injured. *Brunsden v. Humphrey,* 14 Q. B. Div. 141 (1884) *Reilly v. Sicilian Asphalt Paving Co.,* 170 N. Y. 40, 62 N. E. 772, 57 L. R. A. 176, 88 Am. St. Rep. 636 (1902) *Ochs v. Public Service R. Co.,* 81 N. J. Law 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D 255 (1911) *Schermerhorn v. Los Angeles R. Co.,* 18 Cal. App. 454, 123 Pac. 351 (1912) *Boyd v. Atl. Coast Line R. Co.,* 218 Fed. 653 (1914) *Borden's Condensed Milk Co. v. Mosby,* 250 Fed. 839 (1918). The line of decisions supporting the rule laid down in Washington bases its holdings upon the ground that as the defendant's act is single, and that since different injuries occasioned by it are merely items of damage proceeding from the same wrong, there is but one right of action for injuries both to person and property. *Birmingham So. Ry. Co. v. Lintner* 141 Ala. 420, 38 So. 363, 109 Am. St. Rep. 40, 3 Ann. Cas. 461 (1904) *King v. C. M. & St. P R. Co.,* 80 Minn. 83, 82 N W 1113, 50 L. R. A. 161, 81 Am. St. Rep. 238 (1900) *Coy v. St. L. & S. F R. Co.,* 186 Mo. App. 408, 172 S. W 446 (1915), *Cassidy v. Berkovitz,* 169 Ky. 785, 185 S. W 129 (1916) *Chicago West. Div. R. Co. v. Ingraham,* 131 Ill. 659, 23 N. E. 350 (1890) SUTHERLAND: CODE PLEADING PRACTICE AND FORMS: (1st ed.), § 202. The courts uniformly hold that if the property belongs to one person and the person injured is another, then two causes of action arise, one in favor of the person injured and one in favor of the owner of the property. *Southern Ry. v. King,* 160 Fed. 332, 87 C. C. A. (5th Circ.) 284 (1908) *Taylor v. Manhattan R. Co.,* 53 Hun. 305, 6 N. Y. S. 488 (1889).

The real basis of the decisions holding that there is but one cause of action where both personal and property damage is done by the same negligent act would seem to be the avoidance of multiplicity of suits rather than that there is but one cause of action. Even the courts holding that there is but one right of action when the injuries are to the same man uniformly hold that there are two causes of action when the injury to person is to one and the injury to property is to another, although the accident happens in identically the same way. This would seem to imply that there is a right in the person and another separate and distinct right in the property. There would seem to be no adequate reason for the view that there is but one right of action when both rights invaded are in one person and that there are two separate actions when the rights are held by separate persons, unless it be that of preventing a multiplicity of suits. On the question of separate rights see *Reilly v. Sicilian Asphalt Co., supra,* and *King v. C. M. & St. P R. Co., supra.*

G. DE G.

BANKS AND BANKING—PRINCIPAL AND AGENT—APPARENT AUTHORITY ACTIONS FOR DEPOSITS.—W, a general agent authorizedly indorsed his firm's checks "Rice-Greisen Company, by H. M. Watts, Manager." Upon requesting the defendant bank to deposit the checks to his personal account, the bank made inquiries and discovered that W was local manager of the plaintiff firm. Nevertheless, the bank received the deposits and credited same to the personal account of W Plaintiff sues bank on the ground that an agent cannot deposit his firm's checks to his personal account and the bank is chargeable with notice of such lack of authority. *Held:* Plaintiff could not recover. *Rice v. Peoples Savings Bank,* 40 Wash. Dec. 7, 247 Pac. 1009 (1926).

Where an agent deposits in a bank to his own account moneys of his principal, a constructive trust is impressed upon the deposit in favor of the principal. *Van Alen v. American National Bank,* 52 N. Y. 1 (1873) *Turner v. Williams,* 114 Kans. 769, 221 P 267 (1923), 39 Cyc. 191. If the bank has notice or is chargeable with notice that the trust is being violated by the agent, the principal may hold the bank liable for wrongfully crediting the funds impressed with a trust to the agent's personal account (according to one line of authority) or for the wrongful withdrawal of such funds (according to another line of authority). The theory upon which liability is predicated is that the bank participates in the wrongful diversion of the funds. *Mott Iron Works v. Metropolitan Bank,* 78 Wash. 294, 139 Pac. 36 (1914), *U. S. Fidelity & G. Co. v. People's Bank,* 127 Tenn. 720, 157 S. W 414 (1913) (entry of trust funds held a conversion) *Dempsey Oil & Gas Co. v. Citizens National Bank,* 119 Okl. 39, 235 Pac. 1104 (1925), *Allen v. Puritan Trust Co.,* 211 Mass. 409, 97 N. E. 916, L. R. A. 1915C, 518 (1912) 3 R. C. L. 551. Just what circumstances constitute notice or constructive notice is a perplexing question, the authorities being difficult to harmonize. See notes to *Allen v. Puritan Trust Co., supra.* Whatever puts a party on inquiry in the exercise of reasonable care, where the means of knowledge are at hand, is notice of all facts that such inquiry should reasonably reveal. *Welzler v. Nichols,* 53 Wash. 285, 101 Pac. 867, 132 A. S. R. 1075 (1909) *Daly v. Rizzutto,* 59 Wash. 62, 109 Pac. 276, 29 L. R. A. (N. S.) 467 (1910) 20 R. C. L. 346. And this rule is applicable to banks in their relations to depositors. *Allen v. Puritan Trust Co., supra; Keeney v. Bank,* 33 Cal. App. 515, 165 P. 735 (1917). A mere suspicion is ordinarily not notice. See *Goodman v. Simonds,* 20 How. 343, 15 L. ed. 934 (1857). 5 Rose's Notes 58; 20 R. C. L. 351. The bank need not go outside the channels of its business to acquire notice of the intended diversion of the funds. *Merchants' etc. National Bank v. Clifton Mfg. Co.,* 56 S. C. 320, 33 S. E. 750 (1899), see also *Keeney v. Bank, supra.*

In the principal case, the indorsement coupled with the bank's independent knowledge of agency after investigation is held insufficient notice of the intended diversion when the agent asks to have the check credited to his individual account. *Prima facie,* an agent has no authority to negotiate his principal's paper for his own interest. And an early case holds that the fact that the proceeds of a bill are passed to the credit of the agent is proof that the agent is acting for his own benefit so as not to bind the principal. *Stamback v. Commonwealth Bank,* 11 Gratt. (Va.) 269 (1854). Nevertheless, the courts are reluctant to hold the bank liable, as is shown by the decision in the principal case and others. *U S. Fidelity & G. Co. v. First Nat. Bank of Monrovia,* 18 Cal. App. 433, 123 P 352 (1912), *Martin v. Kansas Nat. Bank,* 66 Kan. 655, 72 Pac. 218 (1903). This reluctance may be explained by commercial expediency. To impose a duty on the banks to supervise the acts of agents with respect to principals with whom they are not otherwise in privity would place an onerous burden on the banks and seriously interfere with commercial transactions. 3 R. C. L. 550. C. H.

BOUNDARIES — ASCERTAINMENT AND ESTABLISHMENT — EVIDENCE — SUFFICIENCY.—A, the owner of lots 4, 5, and 8 in a certain addition to the city of Seattle, contracted to sell to B lot 8 and the east 60 feet of lot 5. The line between lots 8 and 4 was not marked on the ground, but it was understood between the parties that A, who claimed to know the true line, should locate the same and erect a concrete wall thereon. After the wall was erected A con-

veyed the property to B. On lot 4, which was immediately to the north of lot 8, and which A subsequently conveyed to C, there was a dwelling house. B brought this action in ejectment against C, claiming that the wall was not upon the true lot line, and that the eaves of the house on lot 4 extended over the dividing line between the lots. Upon the trial an engineer who made a survey at the instance of B, based upon the city survey of 1910, testified that the concrete wall was not on the dividing line and that the eaves of the house did extend over the true line. This addition had been platted some years prior to the city survey of 1910. *Held:* In the absence of a showing that the monuments set at the time the addition was platted coincide with those set by the city subsequently, the evidence does not show that the concrete wall was not upon the true line. *Suter v. Campbell,* 39 Wash. Dec. 9, 245 Pac. 29 (1926).

This decision simply holds that in order to prove that the concrete wall was not upon the true line it must be shown that it was improperly located according to the original survey, and that unless it is shown that the subsequent city survey coincides with the original plat, a survey based upon monuments set by the city subsequently, proves nothing regarding the location of the lot lines.

It is the general and well recognized rule that in the case of a discrepancy between an original and a subsequent survey, the location of lot lines is governed by the original plat, and no subsequent survey can be allowed to unsettle these boundaries to affect the vested rights of purchasers. *Pere Marquette Ry. Co. v. Tower Motor Truck Co.,* 222 Mich. 301, 192 N. W 634 (1923) *Washington Rock Co. v. Young,* 29 Utah 108, 80 Pac. 382, 110 A. S. R. 666 (1905) *Mills v. Penny,* 74 Iowa 172, 37 N. W 135, 7 A. S. R. 474 (1888) *Flynn v. Glenney,* 51 Mich. 58, 17 N. W 65 (1883) *Le Compte v. Lueders,* 90 Mich. 495, 51 N. W 542, 30 A. S. R. 450 (1892). The rule is also applicable to public lands surveyed under the direction of the United States government. *Pittsmont Copper Co. v. Vanina,* 71 Mont. 44, 227 Pac. 46 (1924) *Hickman v. Jones,* 106 Neb. 466, 183 N. W 980 (1921).

When the discrepancy is between a survey and a plat of lands, the survey controls when it can be ascertained, and one who purchases with reference to the monuments and boundaries, acquires title regardless of the lines shown by the recorded plat. *Olson v. Seattle,* 30 Wash. 687, 71 Pac. 201 (1903) *Root v. Town of Cincinnati,* 87 Iowa 203, 54 N. W 206 (1893) *Halst v. Streitz,* 16 Neb. 249, 20 N. W 307 (1884) *Burk v. McCowen,* 115 Cal. 481, 47 Pac. 367 (1896). As a matter of fact, the object of a resurvey is not to dispute the correctness of or to control the original survey but its only effect is as evidence tending to determine the location of the original lines. *Trotter v. Stayton,* 41 Ore. 117, 68 Pac. 3 (1902) *Washington Rock Co. v. Young,* 29 Utah 108, 80 Pac. 382, 110 A. S. R. 666 (1905) *Pereles v. Gross,* 126 Wis. 122, 105 N. W 217 (1905) *Fellows v. Willett,* 98 Okla. 248, 224 Pac. 298 (1923). A perusal of the above decisions clearly shows that the principal case is in accord with the weight of authority. It follows also the doctrine as recognized and adopted in *Olson v. Seattle, supra.*

It appears that the principal case of *Suter v. Campbell* might have been decided by the rule of law that the location of a boundary line by a common grantor, is binding upon the grantees. *Turner v. Creech,* 58 Wash. 439, 108 Pac. 1084 (1910) *Osteen v. Wynn,* 131 Ga. 209, 62 S. E. 37, 127 A. S. R. 212 (1908) *Herse v. Questa,* 100 App. Div. 59, 91 N. Y. S. 778 (1904) 9 C. J. 244. But the Court considered it unnecessary to determine whether the evidence brought the case within this rule, affirming an order of dismissal entered upon the insufficiency of the plaintiff's evidence to uphold his contentions.

G. W McC.

DAMAGES—LOSS OF PROFITS—EVIDENCE—SUFFICIENCY.—Defendant wrongfully converted plaintiff's property, thereby breaking up a dairy business of several years standing. The evidence showed that the business, when the plaintiff took it over, and for some time previous, was unprofitable; that this was probably due to the run-down condition of the physical property of the dairy; that the plaintiff, who had recently acquired the business, was rapidly

rectifying this condition by improvements and investments; that at the time of conversion the plaintiff "had built up a good, high-class dairy plant in King County within convement distance of the city of Seattle" worth over $100,000. Neither the prospective profits, nor the profits for the eight months the plaintiff operated the dairy, were shown with any certainty but some "substantial profits" were shown. From a judgment for the plaintiff for the value of the converted property, plus $7,500 for the destruction of the business, the defendant appeals. *Held* (Mackintosh, J., dissenting): As a matter of law the verdict is not excessive. *Seely v. Peabody,* 39 Wash. Dec. 290, 247 Pac. 471 (1926).

Where an established business has been injured, our Court, in common with the majority of American courts, allows recovery for loss of profits. Such profits often cannot, and are not required to be, shown with certainty, but sufficient data must be presented so that they may be reasonably ascertained, and so that they are not too speculative and conjectural. *Allison v. Chandler* 11 Mich. 552 (1863) *Belch v. Big Store Co.,* 46 Wash. 1, 89 Pac. 174 (1907), *Bogart v. Pitchless Lumber Co.,* 72 Wash. 417, 130 Pac. 490 (1913) *Seidell v. Taylor,* 86 Wash. 417, 151 Pac. 41 (1915), *Loutzenhiser v. Peck,* 89 Wash. 435, 154 Pac. 814 (1916) 1 SEDGWICK ON DAMAGES (9th ed.) § 182.

Where, as in the principal case, the act causing the destruction of the business is a wilful wrong, our Court takes the view that the damages need not be measured with any degree of nicety, and apparently requires but slight proof of prospective profits. *Seidell v. Taylor, supra,* citing *Burckhardt v. Burckhardt,* 42 Ohio St. 474, 51 Am. Rep. 842 (1885), and *Allison v. Chandler, supra.* This view is open to the criticism that it is an attempt to let punitive damages in by the back door. It would seem that the plaintiff should be held up to the same standard of proof whether the act causing the damages is a wilful wrong or not. Text writers generally make no distinction in the amount or nicety of the proof required on this basis. 1 SEDGWICK ON DAMAGES (9th ed.), *supra,* 17 C. J. 795, § 117.

Whether or not the proof was sufficient in the principal case to justify the award, is, after all, a question of fact. The amount of the award would seem justifiable in view of the finding that some substantial profits were shown, and that the plaintiff had built up a high class dairy plant with good prospects.

O. C. H., JR.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.—Plaintiff, a widow, brought the action under the Workmen's Compensation Act of Washington for the death of her husband. Deceased was employed as a spotter on the resaw in a saw mill, his hours of work being 8:00 A. M. to 12:00 and 1:00 P M. to 5:00 P M. The morning of his death deceased punched the time clock at 7:25 A. M. and proceeded to the mill dam, which was on the premises of the mill, but far out of the line of the deceased's duties, for the avowed purpose of fishing. He was found some time later in the water, drowned, his fishing apparatus near him and his watch stopped at 7:40 o'clock. *Held:* Plaintiff could recover on the theory that a good employee is always prompt and thirty-five minutes is a reasonable time to arrive in advance of the whistle. *Bristow v. Dept. Labor & Ind.,* 39 Wash. Dec. 172, 246 Pac. 573 (1926).

This case is an interpretation of parts of statutes found in Rem. Comp. Stat., §§ 7675 and 7679, the pertinent parts of which are as follows: §7675—A "workman" is defined as "Every person in this state who is engaged in the employment of an employer coming within the provisions of the Act whether by way of manual labor or not and whether upon the premises or at the plant or he being in the course of employment away from the plant of his employer." "The words injury or injured as used in this Act refer only to an injury arising from some fortuitous event as distinguished from disease." § 7679—"Each workman who shall be injured whether upon the premises or at the plant or he being in the course of employment away from the plant shall receive out of the accident fund, etc."

The Court in the present case follows *Sterts v. Ind. Ins. Comm.,* 91 Wash. 588, 158 Pac. 256 (1916), which case holds that the Washington Workmen's Compensation Act is in reality an insurance act, designed to protect workmen

when on the premises of their employers whether in the course of employment or not. This is undoubtedly the meaning of the statutes in question, but recovery must be predicated upon the theory that the person injured was at the time injured a "workman", i. e., "engaged" in the employment of an employer coming within the Act. In the principal case it would seem to be a very questionable matter whether deceased was so "engaged" when the intention of the deceased is taken into consideration. The Workmen's Compensation Act of Washington is unique and, it is believed, entirely original in that jurisdiction. Twenty-four jurisdictions of the United States require the injury to be the result of "accident" "arising out of and in the course of employment." These are Alabama, Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Dakota, Tennessee, Utah, and Virginia. Eleven states have similar acts with the word "accidents" omitted. These are California, Connecticut, Iowa, Massachusetts, Michigan, Nevada, New Hampshire, Oklahoma, Vermont, and West Virginia. Montana employs the same wording as the first group *supra* with the exception that "fortuitous event" replaces the word "accident." In this requirement of a fortuitous event Montana and Washington are alike and alone. Pennsylvania requires the injury to occur "in the course of employment" and the result of "accident." Ohio, Texas and North Dakota make the same requirement, omitting "accident" In Wyoming the injury must be the "result of the employment" and the U. S. Civil Act covers injury "in performance of a duty." The English act is, of course, the original enactment on the subject and similar to the acts of the first group of jurisdictions cited.

T. M. G.

NEGLIGENCE—CARE AS TO LICENSEE—RES IPSA LOQUITUR.—The plaintiff, while waiting on the sidewalk for the doors of a bank building to open, was struck and severely injured by a roller from a window shade which had fallen from a window in one of the upper stories of the building. Action was commenced to recover for injuries received upon the theory that the owners of the building were bound not to injure a person passing the building or using the sidewalk in front of the building and that when a person was so injured a *prima facie* case of negligence on the part of the owners of the building was established. *Held*. That the plaintiff recover, since the doctrine of *res ipsa loquitur* applied and the burden was upon the defendant to rebut the presumption of negligence. *Poth et al. v. Dexter Horton Estate,* 40 Wash. Dec. 200, 248 Pac. 374 (1926).

This case falls within a class which make up a large portion of the *res ipsa loquitur* decisions and is second only to the carrier cases in the application of the doctrine. The doctrine of *res ipsa loquitur* has found a frequent application in cases of injuries from falling objects and substances. *Dixon v. Pluns,* 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698 (1893) *Carl v. Young,* 103 Me. 100, 68 Atl. 593, 125 Am. St. Rep. 290, 14 L. R. A. (N. S.) 425 (1907) 20 R. C. L. 191. The basis of the application of this doctrine to this class of cases rests upon the duty which the owner of a building abutting upon a public highway or street owes to the public to have the building safe so as not to harm those passing upon the sidewalk or highway. *Atchison v. Plunkett,* 8 Kan. App. 308, 55 Pac. 677 (1899). Arising from this duty has come the rule that as soon as an injury to a person, while a passenger upon the street, occurs by reason of anything falling from a building, then the burden shifts to the owner of the building to rebut the *prima facie* case of negligence made out against him. *Mullen v. St. John,* 57 N. Y. 567 15 Am. Rep. 530 (1874) *Ryder v. Kinsey,* 62 Minn. 85, 34 L. R. A. 557, 54 Am. St. Rep. 623, 64 N. W 94 (1895) SHEARM. & REDF. NEGLIGENCE (6th ed.), §§ 59-62; *Anderson v. McCarthy Dry Goods Co.,* 49 Wash. 398, 95 Pac. 325, 125 Am. St. Rep. 870, 16 L. R. A. (N. S.) 931 (1908). In order to make out a *prima facie* case of negligence against the owner of the building, the accident must have been such as in the ordinary course of things does not happen, and no adequate explanation of its occurrence is offered by the owner of the building. *Waller v. Ross,* 100 Minn. 7, 110 N. W 252, 117 Am. St. Rep. 661, 10 Ann. Cas. 715,

12 L. R. A. (N. S.) 721 (1907), *Wolf v. American Trac. Soc.*, 164 N. Y. 30, 58 N. E. 31, 51 L. R. A. 241 (1900), *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016 (1910). The placing of the burden of proof upon the defendant may be supported upon the same principle that caused the growth of the doctrine of *res ipsa loquitur* in carrier cases, namely, the difficulty of proving negligence on the part of the carrier, or on the part of the owner of the building. The doctrine is well founded and supported by cases in a great number of jurisdictions. *Wodnik v. Luna Park Amusement Co.*, 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N. S.) 1070 (1912) *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 166, 12 Am. St. Rep. 526, 1 L. R. A. 698 (1889).

G. De G.

NEGLIGENCE—LAST CLEAR CHANCE.—T was an invitee in an automobile driven by C, under such circumstances that the negligence of C could not be imputed to T. C's car collided with that driven by D, injuring T. T sues D, who introduced evidence tending to show that C's car was on the wrong side of the road, and that such was a proximate cause of the accident. Upon the introduction of this evidence T requested and the Court gave an instruction embodying the doctrine of last clear chance upon the theory that after perceiving the position of C's car, D might have avoided the collision by turning off the pavement onto a level space adjoining, used for parking and occasionally for street purposes. *Held*. The instruction was properly given. *Thompson v. Collins*, 139 Wash. Dec. 305, 247 Pac. 458 (1926).

Most of the earlier decisions, including those in Washington, explain the doctrine of last clear chance upon the basis that in those cases where the doctrine has been applied, the defendant's negligence is the proximate cause of the injury, while that of the plaintiff is only a remote cause. *Nicol v. Oregon-Washington Ry. and Navigation Co.*, 71 Wash. 409, 128 Pac. 628 (1912), *Drown v. Northern Ohio Traction Co.*, 76 Ohio 234, 81 N. E. 326, 10 L. R. A. (N. S.) 421 (1907) *Nehring v. Connecticut Co.*, 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 896 (1912).

This reasoning, however, is unsatisfactory, for if the question is solely one of proximate cause, then logically the doctrine ought to apply as between joint defendants charged by a plaintiff with separate acts of negligence. But the rule is well settled that such defendants cannot avail themselves of the last clear chance doctrine, as between themselves, and as against the plaintiff's right to recover. See: *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (1907), *Shield v. F Johnson & Son*, 132 La. 773, 61 So. 787, 47 L. R. A. (N. S.) 1080 (1913).

A more satisfactory basis for the doctrine thus becomes necessary so that later cases take the position that the doctrine of last clear chance is an exception to, and a limitation upon, the rather harsh rule of contributory negligence. This exception is based upon considerations of policy. See: *Young v. Southern Pacific*, 189 Cal. 746, 210 Pac. 359 (1922) *Dahmer v. Northern Pacific*, 48 Mont. 152, 136 Pac. 1059 (1913), *Muskogee Electric Traction Co. v. Tice*, 243 Pac. (Okla.) 175 (1925).

Taking this view of the doctrine of last clear chance, its injection into a case, where the plaintiff was not guilty of contributory negligence and where such negligence could not be imputed to him, as in the principal case, would seem unwarranted. In such a case the only negligence involved is that of the defendant, and the liability, if any, should be predicated, it would seem, on the ordinary rules of negligence. There is much *dictum* both in the Washington decisions and elsewhere to the effect that the doctrine of last clear chance presupposes contributory negligence. *Hartley v. Lasater*, 96 Wash. 407, 165 Pac. 106 (1917), *Hubenthal v. Spokane and Inland Ry.* 97 Wash. 581, 166 Pac. 797 (1917), *Burlie v. Stephens*, 113 Wash. 182, 193 Pac. 684 (1920), *Darling v. Pacific Electric Co.*, 242 Pac. (Cal.) 703 (1925) *Anderson v. Missoula St. Ry. Co.*, 54 Mont. 83, 167 Pac. 841 (1917) *McGowan v. Layman*, 132 S. E. (Va.) 316 (1926).

There are a number of cases where the point here raised was more directly at issue than in the cases above cited, all holding that the application of the doc-

trine of last clear chance to a case where contributory negligence is not involved is erroneous. *Woodward v. McGraw*, 71 Colo. 287 206 Pac. 386 (1922) *Hartlage v. Louisville*, 180 Ind. 666, 103 N. E. 737 (1913), *State v. Washington B. & A. Electric Ry.*, 131 Atl. (Md.) 822 (1926) *Dahmer v. Northern Pacific, supra.*

B. B.

PAYMENT—PRESUMPTION OF PAYMENT—PROOF OF PAYMENT BY CIRCUMSTANTIAL EVIDENCE.—Plaintiff sued on an alleged contract for work and labor performed five years after the cause of action accrued but within the period fixed by the Statute of Limitations. The pleadings raised the issue as to the amount due, defendant claiming a payment of $182 as a settlement in full, while plaintiff claimed the sum of $464.84 as still due. The lower court denied defendant's offer of proof, made for the purpose of proving payment circumstantially, that plaintiff was in needy condition at the time debt was due and never asked the defendant for payment. The evidence indirectly shows that the defendant was able to pay. *Held.* Two judges dissenting, the offer was irrelevant under the issues and, the error, if any in refusing to submit the evidence to the jury, harmless. *Thompson v. Larson, 247* Pac. (Ore.) 139 (1926).

Payment is a fact which may be proven by circumstantial as well as direct evidence. *Garnier v. Renner*, 51 Ind. 372 (1875) *McAllister v. Chambers*, 71 Wash. 521, 129 Pac. 85 (1913). The evidence must, of course, be relevant, but great latitude is allowed in the admission of circumstantial evidence. *Baugher v. Boley*, 63 Fla. 75, 87, 58 So. 980 (1912) *Shannon v. Kinney*, 1 A. K. Marsh (Ky.) 3, 10 Am. Dec. 705 (1817). At common law mere lapse of time for twenty years as to a matter not embraced by the statute of limitations raised a rebuttable presumption of payment. The period was determined by analogy to the period fixed by the statute of limitations. *Stovers & Barnes v. Duren*, 3 Strob. (S. C.) 448, 51 Am. Dec. 634 (1849) *Holway v. Sanborn*, 145 Wis. 151, 130 N. W 95 (1911) 21 R. C. L. 134; *Graves v. Stone, 72* Wash. 382, 130 Pac. 369 (1913) rehearing 135 Pac. 810. But there appears to be no good reason why a defendant may not avail himself of the presumption of payment if it is applicable, although the action is brought on an obligation covered by the statute of limitations. *Courtney v. Standenmeyer* 56 Kan. 392, 43 Pac. 758, 54 A. S. R. 592 (1896). This rebuttable presumption of payment, to be distinguished from the conclusive presumption raised by the statute of limitations, never arises from lapse of time alone, short of the period fixed by law. *Adair v. Adair* 5 Mich. 204, 71 Am. Dec. 779 (1858) and see *Dietmann v. People ex rel Blackman, 232* Pac. (Colo.) 676 (1925) *Graves v. Stone, supra.* Yet in connection with other circumstances, lapse of time short of the period fixed by law, may establish the fact of payment. *Graves v. Stone, supra; Van Ness v. Ransom,* 144 N. Y. S. 420, 83 Misc. Rep. 128, affirmed, 150 N. Y. S. 251, 161 App. Div. 483 (1914), affirmed, *Parsons v. McFarlane,* 115 N. E. 1046 (1917). The fact that a creditor during the period when he might have enforced his demand by suit, if he had one, needed the money, is a relevant circumstance tending to strengthen the presumption that the demand has been paid or otherwise satisfied. *Bean v. Tonnelle,* 94 N. Y. 381, 46 Am. Rep. 153 (1884) *Graves v. Stone, supra;* and see 8 Ann. Cas. 779. The circumstances of lapse of time, the character of the creditor for strictness in the collection of debts due him, the creditor's need, and the debtor's ability to pay are all circumstances to be considered in raising the rebuttable presumption of payment. *Stone v. Tupper* 58 Vt. 409, 5 Atl. 387 (1886) 21 R. C. L. 135. The existence of the presumption operates to shift the burden of going forward wtih the evidence of payment. *Stover & Barnes v. Duren, supra; Graves v. Stone, supra,* and see *22* C. J. 79.

In the principal case, the issue of payment by settlement being raised, it would seem that evidence of the creditor's needy circumstances coupled with his failure to ask for the claim for five years when the debtor appears to have been able to pay, should have been admitted as tending to raise the presumption that a payment by settlement had in fact been made; and exclusion of such material evidence from the jury would appear to be prejudicial error. See *Hamilton v.*

Hamilton's Extrs., 18 Pa. 20, 55 Am. Dec. 585 (1851) Wigmore on Evidence, §§ 159, 2517.

C. H.

TRADE SECRETS—SOLICITATION OF CUSTOMERS BY FORMER EMPLOYEE.—The defendant left the employment of the plaintiff Ice Co., and some months later entering the service of a competing company, solicited and served ice customers of the plaintiff, known to the defendant from his former service as driver for the plaintiff. *Held*. The defendant should not be enjoined from so doing. *Ice Delivery Co. of Spokane v. Davis*, 137 Wash. 649, 243 Pac. 842 (1926). The case was followed in *City Ice Co. v. Kinne*, 40 Wash. Dec. 286, 249 Pac. 782 (1926).

The principles which govern such cases are similar to those governing the protection of other manufacturing and marketing secrets. The basis of the relief is sometimes said to be property, sometimes implied contract, and sometimes unfair competition. As to the first it has been well said that "The word property as applied to trade secrets and trade marks is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." Holmes, J., in *Du Pont v. Masland*, 244 U. S. 100 (1917).

While as to the second—"to imply a contract where none exists is not satisfactory as a ground of relief, being merely another way of saying that no contract is necessary." 19 COL. L. REVIEW 325. Yet the contract implied in fact may often be a satisfactory basis of relief, because justice to the employer will usually prevent his restraint except where he knew, or ought reasonably to have known, at the time he occupied the fiduciary relationship, that the thing now called a secret was in fact a secret. See E. P Fish, "The Ethics of Trade Secrets," 29 PROC. AM. SOC. MECH. ENG. 13, 31 (1907). Where that appears, an actual contract could usually, but not always, be implied in fact, and unless it was so broad as to be in restraint of trade, equity would enforce it by injunction. *Fralich v. Despar*, 165 Pa. 24, 30 Atl. 521 (1904), *Harrison v. Glucose Refining Co.*, 116 Fed. 304, 312 (C. C. A. 7th Circ. 1902), *Norfolk v. Peabody*, 98 Mass. 452 (1865).

The third theory, that of unfair competition, which is the one relied on in the principal case, would seem to be the one which best explains the cases. 19 COL. L. REVIEW 236. In the absence of contract, it is only as a protection to an existing business that the court will restrain the communication or use of such secrets. *Bristol v. Equitable Life Company*, 132 N. Y. 264, 30 N. E. 506 (1894).

Considering the matter on the very broadest principles, it would seem to be a positive act resulting in irreparable damage to the plaintiff, which being rooted in breach of contract and abuse of a fiduciary capacity, is unjustifiable. As such it would be a tort, and such a tort as equity would prevent. See 18 HAR. L. REV. 411. The problem of the court is to determine what actually constitutes a breach of confidence, and when the relationship between employer and employee is such a one that good faith demands that knowledge gained therein be held in secret. The Court has quite properly determined that the line is somewhere between the facts of the well known case of *John Davis & Co. v. Miller*, 104 Wash. 444, 177 Pac. 323 (1918), and those of the principal case.

Although they will not always enjoin the use of knowledge of a former employer's customers, where that knowledge is carried away in the head, yet the courts will not tolerate the making or carrying away of lists of customers. *Doods v. Grand Union Tea Co.*, 164 Mich. 50, 31 L. R. A. (N. S.) 260, 128 N. W 1090 (1910), *Lamb v. Evans* (1893) 1 Ch. 218; and the annotations in 23 A. L. R. 425 and 34 A. L. R. 395. It is easier to recognize property rights in a written list than in confidential information not reduced to writing. Thus in *Robb v. Green* [1895] 2 Q. B. 315 (C. A.), it is said that the defendant who copied a list and used it was using stolen material. But as pointed out in *Davis & Co. v. Miller, supra*, it is the information which is valuable, not the list, and no valid distinction on that theory can be made between copying the knowledge from lists and carrying it away in memory. It is submitted that the true reason for the distinction is this: The law, wherever it deems it itself able, will pre-

vent or redress the wilful causing of damage to another if it is possible to do so without restricting the defendant's freedom of action in a particular deemed valuable by the law. But if the preventing or redressing of the damage would tend to restrict the freedom of action of other persons, i. e., employees, in a manner deemed impolitic, it is a case of *damnum absque injuria.*

"For him [the employee] to be compelled to give up all his friends and business acquaintances, made during his previous employment, would tend to destroy the freedom of employees and reduce them to a condition of industrial servitude," p. 16 of principal case. Hence the damage must be endured without remedy But it is never necessary to the employee's proper freedom of action that he be allowed to copy his employer's lists, and there is no valid objection to preventing that. See Kay L. J., in *Lamb v. Evans, supra.*

While the taking or copying of lists should be a sufficient basis for relief, it should not be necessary to the interposition of the law, anymore than it is in the case of other trade secrets. The ultimate extent of the remedy will depend on what degree of good faith may be required without too seriously restricting a freedom of action valuable to society. Whether or not the information could be discovered fairly, is not, it would seem, the test (as it was intimated to be by one of the authorities cited in the principal case). "Because this discovery may be possible by fair means, does not justify a discovery by unfair means " *Tarbor v. Hoffman,* 118 N. Y. 30, 23 N. E. 12 (1889).

O. B. K.

BOOK REVIEWS

CASES ON BUSINESS LAW—INTRODUCTORY COURSE. By Leslie J. Ayer. Seattle: Wood & Reber, Inc., 1926, pp. 474.

The solution of the problem of teaching business law, that is, of teaching a limited legal subject-matter in a limited time to students who are intending to be, or are, business men and not lawyers, has been approached through many avenues. This book represents the solution of a professional law teacher who has had more than fifteen years of experience as a teacher in recognized law schools, and who has for more than a decade rendered a part-time service to the school of business administration at the University of Washington, in teaching business law. He entertains the opinion that the same reasons which have caused modern law schools to abandon the text method and to adopt the laboratory method of case teaching exists for the introduction of the case method into so-called business law courses; that is to say, that a business man, just as the regular law student, will profit most by a study and analysis of legal principles in concrete situations passed upon by courts of justice.

The writer, after an introduction designed to prepare the student for intelligent study has selected interesting as well as leading cases, and in the development of a subject uses the standard legal classifications. The book deals primarily with contracts. The author also devotes some treatment to remedies, dividing this subject into sections covering damages, specific relief, and the miscellaneous remedies involved in receiverships, assignments for the benefit of creditors, bankruptcy proceedings, and claims against decedents' estates.

The case book uses headnotes only as introductory to large subdivisions of the subject-matter treated, and has thus reserved the analysis of specific cases for the student without stating the solution for him. This method is commendable in that it makes the solution of the problem not a matter of memorizing but of subjective analysis. The judgment with which the cases in this book are selected and the care with which they are edited can perhaps be best expressed in the language of the reviewer for one of the large New York publishing companies other than that hereafter named, as follows:

> "Like all case books, the contents consist almost entirely of complete or edited reports of cases decided by the various courts of appeal