Washington Law Review

Volume 22 | Issue 2

5-1-1947

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RECENT CASES

Work and Labor—Recovery on Quasi-Contract Where an Implied-in-Fact Contract Can Not Be Established. *D*, a general contractor, requested and received an estimate of the cost of special work from *P*, a subcontractor. *D* used the estimate in computing his bid, and was awarded the general contract. When a contract for the special work was not given to *P*, he brought suit based upon implied-in-fact contract for the value of the services rendered. At the trial *P* admitted that no mention of payment was made when the information was given; and *D* introduced evidence to show that it was not the custom of the trade to charge for such services. Verdict for *D*. From an order granting *P* a new trial, *D* appealed contending that his motion for a dismissal on the evidence was improperly overruled. *Held*. The evidence established a case to be decided by the jury since: (1) it was not necessary that *D* expect to pay, if as a reasonable man he should have known that *P* expected payment; (2) the fact that *P* hoped to obtain a subcontract and made his figures available for that reason is not necessarily inconsistent with an expectation of payment on his part. *Western Asphalt Co. v. Valle*, 25 Wn.(2d) 428, 171 P.(2d) 159 (1946).

The court's holding that the evidence established a case for the jury to decide is not necessaritly sustained by the court's reasoning. Assuming it to be established that *P* expected payment, and applying the rule that *D* will be held to what he should have known, there is still the question of whether *D* should have known that *P* expected payment. Basically it is a problem of the sufficiency of the evidence, and in the case of *Meacham v. Pederson*, 70 Wash. 479, 127 Pac. 144 (1912), it was held that evidence similar to that presented in the principal case would not support a finding that a contract (for payment as an alternative to a subcontract) had been entered into between the contractor and subcontractor. The only evidence not found in the *Meacham* case that was established in the principal case was that the estimate was used by *D* and proved beneficial to him. It is submitted that this evidence is not relevant to the specific problem of whether *D*, as a reasonable man, should have known that *P* expected payment because it does not tend to show *P's* expectations, however much it may justify them. It would seem that a better rationale for the principal case would be to predicate *D's* liability upon quasi-contractual principles. A quasi-contractual obligation would not be determined by what *D* should have known or what he in fact contracted to do, but by the rule of law that the court will presume a man has promised to do what it is certain he should do. *King County v. Odman*, 8 Wn.(2d) 32, 111 P.(2d) 228 (1941). Within the quasi-contract field is a rule which would be applicable to the principal case:

"A person who has conferred a benefit upon another, manifesting that he does not expect compensation therefor, is not entitled to restitution merely because his expectation that the other will make a gift to him or enter into a contract with him is not realized." RESTATEMENT, RESTITUTION, § 57.

This rule is negative in effect; it denies restitution to a party who manifests that he does not expect compensation irrespective of his actual intent. Thus a distinction is made between a party's manifestations and his expectations. In cases where the manifestations are clear, they control. RESTATEMENT, RESTITUTION, p. 227 In the alternative situation, where the manifestations of the party conferring the benefit are ambiguous, his intent to receive or not to receive compensation controls. RESTATEMENT, RESTITUTION, p. 228. In short, the primary issues in determination of a case under this rule would be: (1) did the party conferring the benefit manifest (*i.e.* by his words and acts) that he did not expect compensation therefore. (2) If his manifestations were ambiguous, did he in fact expect to be compensated therefore. It is submitted that the problems presented by the principal case could adequately be handled under this approach. (See Illustration 7 § 57 RESTATEMENT, RESTITUTION)

There are, furthermore, several precedents for treating the principal case as one involving a quasi-contractual obligation. In *Thomas v. R. J Reynolds Tobacco Co.,* 350 Pa. 262, 38 A.(2d) 61 (1944), *T* submitted a letter of commendation to a tobacco company expecting to be paid if the letter was used for advertising. The letter was never used but an idea in it was. The court held that *T* had a cause of action on quasi-contract (though recovery was denied on other grounds) Plaintiff in *Kuhlmann's Estate v. Poss,* (Tex. Civ App.) 220 S. W 564, (1920), had maintained decedent's car, expecting to be sent away to school when he grew up. The court held that, while there was no contract, the services were clearly not performed gratuitously and allowed recovery upon quasi-contract. Recovery has also been allowed for performing services in expectation of future employment. *Thomas v. Thomasville Shooting Club,* 121 N. C. 238, 28 S. E. 293 (1897).

Finally, it is suggested that there is a logical reason for not applying the rules for the construction of implied-in-fact contracts to the principal case. The services were performed with the understanding on the part of the parties that they would be compensated for indirectly by an agreement to be made in the future. Under these circumstances the present intent of the parties was to contract in the future; therefore, there was no showing of a present intent to contract. Hence there can be no implied-in-fact contract for compensation.

H. R. V

Fixtures—Tests—Intention of Annexor—Outmoded Cases—Mirrors. After receiving the purchase price of $35,000, the respondent moved from the premises taking, among other things, a large crystal chandelier, five

other matching light fixtures and two large mirrors. The mirrors had been firmly attached to plaster walls in the following manner: A large piece of three-eighths-inch plywood was firmly nailed to the wall for each mirror, with at least thirty-six nails in one instance, and the mirrors were attached to their plywood backing with screws. In a replevin action by appellant, the trial court found the mirrors and light fixtures were personal property which respondent had a right to remove. Appeal. *Held.* Reversed; the chandelier and sidelights were clearly fixtures. The mirrors presented a closer question, but each mirror and its plywood backing was considered as one article and was regarded as having been a portion of the house walls, therefore going to the purchaser as a fixture. *Strain v. Green,* 25 Wn.(2d) 692, 172 P.(2d) 216 (1946).

The substitution of cheap plastic imitations for the chandelier and sidelights by the seller was found to be an implied admission that a house without light fixtures would not be a complete house. The general test followed by the court for determining a fixture consisted of the united application of three requisites: (1) actual annexation to the realty or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold. This general test is followed in a majority of jurisdictions. *Filley v. Christopher,* 39 Wash. 22, 80 Pac. 834 (1905), *Hall v. Dare,* 142 Wash. 222, 252 Pac. 926, 50 A. L. R. 635 (1927), *Gasaway v. Thomas,* 56 Wash. 77, 105 Pac. 168 (1909), *Blake-McFall Co. v. Wilson et al.,* 98 Ore. 626, 193 Pac. 902 (1920), *People's Savings & Trust Co., et al. v. Munsert, et al.,* 212 Wis. 449, 249 N. W 527 (1933), *Teaff v. Hewitt,* 1 Ohio St. 511 (1853), BROWN, PERSONAL PROPERTY (1936) § 137 The objective intention of the party making the annexation to make a permanent accession to the freehold is considered in Washington and a majority of the jurisdictions as controlling. It is uniformly held that the secret intention of the annexor is unimportant. *Washington National Bank of Seattle v. Smith,* 15 Wash. 160, 45 Pac. 736 (1896), *Ballard v. Alaska Theatre Co.,* 93 Wash. 655, 161 Pac. 478 (1916), *Bond Investment Co. v. Blakeley,* 83 Cal. App. 696, 257 Pac. 189 (1927), BROWN, PERSONAL PROPERTY (1936) § 141. The point of secret intention arose in the principal case when respondent argued that the family had owned the mirrors and chandelier for a number of years, had previously moved them from house to house in which they had lived, considered them as personal property and had no intention of making them a permanent part of the realty when they installed them. Respondent cited previous Washington cases holding bathtubs, hot water heaters and electric light fixtures as "leading cases in this jurisdiction." In holding that these cases were no longer authoritative on the point, the court reasoned that, although the cases

cited had never been overruled, they had been *outmoded* because "the law relating to fixtures slowly and gradually changed as the times have changed," the changes resulting from an awareness of the fact that "the luxuries of a given generation become the necessities of the next."

The court is on obviously practical ground in recognizing that household furnishings, once unusual and clearly personal property, can in time become widely and commonly used to such an extent that a house without them would not be complete according to community standards. This approach clearly presents the ultimate question of whether, under all the facts and circumstances, the ordinary reasonable man of the community would consider the article in question as a part of the real estate. BROWN, PERSONAL PROPERTY (1936) § 137

J. P S.

Guaranty Made After Principal Contract—Consideration—Limitations Upon Rule. *P* and *B* entered into a contract for distribution of *P's* newspapers, the contract requiring that *B* "deposit and maintain with the company a satisfactory bond" for performance of his obligations. No particular guarantor was mentioned by name nor was any within the mutual contemplation of the parties at this time. Several weeks thereafter *D* signed as guarantor, the contract reciting the awarding of the principal contract as consideration. *B* defaulted on the distributor contract, and *P* sued *D* as guarantor thereof. *D* argued no consideration for the contract of guaranty Judgment for *D* in trial court. *Held*. Affirmed. The majority cited from 24 AM. JUR. 906 the rule that a subsequent contract of guaranty "is founded upon a consideration if its execution is the result of previous arrangement, the principal obligation having been induced by or created on the faith of the guaranty" and held that its application is limited to the following situation: (1) The guarantor has offered or promised the debtor to guarantee the debt, and the debtor has communicated this information to the creditor, who executes the principal contract in reliance thereon; (2) The guarantor makes such promise direct to the creditor with the same result; (3) The debtor assures the creditor that, if he later deems the debt insecure, he may look to a certain person, then named by the debtor, to guarantee the debt. Four judges dissented, urging that the provision in the principal contract requiring that a bond be maintained brought the subsequent guaranty contract within the "same transaction" as the principal contract, thus obviating the necessity of any new consideration as a matter of law. *Cowles Publishing Company v. John H. McMann, et al.*, 25 Wn.(2d) 736, 172 P.(2d) 235 (1946).

With the rule that a subsequent promise of guaranty must be supported by a new consideration as a starting point, it is well recognized that the rule is not without exception and that a subsequent guaranty may, in proper

situations, be sustained by the consideration of the principal contract. Arant identifies a single exception to the rule: "If goods are sold at the request of the defendant to a third person, the defendant's subsequent promise to pay for the goods may be enforced." (ARANT, SURETYSHIP, p. 72). Such a statement of the exception embraces limitations (1) and (2) of the majority without difficulty. Arant finds a further "apparent exception" in the case where there is "an understanding between the promisee and the principal that certain persons will later add their signatures to the notes as sureties," *(id.)*, and this apparent exception is not distinguishable from the majority's third limitation. However, the exceptions to the rule are usually stated as a single rule, as quoted by the majority, *supra*. Essentially the same rule is stated by the dissent in the instant case; no new consideration is necessary where the guaranty contract is to be regarded as constituting "a part of the same transaction" as the principal contract, having been executed pursuant to an understanding had before and as an inducement to the execution of the principal contract, or made "pursuant to some provision in the principal contract." *Pacific State Savings & Loan Co. v. Stowell*, 7 Cal. App.(2d) 280, 46 P.(2d) 780 (1935), *Osborne v. Smith*, C. C. Minn., 18 Fed. 126, 5 McCrary 487 (1883).

Among prior Washington decisions and foreign cases cited as authority for the above statements of the rule, the writer found no case squarely in point with the present facts. The bulk of controversies present a situation in which the creditor not only relied upon the promise of a known or named guarantor, or the promise by the debtor to obtain such guarantor, but would enter the principal contract on no other condition. The following is a significant and perhaps adequate answer to the dissent's efforts to bring the present case within the "same transaction" rule: In all cases which they cited wherein the guaranty was deemed a part of the same transaction and supported by the same consideration as the principal contract, the creditor relied on either the promise or the known availability of a guarantor *named and known to the creditor* at the time of entering the principal contract.

This observation brings into focus the statement in the majority opinion that the "basic premise" of the general exception rule is that the creditor, in entering the principal contract, *"relied upon an existing offer or promise of the guarantor to bind himself at some future date."* (italics theirs). And, in examining the three limitations, *supra*, which the majority offers as gleaned from its review of the cases cited in the opinion, it will be seen that the first and second limitations are clearly consistent with the stated premise. But the third limitation, if it is to be distinguished from the first, must contemplate that the understanding as to a guaranty is as yet unknown to the guarantor-to-be, or at least that he has made no affirmative offer or promise to anyone.

Therefore, by hypothesis, the third limitation requires no reliance on a communicated or known offer or promise of guaranty by a person certain at the time of signing the principal contract. It is thus quite difficult to reconcile this third limitation with the "basic premise" of the general rule as defined by the majority And, in fact, a review of cases cited by the majority and by all other authorities examined by the writer reveals only one which extends the rule as far as the third limitation. *McNaught v. McClaughry,* 42 N. Y 22, 1 Am. Rep. 487 (1870). Thus, in identifying and recognizing this third limitation, the majority takes a position which has extremely limited case support, and which is substantially contradicted by the majority's own analysis of the cases and the "basic premise" to be derived therefrom. The present case would appear then to be of dubious authority were a case to arise in Washington wherein this limitation would be precisely applicable; as it would, for example, in the present case, were there offered the mere additional showing that *B* had named *D* as the person to whom *P* could look for guaranty

V H.

Landlord and Tenant—Action for Unlawful Detainer—Estoppel. *D* rented a dwelling house from *P* *D* tendered the February, 1946, rental of $36, 18 days late. *P's* agent refused the same and, without giving notice to quit, *P* brought action for unlawful detainer to recover the premises pursuant to the provisions of REM. REV STAT. SUPP (1941) § 814-1. In previous months the rent had been paid and accepted after the due date apparently without objection. The trial court concluded as a matter of *law* that *D* was not in default and entered judgment of dismissal. *P* appealed. *Held.* Reversed. *P* is entitled to a writ of restitution, since under the terms of the act all *P* need show is that *D* was holding under a monthly rental of less than forty dollars; that he was in default on the February installment, and that subsequent thereto *P* had not accepted payment. *Neitsch v. Tyrrell,* 25 Wn. (2d) 303, 171 P.(2d) 241 (1946).

As a general rule, a landlord may be estopped to avail himself of a forfeiture where, by his words and conduct, he has led his tenant to believe that he did not intend to enforce a forfeiture. *Conley v. Johnson,* 69 Ark. 513, 64 S. W 277 (1901), *Moses v. Loomis,* 156 Ill. 392, 40 N. E. 952 (1895), 3 THOMPSON ON REAL PROPERTY (Perm. ed. 1940) § 1475. Thus, some courts hold that a landlord who receives rent late and by his course of conduct has induced the belief that prompt payment will not be exacted in the future must give reasonable *notice* of an intention to return to the strict terms of the tenancy before a forfeiture can be declared. *Templer v. Muncie Lodge,* 50 Ind. App. 324, 97 N. E. 546 (1912), *Westmoreland & Cambria Natural Gas Co. v. DeWitt,* 130 Pa. 235, 18 Atl. 724 (1889), 3 THOMPSON ON REAL

PROPERTY (Perm. ed. 1940) § 1476. A careful search of the authorities indicates that this problem has apparently never confronted the Washington court.

The decision in the principal case, interpreting the 1941 act, enables a landlord to recover premises without giving the twenty-day notice to quit heretofore required by REM. REV. STAT. § 812 *et seq.*, or the thirty-day notice under § 10619. Under § 814-1, the service of the summons and complaint is tantamount to service of written notice to quit. Prior to the 1941 Act, a landlord in *all* cases was bound to give statutory written notice before he could commence action for unlawful detainer. *Davis v. Jones,* 15 Wn.(2d) 572, 131 P.(2d) 430 (1942), *Rowland v. Cook,* 179 Wash. 624, 38 P.(2d) 224 (1934).

There was some indication in the instant case that in previous months *P* had with some frequency accepted the rent late. The issue is thus raised as to whether or not, under such circumstances, a landlord may declare a forfeiture by terminating the tenancy without *notice* and by this summary process. Under the general rule, a landlord guilty of such conduct would normally be estopped to assert his right to terminate the tenancy without first giving reasonable notice to pay rent or quit. Indiana is apparently in accord with the Washington position. In *Karas v. Skouras,* 79 Ind. App. 99, 137 N. E. 289 (1922), the court in applying a similar statute (BURNS' ANN. ST. 1914, § 8059) failed to find an estoppel where the landlord had indulged his tenant by accepting late rentals in previous months. The court held that such conduct did not amount to a waiver of the right to proceed under the statue. The Washington court in the instant case did not directly pass on the issue of estoppel, which was not raised by *D,* but indicated that even though such a defense were urged, it would be unavailing in the face of the statute.

H. D.

Evidence—Opinion Rule and Hearsay. In a homicide case the issue was whether the gun in *D's* hands was accidentally discharged or whether he fired it with a premeditated design to kill his wife. The trial court, over objection, admitted testimony that deceased appeared to be afraid of defendant, and that deceased had stated on a number of occasions that she was in fear of him. *D* was convicted and the judgment was affirmed. *State v. Bauers,* 25 Wn.(2d) 825, 172 P.(2d) 279 (1946).

Assuming for the moment that the state of mind of the wife was relevant and that proof thereof could avoid the hearsay rule, the opinion rule appears to interpose a preliminary obstacle. However, relying on *State v. George,* 58 Wash. 681, 109 Pac. 114 (1910), the court held the proof admissible under the exception to the opinion rule which permits a lay witness to give

his conclusion when it is evident that the factual basis for the opinion cannot be adequately reproduced. So far as the "fear" of the deceased was concerned, the holding is orthodox enough. But there is authority that testimony as to the cause of this state of mind is not within the exception because the witness should be able adequately to reproduce the facts on which he bases his conclusion as to the agency causing the state of mind and, consequently, testimony that *A* was afraid "of *B*" is an inadmissible conclusion. In re *Crissick's Will,* 174 Iowa 397, 156 N. W 415 (1916).

The holding is questionable on other grounds as well. Notwithstanding the court's reliance on *State v. George, supra,* that case seems distinguishable. There, the principal issue was premeditation and the court held that proof of amicable relations *between* defendant and deceased was admissible. But here the testimony in question bears, directly at least, only upon the state of mind of deceased which, of course, was not in issue. If the evidence is deemed probative of hostility on the part of defendant toward deceased, it is hearsay by orthodox doctrine. So used, relevancy depends upon inferences from the state of mind of deceased to a belief by her that defendant was hostile, thence to the fact of hostility This, under nearly all the cases (where the hearsay point has been raised), is deemed equivalent to an extra-judicial assertion by deceased of the fact of hostility and thus is inadmissible hearsay McCormick, *The Borderland of Hearsay* (1930) 39 YALE L. J. 489; Falknor, *Silence as Hearsay* (1940) 89 U OF PA. L. R. 192. The evidence is in the same category as an attempt by an accused to exculpate himself by proof of extra-judicial incriminating conduct (*e.g.* flight) of a third party, which is generally excluded if relevancy depends upon inferences from the conduct to a consciousness of guilt, thence to guilt.

There is a clear distinction between proof on the one hand of the state of mind of a third party, which is an operative fact or dynamic in character—that is to say, which looks toward the future—and, on the other hand, of a state of mind which is relevant only as establishing a belief in the occurrence of a past event. "Declarations of intention casting light upon the future have been sharply distinguished from declarations of memory pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored." Cardozo, J., in *Shepard v. U S.,* 290 U. S. 96 (1933), and see 2 WIGMORE, EVIDENCE (3d ed. 1940) § 267 Thus, a prior intention to do an act is usually deemed relevant to show that the act was done. *Mutual Life Insurance Co. v. Hillmon,* 145 U. S. 285 (1892), *Klein v. Knights and Ladies of Security,* 87 Wash. 179, 151 Pac. 241 (1915), *Sound Timber Co. v. Danaher Lumber Co.,* 112 Wash. 314, 192 Pac. 941 (1920). And contemporary declarations of such a relevant intention are admissible under a well-recognized exception to the hearsay rule. Hinton,

States of Mind and the Hearsay Rule (1934), 1 U. OF CHI. L. REV. 394. But where relevancy of the state of mind rests only in manifesting a belief in the occurrence of a past event, the hearsay rule is unavoidable by the rule of most cases. H. H. H.

Negligence—Tort and Contract Measure of Damages. *P*, the owner of a restaurant and dance building at Shadow Lake, was a subscriber to *D's* telephone service. On discovering a small fire in his building, *P* attempted to reach the operator in Seattle in order to call the fire department at Kent. *P* was unable to make contact with the operator for fifteen minutes, as a result of which alleged negligent delay he contended he suffered the destruction of his buildings, and fixtures and loss of future profits, alleging "that if they (the fire department) had arrived five minutes sooner they could have saved the building with only minor and inconsequential damage resulting." This appeal is from a judgment of dismissal rendered upon *P's* refusal to plead further after a demurrer to his complaint had been sustained. *Held.* Judgment of dismissal affirmed; *P's* damages were special damages which did not arise naturally from a breach of *D's* contract with *P*, and since *P* had not notified *D* of any special risk, he could not recover. A recovery in tort was also refused, the court holding as a matter of law that *D's* negligence was not the proximate cause of *P's* loss. *Foss v. Pacific Tel. and Tel.*, 126 Wash. Dec. 87, 173 P.(2d) 144 (1946).

The general rule for measuring damages in an action for breach of contract is that only those damages may be recovered which arise naturally from such breach. Special damages can be recovered only when notice of special risk or circumstances is communicated to the defendant. *Hadley v. Baxendale* (1854) 9 Exch. 341, 156 Eng. Reprint, 145, 5 Eng. Rul. Cas. 502; WILLISTON, LAW OF CONTRACTS, (Rev Ed. 1937) § 1356. This rule is followed in Washington. *Sedro Veneer Co. v. Kwapil*, 62 Wash. 385, 113 Pac. 1100 (1911), *Martinac v. Bakovic*, 158 Wash. 193, 290 Pac. 847 (1930). The court in applying this rule in the principal case made an analogy to telegraph company cases, where, in suits brought for a negligent failure to provide service, it was held as a prerequisite to recovery of special damages that the telegraph company be informed of the special risk. WILLISTON, LAW OF CONTRACTS (Rev. Ed. 1937) §§ 1356, 1357 But is this a good analogy? Each time one sends a telegram one has the opportunity to notify the telegraph company of any special circumstances. But if, in the telephone cases, the negligence of the telephone company prevents one from notifying them of any special circumstances, it is questionable whether this is a valid reason for denying recovery. It should be noted that the contract for a telegram is usually one contract for a single service, while a contract for telephone service is one contract for

continuous service. Recovery has been allowed in cases where the telephone company has notice of the special risk involved on a single call for a regular subscriber and then negligently fails to perform. *Boldig v. Urban Tel. Co.*, 224 Wis. 93, 271 N. W 88 (1937), *Vinson v. So. Bell Tel. and Tel. Co.*, 188 Ala. 292, 66 So. 100, L. R. A. 1915C 450 (1914) Lack of notice thus gives virtual immunity in cases like the principal one.

This is the first time an action to recover for negligent delay in supplying a telephone connection has occurred in Washington. Will this also be the last case on the point in Washington, as a result of this decision? The court has seemingly closed the door to any recovery in either contract or tort.

J. V

Forcible Entry and Detainer—Persons Entitled—Title to Property. The Commercial Waterway District No. 1 dredged a new channel for the Duwamish River through land purchased in fee under the authority of the commercial waterways act of 1911. (REM. REV STAT. §§ 9724—9776-10), the shores of this channel became new tideland due to the action of the tide from Elliott Bay In 1930, without authority, two houseboats were built upon these tidelands; the defendant acquired title to those houseboats by bill of sale in 1943. Alleging title to the tide lands, the District brought action in unlawful detainer for the removal of the houseboats, under REM. REV STAT. § 812-(6). The defendant alleged the District was not the owner, nor entitled to possession of the tideland, nor authorized to institute this action, but that title to the newly created tidelands vested in the State of Washington under WASH. CONST. Art. XVII. Judgment was for the District and the defendant appealed. *Held.* Affirmed; the District was authorized to institute action, either by virtue of title to land through which the new channel was dredged, or title in the new tidelands released to the District by the state in the statutes of incorporation. The effect of the constitution upon subsequent artificial tidelands was not determined. The court admitted "some confusion" in the issues involved under the unlawful detainer statutes, but assumed that title must be proved when alleged. *Commercial Waterways District No. 1 v. C. J Larson,* 126 Wash. Dec. 206, 173 P.(2d) 531 (1946).

There are two unlawful detainer acts in Washington. By the laws of 1891, unlawful detainer is defined as entering the land of another without permission or color of title, and provision is there made for a remedy which includes appending to the complaint an abstract of title which shall be proved according to the ejectment statute, in the event the defendant denies such title. (REM. REV. STAT. §§ 834-837) The second act originally set out five conditions whereby unlawful detainer arose from a landlord-tenant relationship only, and was included in the general forcible entry and detainer statute.

(REM. REV. STAT. §§ 810-812). The confusion resulted when this second unlawful detainer act was amended in 1905 by the addition of a clause that was not restricted to a landlord-tenant relationship, but pertained to anyone. This amendment duplicated the definition of unlawful detainer by unauthorized entry as set out in REM. REV. STAT. § 834, but prescribed no remedial procedure. (REM. REV. STAT. § 812-(6).) That these are two independent enactments was determined in *Columbia and Puget Sound Railroad Co. v. Moss,* 44 Wash. 589, 87 Pac. 951 (1906) It has been held that in an action of unlawful detainer under REM. REV. STAT. § 812, the right to possession is the only issue and the question of title is excluded. *Angel v. Ladas,* 143 Wash. 622, 255 Pac. 945 (1927). Also, title may not be tried in an action in unlawful detainer. *Meyer v. Beyer,* 43 Wash. 368, 86 Pac. 661 (1906). The rule that title is not in issue in unlawful detainer actions has been established in other jurisdictions. *Lipscomb v. Moore,* 228 Ala. 365, 153 So. 393 (1934), *Richardson v. King,* 51 Idaho 762, 10 P.(2d) 323 (1932), *McAdams v. Austin,* (Mo. App.), 72 S. W.(2d) 513 (1934). In other jurisdictions, deeds, papers, or statements as to title are admitted as evidence, not to show title, but rather to show the nature and extent of possession. *Pemberton v. Hardin,* 258 Ky 538, 80 S. W.(2d) 589 (1935), *McAdams v. Austin, supra.* But in the instant case the court cited *Columbia and Puget Sound Railroad Co. v. Moss, supra,* as a possible precedent for holding that title is necessary in order to bring action under the unlawful detainer provisions of REM. REV STAT. § 812. In the *Columbia* case a *prima facie* case was made out by alleging and proving (1) title, and (2) that after entering without permission or color of title and after due notice to vacate, defendant had failed to remove from the premises. The court in the principal case questioned that proof of title was necessary in an unlawful detainer action, but assumed from the *Columbia* case that title must be proved when alleged, and that the plaintiff had proved such title.

By such a negative holding the court avoided a question which has not yet been decided in Washington: Need surplus allegations be proved? Redundant matter may be stricken out on motion, (REM. REV. STAT. § 286), but can it be said that when surplusage is not stricken it must be proved? Other courts have held that unnecessary allegations need not be sustained. *Salsman v. Bloom,* 172 La. 238, 133 So. 760 (1931), *Noell v. Chicago & E. I. Ry. Co.* (Mo. App.) 21 S. W.(2d) 937 (1929), *Mankofsky-Goldstein Shoe Co. v. J W Carter Co.,* (Mo. App.), 33 S. W.(2d) 1049 (1931), St. *Clair v. State Highway Board,* 45 Ga. App. 488, 165 S. E. 297 (1932). But because of the ambiguity arising out of the two unlawful detainer acts in Washington, it would appear that while an allegation of title is unnecessary, it must, if alleged, be proved.

J. S. O.

Contempt — Proceedings — Affording Defendant Opportunity to Exculpate Himself. *D* was convicted of criminal contempt and sentenced to fifteen days in jail for violating a routine court order restraining him from disturbing or annoying his wife and barring him from their home, during the pendency of her divorce action, except to visit the minor children at suitable times. *D* admitted in his pleadings that he went to his home "for the purpose of catching or punishing a paramour" that he supposed was lurking there. The trial court sustained a demurrer to evidence offered by *D* that he saw his wife lying on the bed with a partially undressed man, that he broke a window for the purpose of entering and forcing the man to leave, and that he did not enter when a vase was thrown at him by his wife. The court stated that the admissions in the pleadings established the charge of contempt as a matter of law, and accordingly refused to hear his offered oral evidence. *D* appealed on the ground that the court erred in not permitting him to introduce evidence tending to prove his innocence, or in case of guilt, to submit evidence of mitigating circumstances. *Held.* Judgment reversed. *D* was entitled to introduce evidence tending to prove that he had not been guilty of contempt, and, even if guilty, to show that his acts were to some extent excusable. Since an outright killing, under such circumstances, is frequently held to be justifiable homicide, or merely manslaughter, the court felt that the evidence was admissible as tending to excuse the violation of a routine court order barring him from his home or at least as tending to mitigate the offense. *Trowbridge v. Trowbridge,* 126 Wash. Dec. 146, 173 P.(2d) 173 (1946)

As a general rule, when a contempt is committed in the immediate view and presence of the court, the court may, in committing the offender, act of its own knowledge without further proof or examination, and the accused is not entitled to be heard in his own defense, nor can he complain that his constitutional rights are infringed by the refusal of a hearing. Rem. Rev. Stat. § 1051, *State v. Budress,* 63 Wash. 26, 114 Pac. 879 (1911), *State* ex rel. *Dysart v. Cameron,* 140 Wash. 101, 248 Pac. 408, 54 A. L. R. 311 (1926), *State* ex rel. *Dailey v. Dailey,* 164 Wash. 140, 2 P.(2d) 79 (1931), Ex Parte *Terry,* 128 U. S. 289 (1888).

In the instant case the contempt, if any, was not committed in the presence of the court. Where the contempt occurs out of the presence of the court, the prosecution involves many of the characteristics of a formal trial, including the filing of affidavits, the filing of charges and giving notice thereof to the contemner. Rem. Rev. Stat. § 1052; *State v. Winthrop,* 148 Wash. 526, 269 Pac. 793 (1928) With respect to constructive contempts or those which are committed without the actual presence of the court, it is essential that a hearing should be allowed and the contemner permitted, if he so desires, to present a defense to the charges before punishment is imposed. *State v.*

Nicoll, 40 Wash. 517, 82 Pac. 895 (1905), Ex Parte *McClean,* 151 Wash. 192, 275 Pac. 546 (1929), *State v. Zioncheck,* 171 Wash. 388, 18 P.(2d) 35 (1933), affirmed on rehearing 171 Wash. 395, 23 P.(2d) 1118 (1933). In *Cooke v. U S.,* 267 U. S. 517 (1925), it was held that the mere admission by an attorney that he wrote a letter impugning the honesty and impartiality of a judge with respect to a case being tried before him, and not yet finished, was not sufficient to justify his summary punishment for contempt without opportunity to be heard and offer evidence to excuse or mitigate his offense.

In the principal case, it is evident that the defendant was not summarily denied notice or representation by counsel. The trial court, however, refused to consider the evidence offered by the defendant which might excuse or mitigate the offense. The court in reversing this decision applied the general rule that before a party accused of out of court contempt shall be judged in contempt, he must be accorded an opportunity to explain or excuse his contempt. Whether or not moral justification might operate as a total excuse for the violation of the literal terms of the order, there can be no doubt that the evidence might justify the court in refusing to punish or in making punishment nominal. The refusal of the trial court to receive the evidence offered practically amounted to the denial of a hearing under the rule of the cases cited herein. M.G.W

Negligence—Evidence—Presumptions and Burden of Proof. In an action for personal injuries, the evidence showed that *P,* pedestrian, was found lying on the street twenty-one or twenty-seven feet toward the center of the block from the pedestrian cross-walk with the right front wheel of a municipal bus resting on her left leg. The headlights of the bus were defective and had not been burning, although the street lights and headlamps of all other vehicles were being used. As a result of a concussion incurred in the accident *P* developed a slight amnesia and was unable to recall anything from a time when she was on the sidewalk in the proximity of the intersection until she regained consciousness in the hospital. She testified that it had been her intention prior to the period of her loss of memory to use this particular cross-walk to reach her proven destination, to which it directly led. The driver of the bus, which had just completed a left turn at the four-way, red-and-green light controlled intersection, against the heavy, morning rush-hour traffic, testified, "When I entered the pedestrian crossing I didn't see anybody . but after about twenty-eight feet away, out of the pedestrian crossing in front of the bus I felt an impact of some kind. I thought I seen something brown. I thought it was a woman's hat. I don't know what made me think that or anything." Upon the foregoing and additional evidence by

each party the jury rendered a verdict for *P* *Held*. There was insufficient evidence to permit a finding by the jury that *P* was on the cross-walk when struck, or to support the verdict for *P* (Four justices dissented.) *Ferguson v. Seattle*, 127 Wash. Dec. 52, 176 P.(2d) 445 (1947)

It is a general rule that where an accident results in instant death, the law, out of regard to the instinct of self-preservation, presumes the deceased was at the time in the exercise of due care. *Smith v. Seattle*, 172 Wash. 66, 19 P.(2d) 652 (1933), *Fothergill v. Kaija*, 183 Wash. 112, 48 P.(2d) 643 (1935), 38 AM. JUR. 987 It is reasonable and "well established" that the same rule applies where loss of memory or other incapacity renders the survivor of an accident incapable of testifying, if the incapacity is the result of the accident. *Tubb v. Seattle*, 136 Wash. 332, 239 Pac. 1009 (1925), 141 A. L. R. 873 (1942) and cases therein cited. The rule appears to have been applied so as to presume *specific conduct* on the part of deceased, or *P* *Karp v. Herder*, 181 Wash. 583, 44 P.(2d) 808 (1935) (that *P* stopped at a stop sign before entering an arterial; and that *P's* auto yielded the right of way to *D's* vehicle), *Steele v. Northern Pacific Railway Co.*, 21 Wash. 287, 57 Pac. 820 (1899) and *Baltimore & P R. Co. v. Landrigan*, 191 U S. 461 (1903) (that *P* stopped, looked, and listened before going upon a railroad track) Therefore, it appears that under the facts of the principal case it can be reasonably contended that there is a legal presumption that *P* was on the pedestrian cross-walk and using due care when run down by the municipal bus.

Although it appears that in Washington the presumption of due care has heretofore been applied only upon the issue of contributory negligence, it seems logical and correct upon principle that the presumption should also apply in a case such as this, where the question of *D's negligence per se* is entirely dependent upon *P's* conduct, and the unusual accident has rendered *P* incapable of testifying as to that conduct. When used in this manner the presumption of due care performs the function of a true presumption (*i.e.*, relieves the party upon whom rests the burden of persuasion, of the burden of going forward with the evidence in the first instance. THAYER, PRELIMINARY TREATISE ON EVIDENCE (1898) p. 337, 5 WIGMORE, EVIDENCE, § 2487) It also loses the anomalous characteristics which have been pointed out in connection with its use, on the issue of contributory negligence, in a jurisdiction such as Washington where contributory negligence is an affirmative defense, and the burden is *already* on *D* to prove contributory negligence by a preponderance of the evidence. Falknor, *Notes on Presumptions* (1940) 15 WASH. L. REV. 71. The presumption of due care is here used as a true presumption, performing the functions set forth by Thayer, *supra*, and Wigmore, *supra*, as it does in the jurisdictions in which the rule is thought to have

originated, where the burden is on *P* in a personal injury action to show, in the first instance, that he was exercising due care. *Greenleaf v. Ill. Central R. Co.*, 29 Iowa 14, 4 Am. Rep. 181 (1870), 33 L. R. A. (N.S.) 1111 (1911), 6 IOWA L. BULL. 55 (1920).

Assuming *arguendo* that a presumption of due care can be rebutted by the testimony of interested witnesses, as was said of another presumption in *Bradley v. Savidge, Inc.*, 13 Wn.(2d) 28, 123 P.(2d) 780 (1942), *D's* evidence in this case can scarcely be said to have been "uncontradicted, unimpeached, clear and convincing" as is required by the rule of the *Bradley* case. Moreover, it has been held that "the presumption of due care is not overcome by the testimony of interested witnesses, *or from inferences that may be drawn from circumstantial facts.*" *Reinhart v. Oregon-Washington R. & N Co.*, 174 Wash. 320, 24 P.(2d) 615 (1933), *Gillett v. Michigan United Traction Co.*, 205 Mich. 410, 171 N. W 536 (1919), *Mattingley v. Oregon-Washington R. & N Co.*, 153 Wash. 514, 280 Pac. 46 (1929). Therefore it seems doubtful whether *D* presented evidence sufficient to meet or rebut the presumption of due care. This fact, coupled with the evidence of *P's* immediate intention, proven destination and the conditions under which the left turn was made, add up to make this an extremely close decision.

C. H. H.