YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS

Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC. P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

SCOPE OF THE FEDERAL EMPLOYER'S LIABILITY ACT.

The enactment of workman's compensation laws by a large number of states has raised the interesting problem as to whether such laws can have any application to cases arising between master and servant engaged in interstate transportation by rail, or whether in such cases the Federal Employer's Liability Act must be held to be exclusively applicable. On this precise point, there are but two decisions by state supreme courts, and as these decisions are in conflict, a brief inquiry as to which is the sound one on principle would seem to be warranted.

In *Staley v. Illinois Cent. R. R. Co.*[1] an employee of the defendant railroad was killed while engaged in interstate commerce. As no negligence on the part of the carrier was alleged, it was contended that the state compensation law applied, and that such law did not cover the same field as the federal act which provided a remedy only in those cases of injuries which

[1] 268 Ill. 356.

resulted from the negligence of the carrier. The court held, however, that the field taken possession of by the passage of the Federal Employer's Liability Act, was the employer's liability for injuries to employees in interstate transportation by rail, regardless of negligence or lack of negligence, and therefore the federal act was exclusively applicable.

In *Winfield vs. N. Y. C. & Hudson River R. R. Co.*,[2] on facts similar to those of the Illinois case, it was held that as the federal act made no provision for compensation to an injured employee engaged in interstate commerce, unless the injuries resulted from the negligence of the carrier, it had no application to those cases where the injuries were not the result of such negligence. Therefore an employee injured, while engaged in interstate commerce, without negligence on the part of the carrier might maintain a claim under the state workman's compensation law, as the latter did not cover the same field as the federal act. A similar result was reached by the New Jersey Supreme Court.[3]

Prior to the passage of the Federal Employer's Liability Act, the laws of the several states were held to be determinative of the liability of interstate carriers for injuries received by their employees when engaged in interstate commerce. Congress, though empowered to legislate over the subject, not having acted, the matter was one which fell within the police power of the states.[4] After the passage of the federal act, however, the state laws on that subject were held to be superseded, and the Federal Employer's Liability Act was held to be exclusively applicable to cases of injuries arising while the employee was engaged in interstate commerce.[5]

On principle, it is submitted that the federal law should be held to be exclusively applicable. The New York court's interpretation would seem to be an unreasonable restriction of the scope of the act. It was undoubtedly the intention of Congress to regulate the whole matter of the liability of interstate carriers to their employees for injuries received by the latter when engaged in interstate commerce. Negligence was merely the

---

[2] 216 N. Y. 284.

[3] 94 Atl., 392 (N. J. Supreme Court, not the court of last resort); 95 Atl., 753 (N. J. Supreme Court, not the court of last resort).

[4] Second Employer's Liability Cases, 223 U. S. 1.

[5] *Seaboard A. L. R. Co. v. Horton*, 233 U. S. 492; *Toledo, St. Louis & Western R. Co. v. Slavin*, 236 U. S. 454; *St. Louis, Iron Mt. & Southern R. Co. v. Hesterly*, 228 U. S. 702.

criterion which, on the one hand, determined whether the employee's primary right was invaded, and on the other, whether the employer became subject to a duty to respond in damages. Having expressly enacted that the employer should incur a liability in cases where he was negligent, it would seem to follow that by implication Congress declared that no primary right of the employee should be held to be invaded if there were *no* negligence on the part of the carrier.

If the foregoing analysis be correct the state workman's compensation laws in so far as they are attempted to be made applicable to cases of injuries received by employees while engaged in interstate commerce, are necessarily in conflict with the federal law. If that be so, it follows that in such cases there is no room for their application. The Illinois case which held that the Federal Employer's Liability Act was exclusively applicable would seem to be correct on principle.

F. R.

ENJOINING EMPLOYEES FROM SOLICITING THE TRADE OF FORMER EMPLOYERS.

In a recent New York case,[1] the defendant as a driver in the plaintiff's service delivered laundered coats and aprons to individuals and thus became acquainted with the plaintiff's customers. Discharged by the plaintiff, the defendant induced a third party to embark in a similar business and canvassed the customers of the plaintiff for the new employer. An injunction was granted prohibiting the defendant from soliciting those of plaintiff's customers of whom defendant had obtained knowledge while in the service of the plaintiff.

Where a clerk, apprentice or salesman as part of his contract of employment agrees that he will not solicit in opposition to the employer, he will be enjoined from doing that which he agreed not to do.[2] The negative covenant is considered fair and reasonable and equitable relief by way of injunction is granted because the remedy at law is inadequate as the damages for the breach are uncertain. Similarly, parties will be enjoined from disclosing the secrets pertaining to the employer's business where there is an agreement that in consideration of employment, they

[1] *People's Coat, Apron & Towel Supply Co. v. Light,* 157 N. Y. S. 15.
[2] *Mutual Milk & Cream Co. v. Heldt,* 120 A. D. 793; 22 Cyc. 867.

will not divulge such secrets.[3] And in such case it is unnecessary that there should be an express covenant, if such agreement may fairly be implied from the circumstances of the case and the relation of the parties.[4]

By the common law, independent of copyright or letters patent, an inventor or author has an exclusive property in his invention or composition until by publication it becomes the property of the general public.[5] A similar property right exists in case of trade processes and trade secrets and this will be protected against one who in violation of contract or breach of faith undertakes to apply the secret to his own use or to impart it to others.[6] And so as regards employees, an implied agreement in fact is not needed in all cases. For "when a confidential relationship has existed, out of which one of the parties has derived knowledge of secrets concerning the other, equity fastens an obligation upon his conscience not to divulge such knowledge and enforces the obligation when necessary by injunction."[7]

What is of primary concern here? Is it the interests of the employer that equity seeks to preserve? Will equity protect the employer from every and all injuries that a former employee may cause? This is hardly the case. For the stock of experience which an employee has added to his capital is a source of injury. For the greater the experience, the greater value will this employee be to a rival business and thus the training obtained from the old employer will now be utilized against his interests. But equity will not prevent this.

For, with the exception of valuable trade secrets acquired while in a given service, an employee may use the skill and knowledge there gained in the service of a rival, even when wrongfully leaving the original employment.[8] So that it is not every damage suffered by the employer through the conduct of a former employee that equity will relieve against. It is only when a property right is being unfairly interfered with or a breach of trust is involved that equity comes to the aid of the employer. When the employee attempts to use for himself or

[3] *Fralich v. Despar,* 165 Pa. St. 24.
[4] *Westervelt v. National Paper Co.,* 154 Ind. 673.
[5] *Palmer v. DeWitt,* 47 N. Y. 352.
[6] *Morison v. Most,* 9 Hare 241; *Peabody v. Norfolk,* 98 Mass. 452; *Park & Sons Co. v. Hartman,* 153 Fed. 24.
[7] *Little v. Gallus,* 4 A. D. 569; High on Injunctions, §19.
[8] *Gossard Co. v. Crosby,* 132 Iowa 155.

others secret processes or trade secrets that were disclosed to him in confidence, he will be enjoined. Our problem then is to determine whether a trade secret is involved in the principal case. What do the authorities say?

In *Simms v. Burnette*[9] the court held that the knowledge acquired by a book-keeper as to where and what his employer buys and to whom he sells may be used, for this does not constitute a secret process or trade secret. And in *Stein v. National Life Association,*[10] where a general insurance agent left his employer and attempted to divert policy holders in the company formerly employing him, no injunction was granted as the relation to the employer was not confidential in the sense that he acquired knowledge of any business secret. And similarly in *Salomon v. Hertz,*[11] injunction was refused to prohibit defendants from making known where and from whom complainant buys his materials and to whom he sells his goods because this is not a trade secret.

We thus see that ordinarily courts do not consider a knowledge of the customers as either of a confidential nature or a trade secret. Of course where one has access to the employer's books and copies the list of customers, the knowledge is gained in a reprehensible manner and the use of the names thus obtained will be enjoined.[12]

In the principal case, the court treats the acquaintance with the customers as being in the nature of a trade secret. It does not purport to hold that in no case may the employee solicit for himself or others the trade he canvassed for his former employer. For in a New York case cited in the opinion,[13] a former salesman of a wholesale butter and egg house was not enjoined from dealing with the retail dealers for a rival concern. And the distinction attempted to be drawn is that in the cited case the customers were listed in the city directory and their places of business were conducted publicly while in the principal case the parties dealt with were private individuals not easily discoverable as possible customers by means of a directory.

---

[9] 55 Fla. 702.

[10] 105 Ga. 821.

[11] 40 N. J. E. 400 (court holds that even an agreement to that effect may well be regarded as limited in its obligation to the term of his service).

[12] *Robb v. Green,* 64 L. J. Q. B. (N. S.) 593; *Stevens Co. v. Stiles,* 29 R. I. 399.

[13] *Boosing v. Dorman,* 148 A. D. 824.

There are but few authorities that protect an employer from competition by former employees in the absence of an agreement. An earlier New York case relied on by the principal case[14] dealt with the unfair use of a list of customers, which acts constituted a penal offence in New York.[15] *The Empire Steam Laundry Co. v. Lozier*[16] seemingly supports this proposition. Though there was a contract not to solicit, the court held that the knowledge acquired by the driver of the customers is in the nature of a trade secret and he would be enjoined from soliciting even in the absence of contract. This conclusion is greatly influenced by the quoted English case of *Lamb v. Evans*,[17] which on close investigation does not seem to uphold this proposition.

Is it desirable in principle to stretch the meaning of trade secrets so as to have it include the customers and to give the employer a monopolistic right to them as against the employee? Considerations of public policy and justice should decide whether an obligation of so burdensome a character shall be imposed on the employee. Is it not consonant with the welfare and best interests of society that the employee be permitted to utilize this knowledge to his advantage? For this would add to the opportunities of the employee to increase his earning capacity and to elevate himself from his status. It is therefore questionable whether the principal case was right in creating an obligation on the employee not to solicit the customers of whom he received knowledge while in the employ of plaintiff.

M. H. L.

---

[14] *Witkop & Holmes Co. v. Boyce*, 112 N. Y. S. 874; 118 N. Y. S. 461 (trial of same case).

[15] N. Y. Penal Code, Sect. 642.

[16] 165 Cal. 95.

[17] L. R. 1893, 1 Ch. Div. 218, which affirmed L. R. 1892, 3 Ch. Div. 462 (canvassers of directory enjoined from using blocks and materials for rival but court expressly allows them to canvass the same trades for a rival directory [see pp. 469, 470]).