ter sessions cannot be compelled by mandamus to make such a transfer. It can be made from person to person, but not from place ro place: (*Laib & Co.* v. *Hare et al. Judges*, 163-481.)

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DEPARTMENT OF COMMERCIAL LAW.

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ROBB *v.* GREEN, 2 Q. B. 1 AND 315. JULY, 1895.

The defendant being employed by the plaintiff to manage his business, and having access, in the course of his duties to his master's books, secretly copied from the order book a list of the names and addresses of the customers, with the intention of using it in soliciting orders from them, after he had left the plaintiff's employ. Subsequently, his service with the plaintiff having terminated, the defendant did use the list so obtained, while employed by another in a business similar to that of the plaintiff. The plaintiff applied for an injunction restraining the defendant from the use of the list and requiring him to deliver it up to the plaintiff for destruction, and also for damages done to his business by the defendant's solicitation from the list. All of these requests were granted, and it was *held* by HAWKINS, J., that it was an implied term of the contract of service that the defendant would not use, to the detriment of the plaintiff, information to which he had access in the course of the service, and, therefore, that the defendant was liable in damages for any loss caused to the plaintiff by reason of the breach of that term. In the Court of Appeal (affirming the above) it was held that it was an implied term of the contract of service that the servant would observe good faith towards his master during the existence of the confidential relation between them, and that the defendant's conduct was a breach of that contract in respect of which the plaintiff was entitled to damages and injunction.

COMMUNICATION OF MATTERS LEARNED IN A CONFIDENTIAL RELATION.

Both in the lower court and in the court above the decision was placed on the ground that in every contract of service there is an implied stipulation that the servant will observe

good faith towards his employer in respect of the matters confided to him. At the same time the court did not limit the applicability of its statement with regard to implied contracts to the relation of master and servant. Before viewing the particular ground of the present case, the general statement of the court with reference to implied contracts will be considered. In the court below, HAWKINS, J., quotes the language of POLLOCK, C. B., in *Morgan* v. *Ravey*, 6 H. & N. 265, with approval: " We think the cases have established that where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him." This statement is not clear, but doubtless refers to a contractual relation between two parties, and the enforcement of duties connected with the contract, but not directly contemplated by the parties, or forming the main purpose of the contract. In these cases there may or may not be a public policy favoring the performance of certain duties by either. The most obvious example of the presence of public policy is the case of an inn-keeper or common carrier. In other cases public policy seems to be satisfied by the observance of good faith. Now, so far as the terms of the contract refer to those considerations which are present to the minds of the parties and form an inducing cause, we are no doubt not speaking literally when we say that a jury may infer a promise to do that which the law has imposed on one in his position. This distinguishes contracts or terms of contracts so inferred from contracts inferred from conduct, as where an agreement to pay for goods is inferred from an order or request to furnish them. On the other hand these cases of implied contract are to be distinguished from those where the only remedy takes the form of a remedy in contract. In the latter case there has been no contract or voluntary relation between the parties. Where, however, the parties have voluntarily entered into a relation which contemplates certain objects, the doing of anything by one of the parties inconsistent with that end, or which would make it ineffectual, may well be

considered a part of the contract, so as to prevent recovery and also give right to recover for an injury arising therefrom. The question is not whether the act or conduct which actually prevented the party from receiving the benefit to which he was entitled, was contemplated by the parties, but whether it was so related to the performance as to make any benefit received of no value. This is the view of BOWEN, L. J., in *Lamb* v. *Evans*, [1893] 1 Ch. 218, 229. He there says: "The common law, it is true, treats the matter from the point of view of an implied contract, and assumes that there is a promise to do that which is part of the bargain, or which can be fairly implied as a part of the good faith which is necessary to make the bargain effectual. What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer, in order to give the transaction that effect which the parties must have intended it to have and without which it would be futile."

Implied contracts within the above meaning are most likely to appear where the object of the contract is not a single act, but a course of action, as in the relation of master and servant. The question as to what conduct is inconsistent with the servant's duty, takes the form of a justification for a discharge. Thus in Macdonald on Master and Servant, it is said (p. 210): "A servant is bound to consult the interest of his master and may be discharged for acts seriously injurious thereto. Disclosure of a master's trade or business secrets, disclosure of the accounts of a company to a person connected with another company, advising and assisting an apprentice to quit his master's service, . . .—in all these instances masters have been warranted in dismissing servants." In all these cases the only ground of dismissal has been a breach of the servant's contract for faithful service, and though the point has not arisen, there can be no doubt that if any injury was occasioned to the employer, he would have a right of action against such a servant.

Likewise any agreement, act or conduct by an employee in the course of his work, for his own profit and to his master's prejudice, will be treated as contrary to public policy and of

no effect: *Lum* v. *Clark*, 57 N. W. Rep. 662 (Minn.); *Woodstock Iron Co* v. *Extension Co.*, 129 U. S. 642; *Davenport* v. *Hulme*, 32 N. Y. Sup. 803; *McEwen* v. *Schannor*, 64 Vt. 583.

Where an employee is intrusted with a trade secret, the use of this secret for his own profit and to the disadvantage of his employer will be restrained: *Peabody* v. *Norfolk*, 98 Mass. 408; *Morison* v. *Moat*, 9 Hare, 281; *Fralick* v. *Davenport*, 30 Atl. Rep. 521 (Pa.). In *Tabor* v. *Hoffman*, 118 N. Y. 30 (1889), the defendant had invented a pump, the patent on which had expired. He was manufacturing pumps with an improvement incorporated in his pattern, which was not made public. The defendant hired a man who was employed to repair the patterns to make copies of them. The defendant was enjoined from the use of the patterns so obtained. Most of these cases place the decision on the ground of a breach of confidence without determining its effect on the contract of employment. But there can be no doubt that disclosures of such a secret would justify dismissal, enable the employer to resist an action for wages due, and entitle him to damages.

Where a person makes use of the information he has learned in a confidential relation the grounds of the decision against such use are variously stated as a breach of trust, violation of an implied contract, or the interference with a property right. And sometimes it is indicated that a distinction is to be drawn between them. In the present case [1895] 2 Q. B. 319, KAY, L. J., says that there has been a breach of trust, if not a breach of contract, and that an injunction should be granted and the list of names should be given up to be destroyed. He continues: As to the damages, I think there is more difficulty. The right to them depends on whether the conduct of the defendant can be regarded as a breach of an implied contract." The distinction intended by the Lord Justice is not clear. Without the confidential relation, which was violated by the making and use of the list, there would be no ground for an injunction. In *Corliss* v. *Walker & Co.*, 64 Fed. Rep. 280, it was sought to restrain a photographer from making copies of a photograph, which he

had purchased from another photographer who had taken them for the plaintiff without the privilege of reproducing them for his own profit. The court said: "When a person engages a photographer to take his picture, agreeing to pay so much for the copies which he desires, the transaction assumes the form of a contract; and it is a breach of contract, as well as a violation of confidence for the photographer to make additional copies from the negative. The negative may belong to the photographer, but the right to print additional copies is the right of the customer: *Pollard* v. *Photographic Co.*, 40 Ch. Div. 545; *Tuck* v. *Priester*, 19 Q. B. D., 629. Independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of right which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or oral lectures delivered by a teacher to his class, or the revelation of the contracts of a merchant's books by a clerk: *Duke of Queensberry* v. *Shallcare*, 2 Edm. 329; *Ger* v. *Pritchard*, 2 Swanst. 402; *Folsom* v. *March*, 2 Story, 100; *Abernethy* v. *Hutchinson*, 3 Law J. Ch. 209; *Caud* v. *Sime*, 12 App. Cas. 326; *Tipping* v. *Clarke*, 2 Hare, 383; *Williams* v. *Insurance Co.*, 23 Beav. 338." It seems to the writer unimportant whether the communication of matter learned in the confidential relation is regarded as a breach of trust or a breach of contract or a violation of a property right, so far as the right to compensation is concerned. There can be no doubt of the applicability of the principle to the present case. The secret copying of the list with the intention of using them in competition was undoubtedly a dishonorable means of enabling the servant to maintain a competition with his master after the employment. The fact that a servant after the termination of his employment may compete with his former employer for the trade of his customers of the employer, (*Irish* v. *Irish*, 40 Ch. D. 49; *Helmore* v. *Smith*, 35 Ch. D. 449,) will not justify every means to facilitate that competition taken by a servant in violation of his present duty to that employer.

H. A. C.