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Limitation of Actions—Commencement of Period in Cases of Wrongful Death

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leging that some shirts had been delivered for which he claimed judgment. To support his counterclaim defendant offered his business books kept by a clerk to show defendant's manufacture and shipment of the goods. The clerk testified that she had accurately made all entries, but that she had no actual knowledge of the manufacture and shipment. The trial court admitted the book in evidence, but was reversed by the upper court. *Maryanov v. Janowitch*, 222 App. Div. 494, 226 N. Y. S. 570 (1928).

Under the common law, the books of a party in order to be admissible, must have been kept by a clerk or other disinterested person; and if the entries were made by the party himself, they were inadmissible. 10 R. C. L. 1184, and cases there cited; *Burr v. Byers*, 10 Ark. 398; *DeLand Mining and Milling Co. v. Hanna*, 112 Md. 528; *Mitchell v. Belknap*, 23 Me. 475. This common law rule was based on the familiar doctrine that one cannot make his own evidence.

Necessity in America, however, has forced the courts to deviate from the strict application of this rule, and now, in most jurisdictions, a person may introduce his own books, even though he kept them himself. The modern American shop book rule divides itself into two lines of authority: the New York rule and the New England rule.

The New York rule allows the party to a suit to produce his own books if he lays the proper foundation, i. e., by proving that he had no clerk, that some of the articles had been delivered, that the books produced are the books of the party, and that he kept fair and honest accounts. *Case v. Potters*, 8 Johns (N. Y.) 211; *Vosburgh v. Thayer*, 12 Johns (N. Y.) 461; *Smith v. Smith*, 163 N. Y. 166.

The New England rule allows a party to introduce books kept by himself on the taking of a supplementary oath. *Union Bank v. Knapp*, 3 Pick. 96; *Mo. Pac. Ry. Co. v. Johnson*, 7 S. W. 838 (Tex. 1888).

Hence if books kept by a party to the suit are admissible, surely they are admissible if kept by a clerk as at common law. 10 R. C. L. 1184, *supra*.

Ordinarily and broadly speaking, the knowledge of the facts on the part of the one who made the entry is necessary. 2 Wigmore, Ev., 1555. However, if the entrant made the entries upon reports of another who had personal knowledge of the transaction (as in the principal case), he need only testify as to the accuracy of his copying. The person having actual knowledge should be produced if available. If he is unavailable, e. g., dead, insane, or out of the jurisdiction, or if the organization is of large personnel, nevertheless the book is admissible as an exception to the hearsay rule, namely, entries made in the regular course of business or duty. *Price v. Earl of Torrington*, 2 Lord Raymond 873; *Augusta v. Maine*, 19 Me. 317; *Nicholls v. Webb*, 8 Wheat. 326.

The report of the principal case is silent as to the availability of the persons from whom the witness derived her information, but the unavailability is to be presumed, as no small concern could manufacture 15,000 dozen shirts at over 1,000 dozen per week as was called for by the contract in the case.

The facts present a large business and books kept by a clerk who testified as to her accuracy from reports of unavailable persons, made in the regular course of business and duty—a perfect set up for admitting the books.

Hence the case is clearly contrary to the weight of modern authority and contrary to the trend of modern law, which is to admit all books and records kept in business contemporaneous with each happening. S. M. W., '29.

LIMITATION OF ACTIONS—COMMENCEMENT OF PERIOD IN CASES OF WRONGFUL DEATH.—Plaintiff's intestate suffered injuries as result of defendant's negligence. Deceased brought action for injuries within the two-year statutory limit. While this action was pending and five years after the date of the injury, plaintiff's intestate died. Plaintiff as administratrix then brought an action for wrongful death, and the question was raised as to whether the action was barred because

not brought within the statutory limit of three years from time of injury. *Held*, provision of New York Decedent Estate Law, Sec. 130, authorizing action for death against one who would have "been liable to action in favor of decedent," may be construed as meaning "liable to judgment in a given action" rather than meaning "liable to commencement of an action" as contended by the defendant. *Haas v. New York Post Graduate Medical School & Hospital*, 226 N. Y. S. 617.

The point of time which marks the commencement of the running of a statute limiting the right of action for death by wrongful or negligent act is a matter which must be determined from the provisions of the statute creating the limitation. The statutes vary in phraseology and there is a resulting diversity of opinion as to whether the period within which suit is to be commenced is to be computed from time of injury, date of decedent's death, or time when personal representative is appointed. *Trull v. Seaboard Air Line R. Co.*, 151 N. C. 545, 66 S. E. 685; *Lake Shore R. Co. v. Dylinski*, 67 Ill. App. 114.

Where suit is brought by relatives of the deceased, the statutes permitting recovery generally provide that the suit shall be commenced within a specific period after the cause of action shall accrue and that period is usually computed from time of death. *Atlantic, L. & W. R. Co. v. McDilda*, 125 Ga. 468, 54 S. E. 140; *Kenedy v. Burrier*, 36 Mo. 128. As in the case of a widow, this rule is based upon the fact that she has no right of recovery for death until her husband dies, and the statute could not run against a right of action before it came into existence. *Western, etc. R. Co. v. Bass*, 164 Ga. 390, 30 S. E. 874; *Donnelly v. Chicago City R. Co.*, 163 Ill. App. 7.

Most states hold that as against an administrator the limitation will not run from death but from the time of appointment of the administrator. The reason for this is that the cause of action does not accrue until some person is in existence, capable of bringing and maintaining the action. *Sherman v. Western Stage Co.*, 24 Ia. 515; *Crapo v. Syracuse*, 185 N. Y. 395, 76 N. E. 465. In Kentucky, by Carroll's Kentucky Statutes, Sec. 2156, it is required that the action be commenced within one year after the cause of action has accrued. Accordingly the statute is held not to run until one year from qualification of an administrator. *Faulkner's Administrator v. L. & N. R. Co.*, 212 S. W. 130.

An opposite view is taken in the construction of the Federal Employer's Liability act, Comp. Statutes U. S., Sec. 8657-8665. This act gives a right of action for wrongful death to the personal representative of a deceased railroad employee, when death has been caused by negligence of the railroad, and provides that suit must be brought within two years from the day the cause of action accrued. This is not to be construed as meaning within two years of appointment of an administrator but within two years from death. *Reading Co. v. Koons*, 271 U. S. 58, 70 L. Ed. 827, 46 Sup. Ct. 375.

There is still another class of cases in which the statute does not create a new cause of action but merely preserves to the personal representative the right of action which the deceased would have had to recover for the wrongful injury, had he survived. Here it is held that a new cause of action is not set up. *Williams v. Alabama Great So. R. Co.*, 158 Ala. 396, 48 So. 485. The Code of Tenn. of 1884, Sec. 3469, provided that actions for injuries to the person should be brought one year after the cause of action accrued. In a suit for wrongful death of parents, plaintiff's infancy did not stop the running of the statute of limitations, since plaintiff's action was derived through the parents and was not a new cause of action in favor of the plaintiff. *Whaley v. Caillett*, 103 Tenn. 347, 53 S. W. 131. Under Ohio law the remedy for wrongful death is part of the right to sue for the injury itself, and if it is not enforced within time fixed for suing for the injury, the right to sue for wrongful death expires, *Borovits v. American Hard Rubber Co.*, 287 Fed. 368.

From this brief review, it may be said that the decision of the New York court is in line with the holdings of the majority of the states. By its decision

that the statute would have commenced to run from the date of judgment in the suit for personal injuries and not from the time of the injury, it can be seen that the court is following the rule that a statute limiting an action for death is not to run from the time of the injury. It is to run from the time of death if at that time there remains a legal liability to the injured party. R. L. W., '29.

MASTER AND SERVANT—INJURY TO THIRD PERSON—PRESUMPTION OF AGENCY AND AUTHORITY.—In personal injury action, proof of ownership of defendant's passenger automobile driven by another *held* sufficient to take the case to the jury and to sustain a verdict against the owner under the doctrine of *respondet superior*. *Edwards v. Rubin*, 2 S. W. (2d) 205 (Mo. App. 1928).

The common law rule is that the burden of proof rests on the plaintiff to show that the driver was the agent of the owner and that he was acting within the scope of his employment. The effect upon the rule of the instant case, where it was shown that the car was in fact owned by the defendant, is to raise presumption of agency and authority. This does not mean that the burden of proof is shifted to the defendant, but merely that a *prima facie* case has been made out and that the defendant has the burden of going forward with the evidence. It is similar to the familiar doctrine of *res ipsa loquitur*, applied in other tort actions. The doctrine of the principal case was applied in the English case of *Joyce v. Capell*, 8 Car. & P. 370 (1838), in which Lord Denman says, "If the barge was on hire that will be for the defendants to show. The barge being the barge of the defendants, there is *prima facie* evidence that the barge-man was their servant till they explain it."

The general American doctrine is in accord with the instant case. *West v. Kern*, 88 Ore. 247, L. R. A. 1918D 920; *Mahan v. Walker*, 97 N. J. L. 304; *Baker v. Mashee*, 20 Ariz. 201. The presumptions continue until there is substantial evidence to the contrary. *Orlando v. Pioneer Barber Towel Supply Co.*, 239 N. Y. 342. There are at least twenty states that recognize this rule. Additional citations can be found in 42 A. L. R. 900; Huddy on Automobiles, 8th ed., 930; and Shearman and Redfield on Negligence, Sec. 158. A few American jurisdictions will not follow this rule to the full extent, but demand that the agency be shown before the presumption of authority will be raised. *Hayes v. Hogan*, 273 Mo. 1; *Stumpf v. Montgomery*, 101 Okla. 257, 32 A. L. R. 1490, following the Hayes case, *supra*. In refusing to raise both presumptions, the court in *Hayes v. Hogan* relied on the proposition that the presumption that the driver was acting within the scope of his employment is based upon the previous presumption of agency, whereas a presumption should properly be based upon a fact. The case of *Hayes v. Hogan*, *supra*, seems to have been overruled in this respect by the later case of *Barz v. Fleischmann Yeast Co.*, 308 Mo. 288, the latest case from the Missouri Supreme Court on this point. There is another group of cases holding that no presumption is raised at all, but that the plaintiff must prove both that the driver was the agent of the defendant and also that he was acting within the scope of his employment. *Trombly v. Stevens-Dureuya Co.*, 206 Mass. 516; *Tice v. Crowder*, 119 Kan. 494. Other citations can be obtained from Huddy on Automobiles, p. 933.

The reason for the rule in the principal case is very fully explained in *Baker v. Mashee*, 20 Ariz. 201: "When an owner's car is being driven by another, that fact is presumably within the knowledge of the owner and he can readily show that the vehicle was not being driven for him, if such is the fact. If the vehicle has been stolen and is being driven by the thief or if it has been loaned or hired out to the driver, who is using it for his own business or for his own pleasure, the owner is in the best situation to prove the fact. One who is damaged, either in person or in property by an automobile, negligently operated by some person other than the owner is usually without information as to the relation between the driver and the owner. If he be required to make affirmative proof of the