

1-1926

Recent Case Notes

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Legal Profession Commons](#)

Recommended Citation

(1926) "Recent Case Notes," *Indiana Law Journal*: Vol. 1 : Iss. 1 , Article 11.

Available at: <https://www.repository.law.indiana.edu/ilj/vol1/iss1/11>

This Special Feature is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

RECENT CASE NOTES

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—LEGISLATIVE CLASSIFICATION FOR PURPOSES OF TAXATION.—An Indiana Statute imposing a license fee of two cents (\$.02) per gallon, or fraction of a gallon is hereby imposed on the use of all gasoline used in this state for any purpose whatsoever." Acts 1923, Ch. 182, pp. 532-537. The appellant, plaintiff below, was a resident of St. Joseph County, Indiana, where he owned and operated an automobile run by the internal combustion of gasoline. He was a stockholder in a designated corporation engaged in the business of selling and distributing gasoline and other petroleum products in the city of South Bend and in other parts of the State of Indiana and adjoining states. The appellant sued the appellee as auditor of the state seeking to restrain him by injunction, from taking any steps toward enforcing a tax of two cents (\$.02) per gallon on gasoline sold or used for certain purposes, demanding that he be forbidden to expend state money to put the act in effect and that he be forbidden to exact the payment of two cents per gallon on such gasoline. A demurrer was sustained to the complaint and judgment rendered upon refusal of the appellant to amend or plead further. Appellant assigned as error that the trial court erred in sustaining the demurrer. *Held*, that the statute is constitutional. That the tax is a tax upon the use of gasoline for certain purposes and not a property tax. That the state has power to regulate the business of selling gasoline and imposing an incidental burden upon those who voluntarily engage in that business does not invalidate the statute. *Gafill v. Bracken, State Auditor*, (Supreme Court of Indiana, Nov. 24, 1924) 145 N. E. 312.

The power of the Legislature in matters of taxation for public purposes is unlimited except in so far as restrained by the state or Federal constitution (*Lowe v. Board of Commissioners of White County et al.* 156 Ind. 163). Section 1, Article 10 of the state constitution, which provides for a uniform and equal rate of assessment and taxation relates to a general assessment of taxes on property according to its value, and does not apply to a tax for a license to use vehicles upon the streets of a city (*The City of Terre Haute v. Kersey et al.* 1902, 159 Ind. 300). The excise tax, as applied to local sale and use of gasoline by a distributor, is consistent with the due process and equal protection of clauses of the Fourteenth Amendment (*Bowman, Attorney General of the State of New Mexico, et al v. Continental Oil Co.*, (1921), 256 U. S. 642, 649; *Standard Oil Company v. Brodii*, 153 Ark. 114, 239 S. W. 753; *In Opinion of Justices (Me.)* 121 A. T. L. 902). An act entitled a license "On the use of gasoline," while it imposes a tax only on the use of gasoline for propelling automobiles operated upon the public highways of the state, is constitutional (*Board v. Scanlan*, 178 Ind. 142, 145, 98 N. E. 801; *Kaufman v. Alexander* (1909) 173 Ind. 136 88 N. E. 502). The selection of subjects for taxation is a legislative power that is not restricted by the constitution so long as the property is subject to the taxing power of the state, and the law is made to operate without discrimination (*The Board of Tax Commissioners et al v. Holliday et al*; 42 L. R. A. 826); and the mere fact that part of the money paid into the treasury by the residents of St. Joseph County may be used to build roads in other countries does not make the act invalid. Provision in the act for rebate of money paid for gasoline not used in operating the motor cars makes the necessary appropriation by law for payment of all lawful claims or rebates. (*Carr v. State ex Rel. Coetlosquet*, 127 Ind. 204, 210; 26 N. E. 778; *Henderson v. Board*, 129 Ind. 92, 100; 28 N. E. 778.)

It is within the power of the Legislature to levy an excise tax for the privilege of using a public highway. Obtaining this result indirectly by imposing a tax upon the sale of gasoline which is to be used in motor propelled vehicles can hardly be said to be objectionable. As to the constitutionality of the license tax, against the business as a whole where interstate and intrastate business is engaged in indiscriminately at the same stations and same agencies see, *Leloup v. Port of Mobile*, 127 U. S. 640; *Williams v. Talladega*, 226 U. S. 404. The mere fact that those dealing in gasoline are required to make returns of the amount sold and to collect and pay the tax does not render the act unconstitutional. (*Purce Oil Corp. v. Hopkins*, 264 U. S. 137, 44 S. et 251, 68 L. E. 593.) As to power of Legislature over subjects of taxation see Black on CONSTITUTIONAL LAW 2nd edition p. 375; Cooley on TAXATION 4th edition Art. 259.

P. E. T.

FOOD—LIABILITY OF VENDOR ON IMPLIED WARRANTY—LIABILITY OF MANUFACTURER WITHOUT REGARD TO CONTRACTUAL RELATIONS.—Recently an appeal was taken from a judgment assessing appellee's damages at \$400.00 and costs against appellant who was owner and proprietor of a restaurant and confectionery, from whom appellee, on or about January 1, 1923, purchased and paid for a minced chicken sandwich, which she then and there ate; the sandwich was made up of poisonous and deleterious substances, and by reason of eating it, the appellee became violently ill from ptomaine poisoning. The only error assigned by appellant is that the court erred in overruling his motion for a new trial. Here there was both a sale and an implied warranty, and under modern conditions and methods of service, the court stated that it saw no reason for upholding appellant's contention; especially since the decision would be in harmony with the great weight of modern authority. *Held*: that appellee, in order to recover, was not bound to allege and prove negligence on the part of the appellant. *Heise v. Gillette et al.* (Indiana App. Court, Oct. 29, 1925) 149 N. E. 182.

The court cited the cases of *Parks v. C. C. Yost Pie Company*, 144 Pa. 202. "A manufacturer or dealer who puts human food upon the market for sale or for immediate consumption does so upon an implied representation that it is wholesome for human consumption. Practically, he must know that it is fit or take the consequences if it proves destructive." Other authorities to the same effect are: *Doyle v. Feurst*, 56 So. 906; *Friend v. Child Dining Hall*, 231 Mass. 65, 120 N. E. 407, 5 A. L. R. 1100; *Muller v. Childs Company*, 171 N. Y. S. 541, 185 App. Div. 881.

Despite the cherished principle of no liability without fault, and regardless of the conception of liability as arising only between the parties to a sale, courts of today have frankly renounced such conceptions in certain cases and held that the liability extends to the persons injured, whether or not there was privity of contract. The decisions naturally fall into two classes: those which seek to fix liability on the theory of an implied warranty, and those based upon the negligence of the seller or manufacturer. Under the implied warranty cases, the early decisions varied, the Connecticut court holding in a case as late as 1914, that the remedy of a guest at a restaurant injured by impure food sold to him must be based on the negligence of the proprietor, *Merrill v. Hodson*, 91 Atl. 533. But during the same year the following decisions recognized the doctrine of an implied warranty by one who sells food for immediate consumption: *Leahy v. Ewax Co.*, 148 N. Y. S. 1063, (there is an implied warranty in the sale of pie of its fitness for consumption); *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33. (One preparing and selling food for human consumption impliedly warrants that it is fit for food); *Sloan v. Woolworth Co.*, 193 Ill.

App. 620 (a retailer of canned goods is liable on an implied warranty to a purchaser who sustains damage as a result of eating impure fish); *Tonsman v. Greenglass*, 142 N. E. 756. (Where a waitress bit down upon a wire nail in a piece of cake purchased by her employer from a wholesale bakery, recovery was allowed on the theory that such sale of food was under an implied warranty that the food was wholesome, and this warranty extends to the ultimate consumer of the food). Among later decisions it is held that under modern conditions, those who sell food to be consumed at once are liable under an implied warranty.

Under the line of cases that allow recovery on the negligence theory, the question of a duty to third persons caused much confusion. According to the early English cases of *Winterbottom v. Wright*, 10 M. 7 W. 109, and *George v. Skivington*, L. R. 5 Exch. 1, and as a result of the conception of liability as arising only between the parties to a sale, if a manufacturer negligently sells you a defective automobile negligently manufactured, not knowing of the defect and the defect being latent, you may recover if you are injured. But if you give the car to a friend and he goes out in it and is injured, he may not recover, yet if you had told the manufacturer that you were buying it for the friend, and then he went out on it and was injured, he could recover. A digression was first allowed in the case of those who manufactured articles imminently dangerous, but in *Cadillac Motor Co. v. Johnson*, 221 Fed. 801, 261 Fed. 878, and *MacPherson v. Buick Co.* 111 N. E. 1050, it was held that the principle that a manufacturer or seller of goods is liable for injuries due to defects is not limited to things which are in their nature implements of destruction, but if the nature of the thing is such that it is reasonably certain to place a person in peril when negligently made, the liability attaches, irrespective of contract. Both manufacturers and vendors are liable for injuries to third persons resulting from negligence in care or preparation of such food, without regard to contractual relations. One who was injured from glass found in canned spinach is entitled to recover from the manufacturer, *Rickenbacher v. California Packing Co.* 145 N. E. 280. A manufacturer is liable for negligence in the manufacture of food for human consumption whether the unfitness is due to deleterious ingredients or the presence of a foreign substance, and the plaintiff may recover for injuries suffered from biting down upon a piece of iron imbedded in a slice of bread.

The Indiana cases relative to the matter of negligence are: *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600: If a druggist is directed to put up for a customer a specified drug or medicine, and by mistake he puts up a different drug which causes injury and damage to such customer, the druggist is liable for the injury. But if a person sells machinery that is not imminently dangerous he is not liable for injuries caused by defects in the machinery unless he had knowledge of such defects at the time of sale, *Landeman v. Russell*, 46 App. 32, 91 N. E. 822, and the 1925 case previously cited holding that one who sells food for immediate consumption is liable on an implied warranty. Since there has been no adjudication on the subject of liability to third parties since 1910, it may fairly be inferred that this jurisdiction would follow the great weight of authority as expressed in the cases quoted parallel to the recent holding with regard to an implied warranty.

P. L. V.

LAST CLEAR CHANCE DOCTRINE—ACTUAL KNOWLEDGE OF PERIL.—According to the Indiana decisions, the last clear chance doctrine is applicable only where the defendant had actual knowledge of plaintiff's peril. A recent case involved an action for damages on account of injuries caused

by a freight train which was operated by the defendant. While walking on defendant's right of way, remote from any crossing, the plaintiff had fallen and struck his head on the rail, rendering him helpless and almost unconscious. Defendant's train ran over his arm. The counsel for the plaintiff contended that under the circumstances recited the defendant owed to the plaintiff a special duty under the last clear chance doctrine by charging that after the plaintiff had become incapacitated the defendant with knowledge of the fact negligently inflicted the injury which the plaintiff could not avoid. It was not shown that the defendant had actual knowledge of the plaintiff's peril. *Held*: that the special duty to use care towards the plaintiff does not arise without actual notice of the plaintiff's peril. *Southern Railway Company et al. v. Wahl* (Indiana, Sup. Court, October 8, 1925) 149 N. E. 72.

In *Krenzler v. Railroad Company*, 151 Ind. 587, where a small boy, who had fallen asleep on the railroad crossing was injured by a locomotive engine, it was held that in every case, one who himself has contributed to his own injury, must suffer the consequences of his own want of due care, unless it should appear that the one injuring him knew of his condition in time to have avoided the injury. Other Indiana cases in point are: *Terre Haute etc. Traction Co. v. Stevenson*, 123 N. E. 785. *Union Traction Co. v. Vatchet*, 191 Ind. 324 132 N. E. 591. *Evansville etc. Traction Co. v. Johnson*, 54 Ind. App. 601. 97 N. E. 176.

It seems hardly consistent to state that the Indiana courts are split on the interpretation of this doctrine, yet it is held in 168 Ind. 398, that it is not necessary that defendant should actually know of the danger to which the plaintiff is exposed. It is there said that it is enough, if having sufficient notice to put a prudent man on the alert he does not take such precautions as a prudent man would take under similar circumstances. This case however, can be reconciled with the preceding cases. But, *Indianapolis Traction Co. v. Kuld*, 167 Ind. 402, is clearly a departure from the rule as generally applied. It is said in this case that it is no departure from just principles, but a wholesome and humane doctrine, to hold, if either after the defendant knew or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover. A street railway company is chargeable with knowledge of a woman's presence on a railroad track, where the motorman had an unobstructed vision of her for 1000 feet.

The last clear chance doctrine is generally attributed to *Davies v. Mann*, 10 Mees, & W. 546 in which case the owner of a donkey, who negligently turned it out on the highway with its feet hobbled, was allowed to recover from a person driving along the highway, who carelessly ran into and killed it. The case is rather vague as to whether the defendant had actual knowledge that the donkey was on the highway, but it would seem that he did not have such knowledge, for it was proved that the driver of the wagon was some little distance behind the horses. So it would seem that it is not necessary that the defendant have actual knowledge of plaintiff's peril.

In Texas this doctrine is called the "Discovered Peril Doctrine." From the very name it appears that it is necessary that the defendant have actual knowledge. Under this doctrine, as in negligence cases generally, the burden is on the plaintiff to establish the essential elements of liability, including actual discovery and not mere duty to discover immediate peril to plaintiff or his property. *Schaff v. Copass*, (Texas) 262 S. W. 234. Is this an anomalous interpretation of the doctrine as originally laid down? How can the plaintiff ever prove that the defendant had actual knowledge?

Who better knows than the defendant himself as to this? And will not the defendant always contend that he did not have such knowledge? But even if the defendant is possessed of actual knowledge, would not the following statement be true? To knowingly injure another, when with ordinary care such injury could be avoided, is not mere negligence, but rather a wilful wrongdoing or at least such a wanton disregard of consequences as amounts to wilfulness. In Utah the interpretation is directly *contra* to the above exposition. Where one owing a duty to maintain a lookout, could in the exercise of ordinary care and vigilance, have discovered the perilous situation of the plaintiff in time to have averted the injury, the law presumes that he saw what he ought to have seen, and actual discovery is not necessary. *Teakle v. Railroad*, 32 Utah 276. 90 Pac. 402. Other states in accord with this statement of the doctrine are Missouri, Colorado, North Carolina, Michigan, Washington, and Ohio. *Logan v. C. B. & Q. Railroad Company*, 254 S. W. 705; *Colorado & So. Railroad Company v. Western Light & Power Company*, 214 Pac. 30; *West Construction Company v. Atlantic Coast Line Railroad Company*, 116 S. E. 33; *Gibbard v. Cursan*, 196 N. W. 398; *Leftridge v. City of Seattle*, 228 Pac. 302; *Cleveland Ry. Company v. Nicholson*, 11 Ohio App. 424. States holding with Indiana are California, Oregon, Minnesota, Nebraska, Montana, South Dakota, Iowa and Texas. *Los Angeles Ry. Company v. Malone*, 238 Pac. 110; *Moser v. So. Pac. Company*, 222 Pac. 736; *Miller v. Canadian Northern Ry. Company*, 281 Fed. 664; *Marshall v. Hines*, 271 Fed. 265; *Stricklin v. Chicago, M. & St. Paul Ry. Company*, 197 Pac. 839; *Miller v. Sioux Falls Traction Company*, 184 N. W. 233; *Miller & Kiger v. Des Moines City Ry. Company*, 195 N. W. 600.

D. M. W.

DESCENT AND DISTRIBUTION—WIDOW DURING SUBSEQUENT MARRIAGE MAY NOT ALIENATE—WHAT GOES TO CHILDREN OF THE FIRST MARRIAGE.—The instant testatrix having been married before, and holding property in virtue of the former marriage, there being children by the former marriage, died leaving also children by the later marriage. A suit for partition was brought in regard to the land held in virtue of the former marriage. *Held*: the property so acquired descends to the children of the one from whom the property was acquired by the wife, as against the children of the second or subsequent marriage. *Mugg et al. v. Fenn* (Indiana, App. Ct., Oct. 16, 1925) 149 N. E. 99.

This case falls under section 3015 of Burns Annotated Statutes, 1914, and follows the general line of Indiana cases that a widow may not during second marriage alienate land acquired through a former marriage where children or their heirs by the former marriage are living. Also the land descends to the children of the first marriage upon the death of the widow during second marriage. *Hasket v. Maxey* 134 Ind. 182, 33 N. E. 358; *Irey v. Mater* 134 Ind. 238, 33 N. E. 1018; *McNally v. White* 154 Ind. 163, 54 N. E. 794 (also reported in 56 N. E. 214). The widow may have her interest set off to her in severalty during second marriage, *Klinesmith v. Sockwell* 100 Ind. 589; *Christie v. Smith* 80 Ind. 573. But even so, upon her death during second marriage, her share so set off will go to the children by the first marriage, *Rozell v. Canfill* 43 Ind. App. 298, 85 N. E. 792. Her second husband takes no interest in the land as against the children of the former marriage, *Mathers v. Scott*, 37 Ind. 303. And the children while minors cannot join with their mother in alienation so as to deprive them of their rights to the property alienated, after her death, *Avery v. Akins*, 74 Ind. 283.

However, in Indiana, the rule is firmly established both by statute and by numerous decisions that a widow holding lands in virtue of a former

marriage cannot alienate the lands so acquired, during a later marriage, as against the children of the former marriage. Furthermore this rule is based on a statute of descent and not of limitation of title. This raises the question of just what right the widow took in the lands upon her husband's death. By statute dower is abolished in this state. This gives the widow only a life interest, which she may convey, while unmarried. And it would seem, were the cases to stop here, that she got no further right under our statute. However the intent, as shown by other cases, is to give the wife a fee, subject only to a limitation on her power to alienate during a subsequent marriage. During widowhood, and before second or later marriage she may alienate the property so acquired and it may even be re-conveyed to her during the second marriage with her right to hold it free from restrictions. *Forgy v. Davenport* 146 Ind. 399, 45 N. E. 592; *Piper v. May* 51 Ind. 283; *Deweese v. Reagan* 40 Ind. 513; *Newby v. Henshaw* 22 Ind. 334.

At common law the wife was entitled to dower, which gave her a life interest in one-third of her husband's realty, *Buckridge v. Ingram* 2 Ves. Jr., 664. This she could not alienate during a second marriage. However, she could alienate the life estate while she remained a *feme sole*: her interest or estate was absolute and the children or lack of children did not affect her right of alienation.

This Indiana rule is rather unique in the field of intestate law. Most of the states follow the common law more closely. However, some of the states have peculiar statutes governing this. Georgia holds differently. Louisiana, under the code with its civil law influence provides that during second marriage a widow could not alienate the land inherited from her deceased husband, but the title vests in the children, and the surviving wife gets but a *usufruct*, *Cook v. Doremus* 10 La. Ann. 679.

G. U. H.

INDIANA DOCKET*

CASES DECIDED BY APPELLATE COURT MONTH OF DECEMBER, 1925

- 12198 ADAMS v. McNUTT. Elkhart County. *Affirmed*. Enloe, P. J. December 9, 1925.
- 12376 BEAVER, *et al.* v. EMYR, *et al.* Boone County. *Affirmed*. Nichols, C. J. December 8, 1925.
- 12523 BEMENT OIL CORP. v. CUBBISON. Ind. Bd. *Reversed*. McMahan, J. December 17, 1925.
- 12448 BRAZILE v. DROLSHAGEN. Ind. Bd. *Affirmed*. Nichols, C. J. December 15, 1925.
- 12398 BROYLES v. PEARSON PIANO Co. Marion County. *Affirmed*. *Per Curiam*. December 10, 1925.
- 12117 C. I. & L. RY. v. ELLIS, Admr. Washington County. *Reversed*. Nichols, C. J. December 10, 1925.
- 12091 DAVIS, Dir. Gen. v. CLAPP. Marion County. *Reversed*. McMahan, J. December 9, 1925.
- 12440 DOWERY v. STATE. Ind. Bd. *Affirmed*. Remy, J. December 18, 1925.
- 12453 FLECKLES v. HILLE. Ind. Bd. *Reversed*. Remy, J. December, 15, 1925.
- 12450 GRASSELLI CHEM. Co. v. SIMON. Ind Bd. *Affirmed*. Enloe, P. J. December 17, 1925.
- 12241 HICKS, *et al.* v. HICKS Pike County. *Reversed*. Remy, J. December 8, 1925.
- 12236 MERCANTILE COM. BK. v. KOCH, *et al.* Ind. Bd. *Reversed*. McMahan, J. December 15, 1925.
- 12176 NIGH v. STATE. Marion County. *Reversed*. Nichols, C. J. December 15, 1925.
- 12329 P. C. C. & ST. L. v. STAATS, Admr. Wayne County. *Affirmed*. McMahan, J. December 8, 1925.
- 11921 P. C. C. & ST. L. v. BUENTING. Sullivan County. *Affirmed*. McMahan, J. December 18, 1925.
- 12152 RICHARDSON, *et al.* v. CROUCH, *et al.* Boone County. *Reversed*. McMahan, J. December 10, 1925.
- 12200 RUDOLPH v. AYDE, *et al.* Pike County. *Affirmed*. Nichols, C. J. December 10, 1925.
- 12062 SINGER, *et al.* v. WASH. LIGHT & POWER Co. Daviess County. *Reversed*. Remy, J. December 16, 1925.
- 12085 SONKEN v. GEMMILL, Admr.. Jay County. *Reversed*. McMahan, J. December 18, 1925.
- 12388 WILSON v. WILSON. Shelby County. *Affirmed*. Enloe, P. J. December 8, 1925.
- 12185 YARLOTT v. BROWN. Pulaski County. *Affirmed*. Nichols, C. J. December 18, 1925.

* It was not possible to give the brief abstracts of each case in this issue because of limited space. This service in complete form will be carried in future issues.

CASES DECIDED BY SUPREME COURT MONTH OF DECEMBER, 1925

- 24875 BARBER v. STATE. Clay County. *Reversed. Per Curiam.* December 15, 1925.
- 24748 CAMPBELL v. STATE. Warrick County. *Reversed.* Gemmill, J. December 17, 1925.
- 24544 DUMAS v. STATE. Vigo County. *Reversed.* Myers, J. December 17, 1925
- 24763 FRONCZAK v. STATE. Lake County. *Affirmed.* Gemmill, J. December 8, 1925.
- 24847 GERRETT v. STATE. Perry County. *Affirmed.* Willoughby, J. December 16, 1925.
- 24510 GMEINER v. STATE. Marion County. *Affirmed.* Myers, J. December 8, 1925.
- 24642 GROSE v. STATE. Marion County. *Affirmed.* Willoughby, J. December 10, 1925.
- 24627 *Ex Rel* HITCHCOCK v. FARRIS. Daviess. *Affirmed.* Ewbank, C. J. Travis, J., *dissents.* December 17, 1925.
- 24258 HOOSIER MFG. CO. v. BERRY. Hancock County. *Reversed.* Travis, J. December 8, 1925.
- 24815 MARTIN v. STATE. Marion County. *Affirmed.* Ewbank, C. J. December 11, 1925.
- 24247 PRUDEN. INS. CO. v. MOORE. Lawrence County. *Reversed.* Ewbank, C. J. December 8, 1925.
- 24452 ROBBINS v. STATE. Decatur County. *Affirmed.* Willoughby, J. December 8, 1925.
- 24935 ROBINSON v. STATE. Delaware County. *Reversed.* Ewbank, C. J. December 18, 1925.
- 24975 ROBINSON v. STATE. Delaware County. *Affirmed.* Ewbank, C. J. December 18, 1925.
- 24891 SCHEERER v. STATE. Grant County. *Reversed.* Willoughby, J. December 18, 1925.