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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

EVIDENCE—INSURANCE—APPEAL AND ERROR.—An action by Appellee against Appellant upon a policy of life insurance. Averment that on June 3, 1903, Appellant issued to one Leonard a policy of insurance on his life for $10,000. Answer alleging waiver of proof by denial of liability because of forfeiture, and setting up a general averment of performance. First allegation was dismissed. Appellant contended that evidence admitted to show waiver was inadmissible after dismissal of first allegation. Defendant appealed from judgment for Plaintiffs in circuit court of Posey County. *Held:* evidence of waiver of conditions of insurance contracts may be made under general denial; that employes of insurer are permitted to testify as to premiums paid to clarify entries in books which were offered as evidence, providing they did not act as agent in making or continuing contract; that deposits showing entries in the books of the home office of insurer as to premium are not admissible as part of *res gestae. Equitable Life Assurance Society of the United States v. Campbell et al.*, Appellate Court of Indiana, Dec. 19, 1925. 150 N. E. 31.

Where there is a general allegation of performance of the conditions of an insurance contract, proof of waiver of conditions may be made. *Union Fraternal League v. Sweeney*, 184 Ind. 378, 111 N. E. 305. *Travelers' Insurance Company v. Fletcher American National Bank*, 148 N. E. 501. But the evidence to prove a waiver of conditions must have probative force; such evidence must not be merely corroborative of more definite evidence because violent or unnatural inferences are not permitted. (Elliotts' Evidence No. 6.) Evidence that has no probative power should be rejected and withdrawn from consideration. "Evidence may be legally admissible as tending to prove a particular fact which yet for itself is utterly insufficient for the purpose. It may be a link in the chain, but it cannot make a chain unless other links are added." *Howard Express Co. v. Wile*, 64 Penn. 201; *Schrock v. Solar Gas Light Co.*, 222 Pa. 271, 273, 71 A 94, 95. If in the instant case Appellees should have produced definite evidence supporting the corroborative evidence as to the payment by note and waiver of receipt, the evidence of Appellees would not have been objectionable . Circumstances in this case sustain at most but a possibility of payment of second premium and as such they will not sustain a legitimate inference as a verdict of a jury cannot be upheld by mere conjecture or speculation. *Johnson v. Brady*, 60 Ind. App. 556, 109 N. E. 230; *Pittsburgh, Cincinnati, Chicago and St. Louis Railway Co. v Vance*, 58 Ind. App. 1, 108 N. E. 158. Instruction when offered, striking out corroborative evidence, should be given by the court.

Employes of an insurance company may be permitted to testify as to whether there is a waiver of a condition in an insurance policy and a payment made of premium, providing they do not come under the statute. (Section 523, Burns Rev. Stat. 1914.) But where as in the instant case the data concerning the insurance is handled by clerks, evidence is admissible. Entries made at the home of an insurance company disproving a waiver of a condition of an insurance contract are not admissible in evidence as part of the *res gestae* unless the entries were made at or near the time of the transaction from reliable information derived from those in charge of the business or work on which the action is based. *State ex rel. Romona Co. v. Central States Bridge Company*, 49 Ind. App. 544, 97 N. E. 803. *Johnson v. Zimmerman*, 42 Ind. App. 165, 84 N. E. 541. The rule is laid down that entries must be original and not on the representations made by another party. In *Fleming v. Jost*, 137 Ind. 195 it was held the

entries must be made at the time the act was done. The entries must be made by a person having knowledge of the facts entered, or at least knowledge that the information was communicated to the entrant by some person engaged in the business, whose duty it was to transact the particular business, and make a report thereof for entry. *Marks v. Box*, 54 Ind. App. 487, 103 N. E. 27.

J. C. A.

EVIDENCE—LIMITATION OF ACTIONS—WAR—MASTER AND SERVANT.—Claim for compensation was filed under the Workmen's Compensation Act by Ante Jelenovic, *et al.*, claimants for the death of Ivan Jelenovic. Appellees filed this claim with the Industrial Board averring that they are dependents of deceased who lost his life in September, 1917, as a result of an accident which occurred in the course of his employment by the appellant. The appellees were aliens living in that part of Austria-Hungary which is now Jugo-Slovia. They became alien enemies when the United States declared war on Austria in December, 1917. In 1918 the United States recognized Jugo-Slovia as an independent government, but did not formally ratify a treaty of peace with Austria and declare the war at an end until December 1921. This action was brought in March, 1923. Appellants contend that this claim is barred by the statute of limitations. Appellees claim that the statute was suspended because of war. *Held:* that recognition of Jugo-Slovia, with which the United States was at no time at war is not regarded as terminating the war against other powers; that the operation of the statute against alien enemies is suspended during the period of the war. *(Inland Steel Co. v. Jelenovic*, 150 N. E. 391.)

The statute of limitations in this action is two years. (Acts 1915 p 398 c. 106; Burns 1926, Section 9439.) However, this is suspended during the time that the appellees were alien enemies because they could not bring suit in our courts. The court will take judicial cognizance of the historical events which determine the duration of the appellees' alien enemy status. Recognition of a government arising out of a rebellion against the enemy does not necessarily change the status of the alien enemies domiciled in the territory then held by that government. *(Garvin v. Diamond Coal and Coke Co.*, 278 Pa. St. 469, 123 Atl. 468; *contra, Kolundjija v. Hanna Ore Mining Co.*, 155 Minn. 176, 193 N. W. 163.) Recognition of a foreign government is a political act and is conclusive in courts only in regard to those things it actually decides and this act was not intended to terminate the war. *(Hamilton v. Kentucky Distilleries*, 40 S. Ct. 106, 64 L. Ed. 194; Congressional Record 1919 pp. 4434, 4435.) Therefore, since recognition did not change the alien enemy status of the appellees, the statute of limitations did not resume operation until the ratification of the treaty of peace and the claim of the appellees is not barred by the statute.

Where the United States is waging war against another nation and a faction in that enemy nation rebels and seizes some territory and is recognized by the United States as a separate nation it does not necessarily follow that the alien enemy status of the people domiciled in that territory is changed. This status does not rest entirely on domicile but is also based on nationality which is not affected by a mere change in government. Therefore the recognition of Jugo-Slovia did not alter the status of the appellees and the statute of limitations remained in effect till 1921. (Dickinson, Recent Recognition Cases, 19 American Journal of International Law 263; The unrecognized Government or state in English and American Law, 22 Mich. Law Rev. 1; Mathews, The Termination of War, 19 Mich. Law Rev. 816.)

W. V. H.

NEGLIGENCE——FAILURE TO GIVE ATTENTION TO INJURED CHILD—ATTRACTIVE NUISANCE.—Appellee, a six year old boy, while playing on the appellant's railroad was injured by appellant's train. It was alleged that one of the employes in charge of the train knew that appellee was injured, that this employe negligently failed to render aid to appellee or report the accident for a period of forty minutes, and that this resulted in great loss of blood and infection to appellee's wound. It was further alleged that the company's right of way was an attractive nuisance. The cause was tried by a jury and there was a verdict and judgment for $10,000. Motion for new trial was overruled. *Held:* appellee was at most a licensee, the railroad right of way was not an attractive nuisance and there was no duty of aid to the appellee imposed on appellent's servant in the absence of an allegation that this servant knew that appellee was in need of his aid in an emergency. It appeared from the case that notice of appellee's injury was given at once to medical authorities by another employe and that appellee received medical attention five minutes after the injury. Decision reversed. *Davis v. Keller*, (Jan. 7, 1926) 150 N. E. 70.

In other jurisdictions it has been held that where a person is injured without fault on the part of the railroad company there is no liability on the railroad because its employe fails to give aid to the person injured, *Union Pacific R. R. Co. v. Cappier*, 66 Kan. 649, 72 Pac. 281; *Griswold v. Boston, & etc., R. R. Co.*, 182 Mass. 434, 67 N. E. 354; 33 Cyc. 774. It seems that the Indiana courts have not decided this question hitherto, although in *Tippecanoe & etc., Co. v. Cleveland & etc., Co.*, 57 Ind. App. 644, 106 N. E. 739, attention is directed to this rule in other states. But in the instant case, the court said, "the duty of the railroad only arises, if at all, as to a bare licensee or trespasser, out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save live or prevent great injury." Thus the court felt that in this case there was no urgency for the particular employe to aid the appellee since he was receiving medical attention with great promptitude through notice given by another employe, *Ohio, etc., R. R. Co. v. Early*, 141 Ind. 73, 40 N. E. 257. It seems that Indiana is now added to the jurisdictions that hold that there is no relational duty of aid owed by a railroad company to an injured licensee unless there is an actual emergency. It does not seem that the allegation of attractive nuisance could have been urged seriously. Surely if the entire right of way of a railroad company is an attractive nuisance there are no limits to this doctrine. In regard to the obligation to slow down when the train notices a small child playing on the track, the Indiana rule is in keeping with the general rule that there is a duty to slow down in the case of a child while in the case of an adult the duty is merely to sound a warning of the train's approach, "but in the instant case there is no averment that appellee was either on the track or in a place of danger as the train approached." R. M. W.

INDIANA DOCKET

APPELLATE COURT

12142 ADAMS v. SHAMROCK OIL Co. Grant County. *Affirmed. Per curiam.* February 2, 1926.

12212 ASHLEY v. KELLEY, *et al.* Spencer County. *Denied.* Nichols, C. J. February 5, 1926.

Where an adjoining landowner is required to pay his part toward a partition fence under the statute, he may be compelled to do so even though this fence is not of service to him.

12094 BALTIMORE & OHIO R. R. Co. v. APPLEGATE. Clark County. *Denied.* McMahan, J. February 17, 1926.

Petition denied and remittitur ordered.

12327 BRYAN v. REIFE, *et al.* Lake County. *Affirmed.* Thompson, J. February 17, 1926.

Where the judicial sale is not of the husband's real estate, the dower interest of the wife is not preserved as against bona fide purchasers for value. The recorded warranty deed of the owner and his wife was a good defense to any action under the statute, Burns R. S. 1926 Sec. 3052.

12179 BUSH, *et al.* v. GOBLE, *et al.* Clinton County. *Affirmed.* Enloe, P. J. February 17, 1926.

Where one deposits a note with a bank for collection, the possession of the note by the bank is *prima facie* evidence of its ownership of the note. There must be some positive evidence that the bank was merely acting as agent in order to overcome this presumption of ownership.

12244 COOK v. DEBUS. Starke County. *Affirmed.* February 24, 1926. *Per Curiam.*

12545 DE RAYA v. ILLINOIS STEEL Co. Industrial Board. *Affirmed.* Thompson, J. February 18, 1926.

The Industrial Board may pass upon the question of whether a widow was in fact dependent upon the earnings of the deceased and may judge of the creditability of witnesses.

12348 DOERR v. HIBBEN, HOLLWEG & Co. Marion Probate. *Affirmed.* Remy, J. February 26, 1926.

Where one partner makes a contract of guarantee with a merchant to cover value of goods which the merchant advances with wholesaler to cover the price of goods which the wholesaler advances to a store; then this contract of guarantee does not limit the merchant's recovery against the partner, if the partner was a general partner in this same store and concealed this fact from the merchant at the time of the guarantee.

12527 EUREKA COAL Co. v. POWERS. Industrial Board. Remanded to Industrial Board for further proceedings. Enloe, P. J. February 2, 1926.

Where appellant had received full payment for an injury under the Workman's Compensation Act, and where the evidence tended to show that his later injury was due to a subsequent accident, only then it was an error to admit a reopening of the original award on the ground that there had been recurrence of the injury.

12546 EVANSVILLE PURE MILK Co. v. ALLEN. Industrial Board. *Affirmed.* McMahan, J. February 10, 1926.

Where there has been medical attention furnished in the meantime, a claim for added compensation on the ground of a recurrence of the in-

jury is proper although it is not filed until more than a year after the original adjustment was made..

12335 FOSTER, *et al.* v. NORTH SIDE BANK. Vanderburgh County. *Affirmed.* Enloe, P. J. February 19, 1926.

Where a bank cashier secured checks for temporary deposit in order to obscure deficiencies in the bank's statement and then later a note was given to pay for these advances, this note was enforcible and not void for duress or illegality.

12305 GARBER v. KING. Marion County. *Affirmed.* McMahan, J. February 17, 1926.

Where a contract indicates that the sale of a certain number of shares of stock covers the total holdings of the vendor in the company, this does not tend to deceive another officer of the company who is presumed to know the actual holdings of the vendor. Where one makes a sale of stock independently of a pool of men who are arranging a merger of two companies, this independent transaction of the vendor is not involved in any fiduciary relationship which the members of the pool may bear to each other.

12525 HILL COAL & COKE CO. v. GREGSON, *et al.* Industrial Board. *Affirmed.* Remy, J. February 4, 1926.

Where decedent's sister was awarded compensation for partial dependency under the Workman's Compensation Act, there is no authority in the law for terminating this allowance merely on the ground of her subsequent marriage.

12242 HUNTINGTON GROCERY CO. v. VAN BUSKIRK. Wabash County. *Affirmed.* Nichols, J. February 24, 1926.

Judgment affirmed on the authority of *Kohler v. Grzesk*, 17 Ind. App. 702, 133 N. E. 506.

12285 JORDAN v. KITTLE. Marion County. *Affirmed.* McMahan, J. February 25, 1926.

A transfer of property in pursuit of a plan for divorce on condition that only certain allegations shall be made in the divorce proceedings is void as being an agreement to bring about a divorce.

12187 JOYCE v. GRISWOLD. Howard County. *Reversed.* Nichols, P. J. February 17, 1926.

Where non-residents are made defendants in an action to have a trust declared of property in Indiana, the action is against the property and personal service, such as would be required if the action were against non-residents personally, is not necessary.

12218 KILMER v. MCCORMICK. Delaware County. *Affirmed.* Bausman, J. February 23, 1926.

Where appellant lived with his married sister but was temporarily absent from the state at the time, there was sufficient service in the case of a suit on a promissory note to serve appellant at his sister's home.

12559 LANGDON v. HADLEY. Marion County. *Affirmed.* Bausman, J. February 26, 1926.

Judgment affirmed on the authority of *Pence v. Aughe*, 101 Ind. 317.

12069 MILLER, *et al.* v. MILLER. Rush County. *Affirmed.* McMahan, J. February 3, 1926.

Where one allows another to use his money in the purchase of a farm, and oral testimony shows that this was intended as a gift, then the creditors of the donor have no right to the property for the payment of his debt.

12340 MONTGOMERY, *et al.* v. CRUM. Vanderburg County. *Reversed.* Thompson, J. February 3, 1926.

Where the divorced husband has kept custody of the child in violation of the court's orders there is no right of action in damages for mental suffering in the divorced wife.

12524 NORMAN v. HARTMAN FURN. CO. Industrial Board. *Affirmed.* Thompson, J. February 4, 1926.

Where a salesman traveling for an Illinois corporation is killed on a railway in Indiana, there is no jurisdiction for the Industrial Board to make an award to his widow under the Workman's Compensation Act.

12219 OBERTING v. JUTTE. Marion County. *Affirmed.* Thompson, J. February 19, 1926.

Where the decedent deposited money in a savings bank in the joint name of himself and appellant in order that appellant might draw the money for the benefit of decedent, it was proper for appellee to bring an action to recover this money as belonging to decedent's estate.

12158 REITEMEIER v. LINARD, *et al.* Cass County. *Affirmed.* Thompson, J. February 24, 1926.

Where it appears that the instruction did not affect the verdict of the jury, there is no reversible error even though the instruction is wrong.

12152 RICHARDSON, *et al.* v. CROUCH, *et al.* Boone County. *Petition Denied.* McMahan, J. February 24, 1926.

There must be a showing of actual fraud if one is to set aside a sale of land on the ground that the sale was made with the fraudulent intent of both parties to prevent the creditor from collecting his judgment against the vendor.

12412 RUBIN, RUBIN v. HODES, MINKO, SCHULMAN. St. Joseph County. *Affirmed.* Nichols, C. J. February 17, 1926.

Where there is a contract of agency under which the agent is to have a certain time to secure a purchaser for land, the agent will be allowed to recover his commission if the owner refuses to consummate the sale within that time in order to avoid paying the commission.

12429 SECURITY TRUST CO. v. JAQUA. Morgan County. *Reversed.* McMahan, J. February 2, 1926.

Where an executor uses the money of an estate in his private affairs it is proper to charge him interest on the basis of the fair earning power of the money so used. Where the judge below died before the decision the bill of exception and testimony taken only before him was sufficient.

12145 SUMMERS v. BUTLER, *et al.* Allen County. *Affirmed. Per Curiam.* February 19, 1926.

12291 TRAVELERS INSURANCE CO. v. FLETCHER AMER. NAT. BANK OF INDPLS. & AMER. CENTRAL LIFE INS. CO. Morgan County. *Affirmed.* Nichols, J. June 25, 1925. *Denied* under date of February 19, 1926.

Petition for rehearing denied and opinion modified.

12547 UNITED STATES FURN. CO. v. PITTMEIER, *et al.* Industrial Board. *Reversed.* Remy, J. February 19, 1926.

Reversed on the authority of the *Indiana Bell Telephone Co. v. Haufe*, 81 Indiana Appeals 667: 144 N. E. 844.

SUPREME COURT

24803 BRONNENBURG v. STATE. Madison County. *Affirmed.* Ewbank, C. J. February 16, 1926.

Where appellant was known to have driven to a certain place and taken something from his machine and hidden it. He was later seen to have taken

this same receptacle and replace it in his machine and liquor was found in this receptacle. It is sufficient evidence for conviction on the ground of illegally transporting liquor.

24914 BURNETT v. STATE. Marion County. *Affirmed.* Willoughby, J. February 17, 1926.

Where the evidence shows that two officers saw the defendant transport liquor in his automobile and this evidence was not contradicted, there was sufficient evidence to justify a conviction for illegally transporting intoxicating liquor.

24150 CHAPPELL v. STATE. Marion County. *Reversed.* Myers, J. February 18, 1926.

Where the liquor was manufactured by appellant's wife and found in the rooms of his boarder, there was not sufficient evidence to convict him of manufacturing liquor although there might be a conviction for possessing liquor.

24319 DALE v. STATE. Delaware County. *Reversed.* Travis, J. February 25, 1926.

To publish an article alleging that the officers of the court were in connivance with criminals to wrongfully convict appellant of violation of the liquor laws is a direct contempt of the court itself.

24869 ARTHUR EISENSHANK v. STATE OF INDIANA. Dearborn County. *Reversed.* Gemmill, J. February 5, 1926.

The prohibition law of 1917 is constitutional. If the court instructs the jury that it is to judge both the law and facts, the court need not add that the jury may disregard the court's instructions.

24525 VONNIE FENWICK v. STATE /o INDIANA. Delaware County. *Affirmed.* Myers, J. February 19, 1926.

Appellant by the acceptance of a jury waived irregularities in their selection if no fraud was alleged.

24946 HASSE v. BIELEFELD. Lake County. *Reversed.* Myers, J. February 5, 1926.

Where the state board acting under section 152 of the Tax Law of 1919 authorized reassessment of real estate in North Township in Lake County upon a local basis, this was error since after 1922 the State Board of Tax Commissioners was required to act wholly as a state wide board.

24992 HICKS v. STATE. Perry County. *Reversed.* Willoughby, J. February 23, 1926.

Where appellant was found drunk near a Ford car and the registration card of that automobile was not on the car at the time, there was not sufficient evidence to convict the appellant of driving an automobile while intoxicated.

24860 HINES v. STATE. Delaware County. *Affirmed.* Gemmill, J. February 2, 1926.

Where appellant had been the housekeeper for a man during a period of eight years and there was no further evidence submitted, it was proper for the court to instruct the jury that there was no evidence that appellant was the common law wife of her employer. This instruction did not tend to injure the character of appellant in the minds of the jury in an action in which she was charged with manufacturing liquor illegally.

11786 HITT, *et al.* v. CARR, *et al.* Laporte County. *Reversed.* Bausman, J. February 19, 1926.

Where there is a written summons showing that appellant had been served, it was improper to admit another summons which purported to state that appellant could not be found. Admission of the later summons was bad since it impeached the record.

24827 LEJUSTE v. STATE. Delaware County. *Reversed.* Gemmill, J. February 25, 1926.

Where a search warrant described the premises as "a one and one-half story house in East Harris Street in the Town of Eaton, gray in color," it was held that this was insufficient where it appeared that there were other such houses in this block.

24447 LUGAR v. BURNS. Benton County. *Affirmed.* Ewbank, C. J. February 24, 1926.

Persons who do not leave a precinct with the intention of changing their domicile and do not in fact later change their domicile retain their right to vote in that precinct.

24286 MARSH v. STATE. Vanderburgh County. *Reversed.* Willoughby, J. February 16, 1926.

The fact that one is riding with a person who is transporting intoxicating liquors is not sufficient evidence to convict him of illegally transporting liquor.

24794 PALMER v. STATE. Vigo County. *Affirmed.* Gemmill, J. February 19, 1926.

When women became voters under the 19th amendment all those who were freeholders or householders became eligible to jury service under the Indiana law. Where in a criminal case it is not necessary to prove that a certain concern is a corporation, failure to so prove such an allegation is immaterial.

25000 POCKER v. STATE. Harrison County. *Affirmed.* Ewbank, C. J. February 3, 1926.

General objections to the admission of testimony without alleged specific reasons for its exclusion at the time will not make the admission of such testimony bad. An instruction that the possession of mash was not sufficient to support a conviction for violation of liquor laws was correct.

24743 REYMAN v. STATE. Orange County. *Affirmed.* Ewbank, C. J. February 6, 1926.

Where defendant accused of conspiracy has burned a building belonging to others as well as himself in order to defraud an insurance company, a conviction is proper although he was not the sole owner. Jurors may not impeach their own verdict by representation of misconduct.

24537 SHACKLETT v. STATE. Marion County. *Affirmed.* Myers, J. February 25, 1926.

It was no entrapment of the appellant where an officer secured liquor from her by telling her that the officers were gone and that she should hurry and give him some before they returned.

24475 SLICK v. STATE. Marion County. *Affirmed.* Willoughby, J. February 25, 1926.

Where under the old law possession of liquor was not a crime, evidence that the defendant had made and possessed the liquor would not result in error if she were acquitted under these facts.

24585 SNEDEGAR v. STATE. Putnam County. *Affirmed.* Travis, J. February 5, 1926.

A search warrant issued under the prohibition act is valid if directed to the one in actual possession of property even though he does not live there and is not the owner. An error in fixing upon the owner of the premises is not significant where the premises themselves and the articles in use there are correctly described.

24439 SPOHN v. STARK, *et al.* Elkhart County. *Affirmed.* Ewbank, J. February 23, 1926.

Where Appellant leased his property to the state for a period of five years, it was correct to tax the property as belonging to the Appellant under the regular tax laws.

24806 STATE *ex rel* FREELAND, *et al.* v. BURNS. Decatur County. *Reversed.* Ewbank, C. J. February 26, 1926.

Where bonds have been determined upon by a municipality the statute of 1921 allows fifteen days thereafter within which to file an appeal to the state board of tax commissioners. The amendment to that provision, Acts 1923, page 264, is not retroactive.

24323 STATE ON RELATION OF TAYLOR v. WHETSEL. Jay County. Petition for Rehearing *Overruled.* Ewbank, C. J. February 19, 1926.

It is the duty of the court to search the record in order to uphold a judgment of a lower court. Here the evidence properly showed that the children lived in the district where the school was.

24427 TOWN OF ST. JOHN v. GERLACH, *et al.* Lake County. *Affirmed.* Ewbank, C. J. February 19, 1926.

Proceedings by appellee to have their land disannexed from the appellant town, such disannexation was proper where the taxes were higher without any benefit to the land concerned. Such authority in the court does not make the statute unconstitutional on the ground of its exercising legislative functions.

25130 TERRE HAUTE, INDPLS. & EASTERN TRACTION CO. v. SCOTT. Boone County. *Reversed.* Ewbank, C. J. February 18, 1926.

Where a passenger sues carrier for damages sustained where robbers attack the carrier's train, there can be no recovery unless it appeared that the carrier's servants were negligent in not giving the plaintiff due protection under the circumstances.

24561 WELCH v. STATE. Martin County. *Reversed.* Myers, J. February 16, 1926.

Where wife was riding with her husband in an automobile which contained intoxicating liquor and there was no direct evidence that she was participating in this transportation, it is error to convict her of illegally transporting liquor.

25020 ZAKRASEK v. STATE. Elkhart County. *Affirmed.* Travis, J. February 16, 1926.

Ignorance of the new law that possession of intoxicating liquor alone is an offense will not prevent the defendant from conviction for violation of the law.