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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

AGENCY—NEGLIGENCE—LIABILITY FOR INJURIES TO INVITED GUEST.—Defendant invited Plaintiff to become his guest and ride in Defendant's automobile. Plaintiff accepted the invitation and while traveling on a highway, Defendant lost control of the machine and ran off the road causing the automobile to turn over and injure Plaintiff. Plaintiff charges Defendant with negligence in driving said automobile. *Held*: Automobile driver is liable for negligence causing injuries to his invited guest. *Munson v Rupker*, 148 N. E. 169; rehearing denied in 151 N. E. 101.

The question of controlling importance in this case is whether Defendant owed Plaintiff the duty of reasonable care. Defendant insists that Plaintiff was a licensee or guest at sufferance and that the only duty imposed upon him was not intentionally or wantonly to injure Plaintiff. The court says, "We cannot agree with this contention, even if it be conceded Plaintiff was a licensee or guest at sufferance. Under the facts as testified to by Defendant an implied invitation on the part of Defendant might well be inferred." The decision of the court however is based upon the theory that Plaintiff as not an invitee, but was a licensee.

The general rule as established by the authorities is that the owner or operator of an automobile owes to an invited guest the duty of exercising reasonable care in its operation and not unreasonably to expose him to danger and injury by increasing the hazard of travel.

Perkins v Galloway (1915) 194 Ala. 265, 69 So. 875, L. R. A. 1916 E. 1190, second appeal *Galloway v Perkins* 198 Ala. 658 73 So. 956; *McGeever v O'Byone* (1919) 203 Ala. 266, 82 So. 508. *Spring v McCabe* (1921) 53 Cal. App. 336, 200 Pac. 91. *Barnett v. Levy* (1919) 213 Ill. App. 268. *Bear v. Klusmeier* (1914) 158 Ky. 153; 164 S. W. 319, 50 L. R. A. (N. S. 1100, Ann. Cases 1915D 342. *Fitzjarrell v. Boyd* (1914) 123 Md. 497, 91 Atl. 547; *Avery v. Thompson* v17 Me. 120, 103 Atl. 4, L. R. A. 1918D 205.

In *Perkins v. Galloway, supra,* it was held; One not a common carrier, who voluntary undertakes to transport another in his automobile, is responsible for injury to the person transported resulting from negligence, whether the service was for compensation or was gratuitous. The duty of the owner of an automobile to the occupant of the car is to exercise reasonable care in its operation, not unreasonably to expose to danger and injury the occupant by increasing the hazard of the method of travel. He must exercise the care and diligence which a man of reasonable prudence engaged in like business would exercise for his own protection and the protection of his family and property. The court discusses the hardship of the rule, saying: "It does seem to be a harsh or hard rule which makes the carrier or host liable to the passenger or guest as for injury or death, in the absence of great negligence or wantonness, especially when the passenger or guest is treated by the carrier or host just as the latter himself is treated, and when both are injured by the same accident. The rule as to trespassers and licensees upon real estate, with all its niceties and distinctions, is not to be applied to one ridin in an automobile at the invitaton of, or with the knowledge or tacit consent of, the owner and operator of the automobile. A trespasser or licensee going upon a tract of land—an inert immovable body —takes it as he finds it, with knowledge that the owner cannot and will not by any act of his start it in motion and hurl it through space in a manner that may mean death to him who enters thereon. He who enters an automobile to take a ride with the owner also takes the automobile and the driver as he finds them. But when the owner of the autombile starts it in motion, he, as it were, takes the life of his guest into his keeping, and in the operation of such car he must use reasonable care not to injure anyone

riding therein with his knowledge and consent. It will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood. The law exacts of any one who puts a force in motion that he shall control it with skill and care in proportion to the danger created. This rule applies to a guest at sufferance as well as to a guest by invitation."

R. M. W.

CONTRACTS—RIGHTS OF CREDITORS—RIGHT TO SHARE IN PROCEEDS—One A, acting as receiver for B company, entered into a contract with the state highway commission for the construction of a portion of a state highway, and the appellant became surety on his bond for the faithful performance of the same. The contract was duly performed and accepted by the commission. This litigation involves the distribution of $16,317.13 retained by the commission under the terms of the contract until after the road had been fully completed and accepted by the commission. The cause was tried on an agreed statement of facts, and the only error assigned is the overruling of the appellant's motion for a new trial, based upon the alleged causes that the decision of the court was not sustained by sufficient evidence and that the same was contrary to law.

Among the several creditors of A was one C company which had furnished lumber and materials that had gone partly into the construction of the road, partly in the construction of buildings in which to store cement to be used in the construction of the road, and partly in living quarters erected for the use and occupancy of the men employed by A in the building of said road. E was another creditor to whom A was indebted for the rental of locomotives, trucks, etc. used by A in the construction of said road. The trial court held that these two creditors were entitled to share *pro rata* along with the other creditors in the distribution of said fund so retained by the commission. The appellant contends that since E's claim and that portion of the claim of C company for lumber used in erecting the storage buildings and quarters for employees were not enforceable against it, as being within the terms of said bond, they had no right to share in the distribution of said fund, and that to permit them so to share would be prejudicial to its rights by thereby increasing the amount for which it was liable to other creditors whose claims were within the terms of its bond. *Held*: that the creditors, C company and E, were entitled to share in the distribution of the fund along with the other creditors because said fund was secured through their efforts also, not by their labor, but by their material and machinery furnished to and used by A, the contractor. *United States Fidelity & Guaranty Company et al. v. Macksville Gravel Company et al.* Appellate Court of Indiana, Jan. 27, 1926. 150 N. E. 390.

The court, in rendering its decision, said, "No case similar to the one now under consideration has been cited by counsel upon either side, and, after a considerable search of the authorities, we have been unable to find a similar case, but we hold that it is well within the principle announced in the cases cited above." The cases cited were: *Koons, Adm'r. v. Beach,* 147 Ind. 137, 46 N. E. 587; *Justice v. Justice,* 115 Ind. 201, 16 N. E. 615; *Miedreich v. Rank,* 40 Ind. App. 398, 82 N. E. 117; and *Puett v. Beard,* 86 Ind. 44 Am Rep. 280. In the latter case Judge Elliott, speaking of the rights of an attorney, said, "We feel no hesitation in declaring that the attorneys have the better and senior right. Their services secured the judgment for their client, and upon the principle which gives a mechanic who manufactures an article a paramount right, they should receive their reward. It is no fanciful analogy that likens the rights of an attorney to such cases, for, in a

limited sense, his services create his client's judgment. Considerations of public policy require such a result.* * * It is generally agreed, both here and in England, that a solictor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those cleaming as their creditors. * * * The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected." B. E. S.

STATUTORY CONSTRUCTION—CONSTITUTIONAL LAW—NEGLIGENCE IN OPERATING AN AUTOMOBILE—Appellee brought an action against appellant for damages alleging that the negligence of appellant was the cause of damage to appellee's automobile. Appellee alleged that he was driving his automobile with due care when he ran into Appellant's automobile truck, because of Appellee's negligence in not having a tail light burning at the time as required by the Indiana statute. (Ind. Acts. 1919 c. 161) There was a verdict for Appellee in the court below and Appellant appeals. *Held*: That the Indiana statute required the light to be burning even though the automobile truck was not in motion at the time and that the statute is constitutional on the ground that it involves a reasonable exercise of the police power. *Koplovitz v. Jensen* 151 N. E. 390 (Supreme Court of Ind., April 2, 1926).

The Indiana statute requires that two head lights and one tail light be kept burning on all automobiles from one-half hour after sunset to one-half before sunrise in the case of "every motor vehicle or motor bicycle operated or driven upon any public highway in this state." Appellant contended that while the automobile truck was stationary it was not "operated or driven" within the words of the statute and hence there was no requirement of keeping lights burning. Iowa and Utah have statutes on this point that are similar to the Indiana law and the courts of those states have held that a stationary motor vehicle is not required to keep lights burning under the law. *City of Harland v. Kraschel* 146 N. W. 463 Iowa 667,*Musgrave v. Studebaker Bros.* 160 P. 117, 48 Utah 410. Even where the Iowa Legislature changed their law to require lights on all cars "in use" on the highway, the Iowa courts still held that a stationary car need not have lights. *Griffind v. McNeil* 201 N. W. 78, 198 Iowa 1359. On the other hand a contrary view on the basis of almost identical statutes is reached in Massachusetts and Vermont. *State v Bixby* 100 Atl. 42, 92 Vt. 287; *Commonwealth v. Henry* 118 N. E. 224, 229 Mass. 19, L. R. A. 1918, 827. The theory of the Vermont and Massachusetts courts is that the legislature must have considered that an automobile is fairly "in use" or "in operation" or "driven" although it may not be in motion every instant. Thus the legislature would fairly intend to require lights on an automobile which stopped at the curb for a few minutes only. The Indiana case follows the doctrine of Vermont and Massachusetts rather than that of Iowa and Utah. This seems a sound interpretation. To have held that an automobile was not "in operation" within this statute whenever it was stationary for a moment would have defeated the purpose of the act and would have led to needless litigation.

Appellant also claimed that the statute was unconstitutional being in conflict with Section 1 of the Fourteenth Amendment of the Federal Constitution and Sections 22 and 23 of Artcle 4 and Section 23 of Article 1 of the Constitution of Indiana. These constitutional provisions in Indiana require the legislature shall not pass any local or special laws in many cases, that all laws shall be general if possible and that no laws granting special privileges shall be passed. The court points out that this statute is a proper legislative enactment under the police power for the protection of life and property of citizens. If there is a reasonable occasion to regulate

automobiles and the regulation itself is not discriminatory, the statute is good even though it does not regulate other vehicles which might be regulated with equal propriety. There is no inequality or discrimination under the Indiana or the Federal Constitution merely because certain things are selected for regulation and others are left unregulated. *Minnesota, etc., v. Ry. Co. v. Beckwith* 129 U. S. 26, 32 L. Ed. 585; *Barbier v. Connolly* 113 U. S. 27, 28 L Ed. 923; Cooley's Constitutional Limitations (6th Ed.) pp. 479, 481.

P. L. S.

TRUST—CONSTRUCTIVE TRUSTS BASED ON THE MISAPPROPRIATION OF CORPORTION FUNDS—RIGHT TO DEPOSIT TRUST FUNDS IN PRIVATE ACCOUNT.—In the instant case the appellants were receivers for an insolvent corporation whose president was charged with depositing corporation funds in his personal bank account and buying real estate with the corporation's money so deposited. The president died and the real estate in question passed into the hands of his wife who was named as a joint grantee in the original purchase. The action was brought to have the wife declared a constructive trustee for the realty for the benefit of the creditors of the corporation. *Held*: That since the lower court did not find as a fact that funds of the corporation were used in the purchase of the land, there was no basis for a constructive trust. *Edmundson, et al. v. Friedell, et al* 151 N. E. 336. (App. Court of Ind., March 31, 1926).

It appeared in the instant case that the president of the corporation opened a bank account in the name of "M. W. Friedell, President of the Black Panther Oil and Refining Corporation." The court held that this constituted a personal account of Mr. Friedell rather than a corporation account since the reference to him as president of the corporation was purely descriptive. (Huffcut, Agency 2nd Ed. page 170 and 237). *Wilks v. Beck*, 2 East 142; *Mussey v. Scott*, 7 Cush. (Mass.) 215; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274. It appeared that the defendant president of the corporation deposited about $100,000 of his own money in this account and that the realty for which a constructed trust is asked cost $25,000. Purchase price for this realty was paid from this account.

It seems that regardless of whether money was misappropriated by the president of the corporation or not, so long as the president did not then draw more from this account than the amount of his own rightful deposits in it, the law will presume that he used his own money to purchase the realty in the name of his wife and himself and that he did not employ money deposited to his personal account but rightfully belonging to the corporation. This doctrine is in keeping with the rule in *Clayton's case* but it is not dependent upon it. It is supported by ample authority both in England and America. James Roscoe (Bolton), *Limited v. Winder*, (1915) 1 Ch. 62; *American Can Co. v. Williams*, 178 Fed. 420; *Woodhouse v. Crandall*, 197 Ill. 104. While it is usually bad management for a trustee to deposit trust funds to his personal account in a bank it is not illegal for him to do so. *Schuyler v. Littlefield*, 233 U. S. 707; *Beard v. Independent District*, 88 Fed. 375.

P. L. S.

INDIANA DOCKET

APPELLATE COURT

12477 AUTOMOBILE DISCOUNT CO. v. BALL. Marion County. *Reversed.* Nichols, C. J. April 22, 1926.

Where a mortgagee has a right to retake the chattels mortgaged upon breach of a condition, such a taking of possessions is lawful and the mortgagor may not bring replevin to recover them.

12492 BEARD CONSTRUCTION CO. v. BUSH *et. al.* Industrial Board. *Affirmed.* Dausman, J. April 20, 1926.

Per curiam.

12438 CLARAGE FAN COMPANY v. PALACE THEATRE. St. Joseph County. *Reversed.* Thompson, J. April 27, 1926.

Where there is uncontradicted evidence of some work done at the buyer's request, a verdict refusing any recovery to the complainant is erroneous.

12558 COLGATE & CO. v. SMITH. Industrial Board. *Affirmed.* Enloe P. J. April 21, 1926.

A wife may recover under the workman's compensation act on the ground that she was dependent on her husband even though she lived apart from him if the separation was entirely with his consent.

12460 COOPER TAYLOR, *et al.* v. WRIGHT. Vigo County. April 9, 1926. *Per Curiam. Affirmed.*

12413 DICKOVER v. OWE. Tipton County. *Reversed.* Nichols C. J. April 9, 1926.

Where the damages are excessive and the jury might have been led to give such damage because of an erroneous instruction, which was later withdrawn, it is proper to grant a new trial.

12551 DIME SAVINGS & TRUST CO. v. JONES. Allen County. *Reversed or Affirmed Conditionally.* McMahan, J. April 28, 1928.

Where testimony is admitted by the trial court in violation of the rules of evidence but without object by the court or council in the case, there is no ground for reversal if the testimony supports the verdict.

12481 DINSMORE v. KREIGHBAUM. Fulton County. *Reversed.* Nichols, C. J. April 22, 1926.

Per curiam.

12402 THE EQUITABLE ASSURANCE SOCIETY v. CAMPBELL. Posey County. *Appellees petition for rehearing is denied.* Nichols, C. J. April 27, 1926.

Per Curiam.

Per Curiam.

12357 EVANSVILLE SUBURBAN & NEWBURG RAILWAY CO. *v.* HAWKINS, *et al.* etc. Gibson County. Per Curiam. *Affirmed.*

11907 HOLLOWELL v. LEARY, *et al.* Marion County. *Affirmed.* April 20, 1926.

Per Curiam.

12392 JEFFERS v. NEAL. Vanderburg County. Per Curiam. *Affirmed.* April 9, 1926.

Per Curiam.

12595 KNITTLE *v.* AYRES, *et al.* Industrial Board. *Affirmed.* Remy, J. April 7, 192.

Per Curiam.

12032 LAYNE, *et al.* v. HOOVER, *et al.* Miami County. *Reversed.* Enloe P. J. April 2, 1926.

Where a contractor appeals from the ruling of the county board on compensation for road building, this appeal must be heard by the courts without jury trial under the statute.

12488 LYNCH, *et al.* v. MARTIN. Sullivan County. *Affirmed.* Nichols, C. J. April 22, 1926.

In an action in replevin to recover personalty against the widow in possesion thereof, declarations by the deceased owner of the chattels while he possesses them are admissible evidence.

12266 MANN v. MANN. Adams County. *Affirmed.* Thompson, J. April 22, 1926.

12423 MARTIN v. MORRIS Harrison County. April 7, 1926. Per Curiam. Judgment *Affirmed.*

12417 *MAXWELL* GRAVEL CO. v. FISHER, *et al.* Hamilton County. *Affirmed.* Enloe, P. J.

Where there are two defendants and the verdict was correct as to one of them in any case, a motion for a new trial for both defendants is properly overruled.

12470 MCGAHAN v. MCGAHAN, *et al.* Warren County. *Affirmed.* Nicholas, C. J. April 27, 1926.

Where a deed is made in absolute terms giving a fee simple ot a wife and then at the end a provision is inserted that "at the death of Ella J. McGahan that the above described land shall revert back to" the grantor, this creates a base fee so that where the wife outlives her husband, she gets a fee simple and the children of the grantor get nothing.

12420 NATIONAL IMPORTING COMPANY, *et al.* v. CALIFORNIA PRUNE AND APRICOT GROWERS, INC. Hamilton County. *Affirmed as to the company and reversed as to Meditch.* McMahan, J. April 27, 1926.

Where the seller of produce notifies the buyer of the arrival of a shipment and then sells it at the market price, he may recover the difference between this price and the contract price.

12281 NATIONAL SURETY CO. v. FLETCHER SAVINGS & TRUST CO. Marion County. *Affirmed.* McMahan, J. April 29, 1926.

In the case of a bonding company that insures a bank against the dishonesty of its employees, the bank has satisfied the requirement of giving notice to the bonding company "five days after knowledge of loss" if it alleges that it notified the bonding company immediately and kept it constantly informed of its investigations.

12469 PRINCETON TELEPHONE CO. v. RUNCIE, *et al.* Posey County. *Reversed.* Nichols, C. J. April 22, 1926.

Where an action is begun on a landlord and tenant passes a showing that certain property was "loaned," is not enough to bring it within the allegations of the complaint.

12085 SONKER v. GEMMILL, *et al.* Jay County. *Reversed.* McMahan J. April 9, 1926.

Where a railroad goes into receivership and is ordered sold to pay creditors, a later particular lien on a part of the road does not have a preference.

12354 TOWN OF BEECH GROVE v. LOWRY. Marion County. April 9, 1926. *Per Curiam.*

24974 UNITED STATES OF AMERICA *v.* FLETCHER SAVINGS & TRUST CO. Marion County. *Affirmed.* Ewbank, C. J. April 21, 1926.

Where a claimant against a bankrupt company has made an adjustment of his claim prior to bankruptcy and no claim in the matter has been filed against the bankrupt estate within the time limit described, the courts will not require the trustee in bankruptcy to consider the claim.

12377 WOODHEAD V. DURST. Delaware Couny. April 7, 1926. Per Curiam. Judgment *Affirmed.*

12419 ZAINEY V. RIEMAN. Marion County. *Reversed.* McMahan, J. April 22, 1926.

Where the employee is not found guilty of negligence there can be no recovery against his principal if negligence in the employee is essential to recovery.

SUPREME COURT

24851 BECK V. WETTER. Marion County. *Affirmed.* Myers, J. April 20, 1926.

Although the statute does not provide for contents in the case of the election of precinct committeemen under the primary law, the court holds that it is an elective office which contemplates legal rights incidental to public office and a contest over an election to precinct committeemen will be entertained by the courts.

24771 BRIDGES V. STATE. Hancock County. *Affirmed.* Gemmill, J. April 29, 1926.

Where one search warrant fails to include the word "feloniously" and a later search warrant does include it and the search is made after both warrants are issued, the later warrant is valid.

24937 FAULKENBERG V. STATE. Perry County. *Affirmed.* Gemmill, J. April 7, 1926.

Where defendant is inditced for assault and battery with intent to commit murder, an erroneous instruction as to the element of intent for this crime will no be error where defendant is convicted of assault with intent to commit manslaughter under the indictment.

24572 HESS V. STATE. Vigo County. *Affirmed.* Myers, J. April 22, 1926.

Where the officers not acting under a search warrant issued under the prohibition law exceeded their authority and used unnecessary force and violence in searching the premises, the conviction for violence of the prohibition law may still be good on appeal, while the officers are subject to legal action for their wrongful conduct.

24193 KOPLOVITZ V. JENSEN. Lake County. *Affirmed.* Myers, J. April 2, 1926.

Under the Indiana law one is required to have tail lights on his automobile while the vehicle is stationary on the highway as well as when it is in motion.

24916 MOWIAN V. STATE. Marshall County. *Affirmed.* Gemmill, J. April 20, 1926.

To possess a still is a crime under the Indiana law regardless of whether it has been used or not. The record of a search warrant in the justice's office is immaterial so long as the warrant was duly issued.

23676 ROOKER, *et al.* V. FIDELITY TRUST CO., *et al.* Hamilton County. *Affirmed.* Travis, J. Ewbank, C. J., not participating. April 20, 1926.

Where the trial judge has been of counsel for one of the contestants, it is proper for the court and not the governor to appoint other judges to hear the case.

24475 SLICK v. STATE. Marion County. Petition for Rehearing is Denied. Willoughby, J. April 21, 1926.

The defendant's testimony about the condition of certain wine was sufficient to support an inference that he was connected with its manufacture so that a conviction for such manufacture would be good on appeal.

25037 STARKS v. STATE. Marion County. *Affirmed.* Ewbank, C. J. April 2, 1926.

Where the defendant charged with burglary gives false explanation about the goods of others that are found in his house, this is sufficient to support a conviction.

25160 STATE *ex rel* CURTIS, *et al.* v. SCHORTEMEIER. Marion County. *Reversed.* Ewbank, C. J. April 13, 1926.

In the case of circuit court judges that are appointed where the predecessor has died while in office, the court holds that the new appointee holds office until the last general election and not until the end of the term of the deceased judge. This is in keeping with the constitutional provision in Indiana.

25170 STATE *ex rel* CLIFTON, *et al.* v. SCHORTMEIER. Marion County. *Affirmed.* Ewbank, C. J. April 13, 1926.

Where there is a contest over an elective office, the court holds that the real parties of interest must appeal in the proceedings under the present statute in keeping with the general rule hitherto.

23732 STATE *ex rel.* LIEBER, *etc.* v. SLOAN, *et al.* Kosciusko County. *Affirmed.* Travis, J. April 22, 1926.

Where authority is given to the Conservation Commission, it is an unwarranted delegation of authority for the four members of the commission to allow their powers to be exercised by an employee. The relator's praecipe did not request that the bill of exceptions be included in the certified transcripts and on appeal, the court held that the bill of exceptions was not included in the record.

24550 TONGUT v. STATE. Putnam County. *Reversed.* Ewbank, C. U. Willoughby, J. Concurs with opinion. April 21, 1926.

A search warrant is exhausted by one search. Thus where some evidence was found of the felonious possession of a still under one search warrant, the same warrant would not justify another search several days later and any evidence by the later search is inadmissible on trial.

24997 WRIGHT v. WALKER. Ripley County. *Reversed.* Ewbank, C. J. April 22, 1926.

In a contest for county recorder, it was error for the trial court to refuse to count the ballots of absent voters because the poll clerks failed to put their initials upon them.