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Recent Case Notes

RECENT CASE NOTES

BILLS AND NOTES—CONSIDERATION.—August 16, 1921, appellee, George Herr, executed his promissory note for $5,000, to the Farmers' Bank of Newburgh, Indiana. This complaint was by the receiver of the Beech Grove State Bank, holder of the note, and alleged that the note and interest was then due and unpaid. The maker filed an answer in ten paragraphs and a cross complaint, and alleged that he gave the note on the assurance of J. C. Effinger, cashier of the payee bank, that it would not represent any debt to the bank, but that it was given merely to avoid an unfavorable report by the bank examiner. The note, which was secured by a mortgage on the maker's property, was made to represent some withdrawals the cashier had made from the cash. A subsequent renewal to the note has not altered the points of law. The maker's answer contained among others, a declaration of fraud, but it was without an averment that any official other than Effinger knew anything of the transaction; an averment of failure of consideration; and an allegation that the holder was aware of the failure of consideration and fraud in the making before it became owner. *Held*: Judgment for defendants reversed. *Jewett v. Herr et ux*, 156 N. E. 568—Appellate Court of Indiana, May 17, 1927.

The cashier can not be said to be acting as the agent of the bank in having this note executed to save him from an embarrassing position. *Peckham v. Hendren*, 76 Ind. 47, 53, 54. *Twin-Lick Oil Company v. Marbury*, 91 U. S. 587; *Merrick v. The Peru Coal Company*, 61 Ill. 472; *Gallery v. National Exchange Bank*, 41 Mich. 169; *The First Nat. Bank v. Gifford*, 47 Iowa 575. The maker's allegation of fraud on the part of the payee bank and holder failed, since no proof was made showing that any official of the payee bank was aware of the conditions of the execution and therefore the inter-relation of the banks does not taint the transfer. Thus, since the payee's title was not impeached, any knowledge of fraud on part of a subsequent holder does not bar recovery. *Thomas v. Ruddell*, 66 Ind. 326; *Hereth v. The Merchants' National Bank*, 34 Ind. 380; *Riley v. Schawaker*, 50 Ind. 592; *Proctor v. Baldwin*, 82 Ind. 376. The consideration that supports this promise to pay, is the benefit to the third party, the cashier, in saving him from an embarrassing situation in which he found himself with the bank. This satisfied the well defined rule that the consideration of a promise need not be a benefit to the promisor, but it may consist of a benefit to a third person or of a detriment to the promisee. *Hayes v. Shirk*, 167 Ind. 569, 78 N. E. 653; *Shaffer v. Ryan*, 84 Ind. 140; *Raymond v. Pritchard*, 24 Ind. 318; *Klitzke v. Smith*, 91 N. E. 748; 13 *Corpus Juris* 325, Sec. 164.

G. R. R.

INSURANCE—WAIVER AND ESTOPPEL.—Action by appellee to recover on a fire insurance policy. From a judgment for appellee, appellant appeals, assigning as error certain of the court's rulings. Policy expressly provided that the entire policy should be void if the subject of insurance be personal property and be or become incumbered by a chattel mortgage. The property was incumbered by two chattel mortgages, but the insurer did not learn of these until two days after the loss was sustained and did not deny liability or act in any way until after suit was commenced. *Question*: Did failure of insurer to deny liability until after this action was commenced and costs incurred constitute a "waiver" of the breached condition? *Held*:

No. Judgment reversed in favor of appellant. *Union Assurance Society, Lm't. v. Reneer,* May 27, 1927. Appellate Court of Indiana, 156 N. E. 833.

Insurance companies have the right to protect themselves, by their contracts, against all breaches of conditions against future incumbrance of the property insured, without making the validity of the condition depend upon the question of fact whether the incumbrances actually increased the risk. *Milwaukee Mechanics Insurance Co. v. Niewedde,* 12 Ind. App. 145. The insured is bound to know of provisions of his insurance policy. *Blunt v. Fidelity and Casualty Co.,* 78 Pac. 729. Waiver involves both knowledge and intention, one being essential to the other, and requires doing or forbearance to do something inconsistent with the existence of the right or the intention to rely thereon. *Hardin v. Liverpool & London & Globe Ins. Co.,* 127 S. E. 353. The right to enforce forfeiture of a policy was held not to be waived, in a non-payment of premium case, by mere silence or inaction of the insurer. *Morgan v. Home Inc. Co.,* 288 S. W. 321. When there has been a breach of a condition contained in an insurance policy, the insurance company may or may not take advantage of such breach and claim a forfeiture. A waiver can not be inferred from its mere silence. It is not obligated to do or say anything to make the forfeiture effectual. It may wait until claim is made under the policy, and then, in denial or in defense thereof, allege the forfeiture. *Titus v. Glen Falls Ins. Co.,* re-affirmed in *Replogel v. The American Insurance Co.,* 132 Ind. 360. Costs incurred in litigation are insufficient to constitute the basis of estoppel. *Hughes v. N. Y. Life Ins. Co.,* 72 Pac. 452. By the weight of authority the bringing of a suit or other legal proceeding is not a change of position within the law of estoppel. *Eikenberry v. Edwards,* 24 N. Y. 530; *Jamison v. Auxier,* 124 N. W. 606—although some of the authorities hold that the expense of the costs and charges of a suit is sufficient prejudice to support an estoppel—*Ripley v. Priest,* 169 Mich. 383. The former view seems the better and the decision of this case correct.

R. W. M.

MASTER AND SERVANT—ASSUMPTION OF RISK.—Action for damages sustained by appellee while in appellant's employ. P. alleged injury caused by negligence of appellant in placing its tracks with insufficient clearance. D. pleads assumption of risk. Appellee engaged in interstate commerce and case comes under the Federal Employers' Liability Act (U. S. Compiled Statutes, Sections 8657 and 8665), which retains the doctrine of assumption of risk, where no safety appliances are involved. Appellant's tracks were constructed so close together that appellee, a conductor, while in the performance of his duty, was crushed and injured by a passing train, while descending from the top of a box car. Appellee had been in appellant's employ for several years and appellants contend that proximity of tracks was so open to appellee's observation, that he assumed the risk of being injured by remaining in their employ. Evidence that proximity of tracks was peculiar to the place, that such condition had not been called to appellee's attention or that he had discovered same. *Held*: Jd. for P. *New York, C. & St. Louis Ry. Co. v. Peele.* Indiana Appellate Court, June 17, 1927. 157 N. E. 106.

Sections 8657 and 8665 of the U. S. Compiled Statutes do not abolish the defense of assumption of risk, save where the carrier's violation of some federal statute enacted for the safety of employees has contributed to the injury or death. *Southern Ry. Co. v. Howerton,* 105 N. E. 1025. Where

the injury results from the employer's negligence and not from the violation of the statute, the doctrine applies and the employee assumes all ordinary risks and danger incident to the employment, including those resulting from the master's negligence, which are known to him or which are open and apparent and would have been known to a person of ordinary prudence and care. *Mechem, sec.* 1662; *Cleveland, Cincinnati, Chicago & St. L. Ry. Co. v. Belange,* 78 Ind. App. 37. However it is not obligatory upon the employee to search for defects or to make a critical inspection of the tools and appliances which the employer provides for his use. *Baltimore & Ohio Southwestern Ry. Co. v. Roberts,* 161 Ind. 1; *M. Rumely Co. v. Myer,* 40 Ind. App. 460. But he can assume his employer has exercised due care to provide a reasonable and safe place for him to work and he therefore does not assume risks which are not ordinarily incident to his employment unless he has actual knowledge of such danger or unless the circumstances are such as to charge him with knowledge of same. *The Pittsburg, Cincinnati & St. Louis Ry. Co. v. Adams,* 105 Ind. 151; *Brazil Block & Coal Co. v. Gibson,* 160 Ind. 319. The case was rightly decided in accordance with the construction placed upon the federal Employers' Liability Act, by the decisions of this and other jurisdictions.

R. H. L.

MASTER AND SERVANT — NEGLIGENCE — CO-EMPLOYEES. — Plaintiff employed by defendant to pitch back hay in mow after it was brought there by a hayfork. Plaintiff directed to go and get hay unloaded. Plaintiff handled fork and co-employee drove horses, used to draw hay up. Plaintiff's hand caught and seriously injured when horses were started. Plaintiff had not handled fork before. Plaintiff seeks damages for personal injuries. Alleged that defendant knew co-employee was inexperienced and incompetent, and that defendant was negligent in employing and retaining him and that defendant's negligence was the proximate cause of the injury. Error assigned in refusal to instruct that burden was on plaintiff to establish by a preponderance of evidence, the incompetence of co-employee and defendant's knowledge thereof; and that plaintiff must be free from contributory negligence. *Held*: Reversed for defendant. *Noblesville Milling Co. v. Witham.* Appellate Court of Indiana, May 18, 1927. 156 N. E. 522.

The holding is well supported by decisions. A master is not liable to a servant for injuries caused by negligence of fellow servant unless the master was guilty of negligence in the employment of the co-employee or, after notice, continues in his service the incompetent or negligent employee; and such negligence must be averred in the complaint. Mechem 1644; *Bogard v. Louisville, Evansville, and St. Louis Ry. Co.,* 100 Ind. 491; *Ohio and Mississippi Ry. Co. v. Collarn,* 73 Ind. 261; *Boyce v. Fitzpatrick,* 80 Ind. 526. A master is not liable when work is not dangerous, where he has used proper care to employ competent servants, and used proper appliances. *Dill v. Marmon,* 164 Ind. 508; *Pitt., Cinn., & St. L. Ry. Co. v. Adams,* 105 Ind. 151.

An employee impliedly contracts to assume perils of injury from co-employees where employer is free from negligence. *Evansville and Richmond Ry. Co. v. Henderson,* 134 Ind. 636; *Pitt., Cinn. & St. L. Ry. Co. v. Adams,* 105 Ind. 151. Employee has no cause of action if his own negligence directly contribute. Mechem 1675; *N. Y., Chi. & St. L. Ry. Co. v. Hamlin,* 170 Ind. 20.

Where the court directs a particular verdict on a finding of certain

facts, instructions must contain all facts and conditions essential to verdict. *Indianapolis Traction & Terminal Co. v. Mathews*, 177 Ind. 88; *American Sheet & Tin Plate Co. v. Bucy*, 43 Ind. A. 501. Instructions should not ignore an affirmative defense which, if supported by evidence, would defeat recovery.

A. L. B.

WATER COURSES—OBSTRUCTION OF FLOW OF WATER IN NATURAL CHANNEL—INJUNCTION.—This was an action by appellee for a mandatory injunction to remove a dam built across the bed of a natural watercourse. It is alleged that the stream was a natural watercourse and had been from time immemorial, that by the construction of the dam the lands of appellee would be practically destroyed as to value. Appellant contends that there is nothing in the findings that show appellee would not have an adequate at law. *Held*: Judgment affirmed for appellee. The findings as a whole show a natural watercourse in appellee's land, the obstruction thereof as it passes into appellant's land, and that such an obstruction will result in damages to appellee. It is a well settled rule that the right to an unobstructed flow of water in its natural channel will be protected by injunction. *Foster v. Malsbary*, Appellate Court of Indiana, July 1, 1927. 157 N. E. 446.

The problem of this case seems not to be the application of the rules of obstruction and detention of water, but that of whether equity can and will give relief to the appellee, in these watercourse cases, as the appellant points out in his contention that there is adequate remedy at law. If it were the former the case might present some difficulty in the application of the rules of reasonable obstruction and detention of water. It is well settled that the appellee as a riparian proprietor has a right to the unobstructed flow of the water through his land subject to a reasonable use in other riparian owners. *Dilling v. Murray*, 6 Ind. 324; *Mitchell v. Parks*, 26 Ind. 354; *Case v. Weber*, 2 Ind. 108. That being so, it is also well-settled that courts of equity have jurisdiction to grant relief where one, obstructing the natural flow of the watercourse does damage to another. *Dilling v. Murray*, 6 Ind. 324; *Detarding v. Central, etc. Service Co.*, 313 Ill. 562. Both authority and sound principles support the holding of the case. "Where the obstruction in a watercourse constitutes a permanent and irremediable injury to the rights of a riparian owner, he is not confined to an action for damages, but may, on a proper showing, have a decree ordering the removal or abatement of the obstruction. Law and equity exercise concurrent jurisdiction in cases of injuries to riparian rights by interference with the course of a stream, but equity furnishes the more adequate remedy because it prevents the multiplicity of suits."—40 Cyc. 577—*Fahnestock v. Feldner*, 98 Md. 335. Further, equity furnishes the more adequate remedy when it is shown that an obstruction will cause irreparable injury, present or threatened, for which an action at law will not furnish the adequate remedy. *Barrows v. Fox*, 30 Pac. 768; *Janesville v. Carpenter*, 77 Wis. 288.

P. A. L.

WILLS—CONTRACT TO DEVISE—REMEDY FOR BREACH.—Action to enjoin appellee from violating a contract made by her and appellant by which appellee agreed to execute her last will, in and by which she would devise and bequeath to appellant in case he should survive her, and to his children, in case he should predecease her, all her property with some minor excep-

tions. After said agreement was made, appellee executed her will as per contract. Appellee now repudiates the contract and seeks to revoke the will made in accordance therewith. The consideration given by P. in exchange for D.'s promise has been executed. Judgment for D. in lower court reversed on appeal. Petition for rehearing. *Held:* A contract to make a will is valid and enforceable and an action to enjoin breach of a contract to will property is a specific way may be maintained during the lifetime of the promisor. *Lovett v. Lovett,* Indiana Appellate Court, June 17, 1927, 157 N. E. 104.

A promise upon a valid consideration to will property is a valid contract and an action will lie for its breach against the personal representative of the promisor or, in the proper case, by a bill in the nature of specific performance against his heirs, devisees, or personal representative. *Roehl v. Haumesser,* 114 Ind. 311; *Caviness v. Rushton,* 101 Ind. 500; *Johnson v. Hubbell,* 10 N. J. Eq. 332; *Woods v. Matlock,* 19 Ind. App. 364. If the promisor has renounced the contract during his lifetime, or has conveyed the property, or has made performance on his part impracticable, the weight of authority holds that such repudiation does not give rise to a cause of action for damages during the life of the promisor. *Warden v. Hinds,* 163 Fed. 201; *Manning v. Pippen,* 86 Ala. 357; *Gordon v. Spellman,* 89 S. E. 749. However, most jurisdictions hold that upon such repudiation the promisee, if he has substantially performed, may sue in equity to establish the contract and to prevent a conveyance of the property to another. *Teske v. Dittberner,* 70 Nebr. 444; *Duvale v. Duvale,* 54 N. J. Eq. 581; *Chentland v. Sherman,* 148 Iowa 352; *Van Horn v. Dunarest,* 77 N. J. Eq. 264. The above decisions hold that an agreement to leave property by will cannot be rescinded by act of the promisor unless the promisee consents thereto, and that to deny relief to the promisee would be an intolerable fraud which a court of equity will not permit. If the remedy at law is inadequate, the breach, although anticipatory, should justify equitable relief on the principle of quia timet. The decision in the present case is supported by well established authority and appears to be a correct application of the law.

H. C. L.