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Recent Case Notes

RECENT CASE NOTES

INSANE PERSONS—MORTGAGES—EQUITY—SUBROGATION.—The conservator in insanity for Plaintiff, a resident of Illinois, was authorized by an Illinois court to negotiate bonds and mortgages for $3,600.00 on plaintiff's Indiana realty, to satisfy mortgage debts of $3,300.00 on the property which the mortgagors refused to renew at maturity. Defendant, in good faith, and relying entirely upon the authorization of the Illinois court made the loan and accepted the mortgages which were not authorized or approved by the Indiana court of competent jurisdiction. Plaintiff, when subsequently pronounced sane, refused to ratify the act of his conservator and sued to quiet his title to the real estate against defendant's mortgages. Defendant answered by filing a cross complaint. Plaintiff appeals from a judgment foreclosing defendant's mortgages as equitable heirs upon the property. *Held:* Judgment reversed with directions that defendants be subrogated to the rights of the mortgages whose claims he paid. *Shaw v. Meyer-Kiser Bank,* Supreme Court of Indiana, May 18, 1927, 150 N. E. 552.

The validity of the mortgage of real estate is to be determined by the law of the place where the property is situated. *Swank v. Hufnagle,* 111 Ind. 453. In Indiana, the mortgaging of the realty of an insane person is governed by statute. Burns' Ann. St. sec. 3431-3435. Where the only power to incumber the real estate is derived from the statutes, an attempt to mortgage by one not duly authorized is a nullity. *Mattox v. Hightshaw,* 39 Ind. 95. When the legal invalidity of the instrument is caused by lack of power to execute the conveyance, equity will not give it effect as an equitable mortgage lien. *Otis v. Gregory,* 111 Ind. 504; *Baxter v. Bodkin,* 25 Ind. 172. In case the debt for which the void mortgage is given to secure, is valid, the court of equity having jurisdiction of a suit to quiet title will not quiet title against such invalid mortgage, which is an apparent cloud on title, unless the party "invoking the aid of equity show that he has done equity to him of whom he complains." *Otis v. Gregory,* 111 Ind. 504; *Russell v. Drake,* 184 Ind. 623. When an obligation is discharged by one not primarily liable for it, at the request of the party ultimately bound, equity will protect the party making the payments but he is only entitled to be subrogated to the rights of the creditors whose claims he has paid. Pomeroy's *Treatise on Equitable Remedies,* sec. 920; *Jolliffe v. Crawford,* 76 Ind. App. 282; *Fisher v. Bush,* 133 Ind. 315; *Warford v. Hawkins,* 150 Ind. 489. M. R. H.

MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE—Action by appellee to recover damages for alleged malicious prosecution. Appellee employed by appellant to sell and deliver gasoline and oil. Appellee worked under superintendent whose duty it was to check daily reports of appellee to see if they were correct and if appellee had made correct statement of sales. Superintendent found shortage and reported same to appellee's sureties and also laid the matter before prosecuting attorney with explanation that he was acting for surety company. Prosecuting attorney refused to act until matter was put before grand jury. Appellee indicted and arrested. No evidence of malice. Succeeding prosecutor filed motion, without investigation, to dismiss indictment and court did so. Appellant's motion to

make complaint more specific and demurrer overruled. Appellant appeals. *Held*: Demurrer and motion properly overruled, but there was a lack of evidence to warrant recovery. Reversed for appellant. *Western Oil Refining Co. v. Glendenning*, Appellate Court of Indiana, April 22, 1927, 156 N. E. 182.

In an action for malicious prosecution, the complaint must allege want of probable cause, malice, and that proceedings complained of ended in favor of appellee. *Casey v. Sheets*, 67 Ind. 375; *Gorrell v. Snow*, 31 Ind. 215; *Steel v. Williams*, 18 Ind. 161; *Seiger v. Pfeifer*, 35 Ind. 13; *Ruston v. Biddle*, 43 Ind. 515; *McCullough v. Rice*, 59 Ind. 580; *Sasse v. Rogers*, 40 Ind. App. 197. Record showing acquittal is not admissible to show want of probable cause, but is admissible only for purpose of showing termination in appellee's favor. Such records need not be attached to complaint as exhibits. 38 C. J. sec. 143; *Ammerman v. Crosby*, 26 Ind. 451. Filing of original proceeding does not make such copy a part of complaint. *Fisher v. Hamilton*, 49 Ind. 341. Evidence of unusual delay in beginning action, or delay in bringing to trial, and final dismissal without a trial may be considered by jury as tending to sustain the action. *York v. Webster*, 66 Ind. 50. Where prosecutor acts on independent investigation, of his own, instead of on the statement of facts by party making complaint, the latter has not caused the prosecution and cannot be held for malicious prosecution. Such is the case where party making complaint acts only in subordination to prosecutor and under his direction or where he states the facts to prosecutor leaving him to judge of the propriety of proceeding with the charge, and where the latter acts on his own initiative in so doing, 38 C. J. sec. 25. A private corporation is liable for a malicious prosecution instituted by its agent, where such was authorized, or ratified, or was within scope of agent's authority. *Farmers' Mutual Ins. Co. v. Stewart*, 167 Ind. 544.

A. L. B.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CASUAL EMPLOYMENT.—Appellant filed an application for compensation vs. appellee for an injury received while repairing one of appellee's school buildings. The evidence shows that appellant was conducting an independent personal business as plumber, tinner, and contractor; that appellee engaged appellant to repair the roof of one of its school buildings; that there was no contract fixing the price of such repair work; that while appellant was engaged in the repairing of said roof he received a personal injury as the result of a ladder slipping from under him; that his helpers who were aiding him in making the repairs completed the work after his injury; and that appellant charged and received from the appellee $1.25 per hour for the labor performed. From a judgment denying compensation for the disability resulting from the injury, claimant appeals. *Held*: The employment was casual and appellant is not entitled to recover under the Workmen's Compensation Act. *Hays v. Board of Trustees of Clinton School City*. Appellate Court of Indiana, Oct. 6, 1927; 158 N. E. 234.

The one question presented by the appeal, is, was the employment of appellant at the time of his injury both casual and not in the usual course of the business, trade, occupation, or profession of the employer, within the meaning of clause (b) of sec. 76 of the Workmen's Compensation Act, sec. 9521, Burns' 1926. The above statute excludes from its benefits any person whose employment is both casual and not in the usual course of

the business of his employer. Was the employment in the present case casual? In general, the cases hold that one engaged incidentally and occasionally, for a limited purpose, is a casual employee. In *In Re Gaynor*, 217 Mass. 86, it was said, "The word casual is in common use. Its ordinary signification, as shown by the lexicographers, is something which comes without regularity and is occasional and incidental. Its meaning may be more clearly understood by referring to its antonymn, which are regular, systematic, periodic, and certain." That the employment of appellant in the present case was casual is clearly evident. *Bailey v. Humrickhouse*, 83 Ind. App. 497, *Zeidler et al v. Prucher* (Indiana), 154 N. E. 35; *Smith v. Philadelphia & Reading Coal & Iron Co.*, 85 Pa. Super. Ct. 563; *Blood v. Industrial Acc. Commission of State of Cal.*, 157 P. 1140. Was the employment of the appellant within the usual course of the business of the employer. This phrase is held to cover the normal and usual operations which form part of the ordinary business carried on, and not to include incidental and occasional operations having for their purpose the preservations of the premises or the appliances used in the business. There is no evidence in the principal case that appellee was engaged in any business which in its usual course called for the employment of a house roofer. *Zeidler et al. v. Prucher* (Indiana), 154 N. E. 35; *Holbrook v. Olympia Hotel Co. et al*, 166 N. W. 876; *Oliphant v. Hawkinson*, 183 N. W. 805; *Callihan v. Montgomery*, 115 A. 889; *London & Lancashire Guarantee & Accident Co. of Canada v. Industrial Accident Commission of Cal. et al*, 161 P. 2.

H. C. L.

PARTY WALLS—INDEMNITY—COVENANTS RUNNING WITH THE LAND.—In 1910 Michael Clune and Mary Adler agreed for extension of a party wall, Clune to construct the extension and to repair Mary Adler's buildings which must be partially removed, and Mary Adler to pay Clune $75.00 therefor. Also that whenever Mary Adler, her heirs or assigns used the whole or any part of the extension she would pay Clune or those holding under him one-half the value of the extension at the time of such use, and that the covenants in the contract should run with the land. McClune Realty and Investment Company succeeded to ownership of land and rights in the party wall of Clune. Adler tract was leased to Leo and Louis Traugott in 1916 by ninety-nine year lease, and in 1917 conveyed to Wineman Realty Company subject to the ninety-nine year lease. In 1922 Traugotts' was assigned to Fair Building Company. The lease to Traugotts contained provision that lessees would save lessor harmless from damage done to adjoining property owner by reason of erection of contemplated improvements, and if further improvements should be made, lessee should execute a bond of indemnity. In 1922 Fair Building Company as principal and Traugotts as surety executed to Wineman Realty Company a bond indemnifying them from liability for injury to adjoining property, and erected a business block on Adler land, attaching same to party wall, part of which was extension constructed by Clune in 1910. Clune Company brings this action vs. Fair Realty Company, Traugotts as lessees, and Wineman Company, as owner, to recover one-half of the value of the party wall. Defendant Wineman Company filed a cross-complaint against its co-defendant Fair Building Company and two Traugotts on the indemnity bond. Judgment for plaintiff Co. v. Defendant Wineman Co. for $3,135.00. Also judgment for Wineman Co. on cross-complaint vs. Fair Building Co.

and Traugotts for $3,135.00. Defendants appeal. *Held*: Affirmed. The right to receive pay for the party wall as well as covenant to pay therefor ran with the land, and lessees agreeing to save lessor harmless from damage in erection of building held for one-half of value of party wall used by them. *Fair Building Co. et al. vs. Wineman Realty Co. et al.*, Appellate Court of Indiana, April 26, 1927. 156 N. E. 433.

In considering whether a covenant is one which does or does not run with the land, there is always embraced the following inquiries: 1. Is the covenant one which, under any circumstances, may run with the land? 2. Was it the intention of the parties, as expressed in the agreement, that it should so run? *Conduit v. Ross*, 102 Ind. 166. The general rule is that a covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest conveyed or created. *Conduit v. Ross*, supra. In the present case, by contract Clune acquired the right to extend a party wall on Mary Adler's property. This was a grant to him of an interest in land, and was of such a character that a perpetual covenant might be annexed to it. *Snowden v. Wilas*, 19 Ind. 10, *Hazlett v. Sinclair*, 76 Ind. 488. In consideration for this grant Clune covenanted to do an act beneficial to the land of Mary Adler, that of erecting the wall. Also he covenanted that when he should receive one-half of the cost of the wall, that Mary Adler, her heirs or assigns should become owner of one-half of the party wall. This agreement created what have been aptly termed cross-easements in favor of each in the land of the other. It contained therefor all the elements necessary to a covenant capable of running with the land. *Hazlett v. Sinclair*, supra. In many jurisdictions, and in Indiana, there has been a distinction made between the running of a covenant for the benefit and burden of lands. Many cases hold that a covenant for benefit of land is personal to the builder of the party wall, but when the burden touches and concerns the land the covenant runs with it. But this question is not raised in this case, as both covenants for benefit and burden are capable of running with the land if such intent is expressed in the contract. An indication of the parties of their intention to bind subsequent holders of the property is necessary to the running of the agreement. Otherwise it will be deemed personal. *Conduit v. Ross*, supra. But failure to state that the covenant is to run with the land is immaterial when the intention of the parties can be gathered from the mention of assigns. 66 L. R. A. 678 note. In the present case that intent is clearly expressed by the use "heirs and assigns" in the case of the covenant of Mary Adler, and "or those holding under him" in the case of Clune. Also there is an express provision that the covenants shall run with the land. The case of *Millikan v. Hunter*, 180 Ind. 153, is a definite decision that when an instrument conveys or grants an interest or right in land and also contains a covenant so expressed as to show that it was reasonably the intent that it should be continuing, it shall be construed as a covenant running with the land.

No weight can be given to appellants' contention that they were without notice of the covenant. The party wall agreement was duly recorded a short time after its execution. The universal rule is that the proper registration of a party wall agreement is notice to all purchasers of the real estate affected by the agreement. 66 L. R. A. 678 note.

It is clear from the lease and indemnity bond that Wineman Company was not to be liable for any damage done by the Fair Building Company in

erecting a building on the leased property, but that lessees would hold the owner harmless. The court properly rendered judgment vs. Fair Company and Traugotts in favor of Wineman Company.

A. V. R.

RAPE—EVIDENCE—UNCORROBORATED TESTIMONY OF PROSECUTRIX.—Appellant was charged by affidavit for the crime of rape on one, E. B., a woman of 16 years. He had twice been convicted, sentenced, and imprisoned in a penal institution for felonies. The prosecutrix testified that the prisoner entered her room at about a quarter of four one morning through the front window. She first saw him standing by the side of the window. Next he was walking on his hands and knees and shining his flash light. Thinking it was her father, she said, "Is that you, Daddy?" Whereupon appellant said, "Shut up, or I will kill you," and came over and laid a knife on her neck and a gun on her breast. She submitted because of fear and stated the prisoner had intercourse with her against her will. She stated that she never had intercourse before. She had never seen the man before until she identified him on the streets. She was positive that this was the man in her room who forced her against her will and then left. It was about 4 A. M. when he left and when prosecutrix went to the room occupied by her parents telling them what had happened. The prisoner entered a plea of not guilty, denying that he committed the crime, and attempting to prove an alibi by his relatives and a boarder at his mother's home. He was adjudged guilty. *Held*: Judgment affirmed. *Abshire v. State*, 158 N. E. 227, Supreme Court of Indiana, Oct. 6, 1927.

The prisoner pleaded not guilty and so the problem of consent in confession and avoidance was not involved. Even if he pleaded consent, the case would have gone against him as the rule is that if there is evidence of sexual intercourse and the display of weapons or other incriminating evidence, the prosecutrix testifying she yielded through fear and on account of threats, it is sufficient to warrant conviction. *Hutchins v. State*, 140 Ind. 78. This case, however, involves two other questions. First, whether uncorroborated testimony of complaining witness, if sufficient to convince jury or court, may support conviction for rape. Second, whether her testimony identifying defendant was sufficient to support conviction. The second question could be easily disposed—evidence held sufficient to support conviction for rape, under Acts 1921, c. 148, sec. 1 (Burns' Ann. St. 1926, sec. 2429), where complaining witness identified defendant.

The first question is neither provided for nor required by statute in this state. This is the first case on this point as no Indiana case could be found touching it. However, there are many authorities from other jurisdictions supporting this case. Unless required by statute (N. Y. Pen. Code, sec. 283), it is the weight of authority that the unsupported testimony of the prosecutrix, if believed by the jury, or if sufficient to convince jury or court, is sufficient to convict of rape. More than twenty states in this country have cases decided in support of this rule. *Crocker v. People*, 213 Ill. 287; *People v. Bates*, 70 Mich. 234; *People v. Benc*, 130 Cal. 159; *State v. Latten*, 29 Conn. 389; *Wallace v. State*, 48 Tex. Cr. 548. But prisoner should not be convicted without corroboration where the testimony of the prosecutrix bears on its face indications of unreliability or improbability, and particularly when it is contradicted by other evidence. *People v. Ardagor*, 51 Cal. 371; *People v. Benson*, 6 Cal. 221, on reversing the lower court said, "the evidence is so improbable of itself as to warrant us in the

belief that the verdict was more the result of prejudice or popular excitement, than the calm and dispassionate conclusion upon the facts by 12 men sworn to discharge this duty faithfully." However, the mere fact that prisoner testifies in his own behalf and positively denies his guilt does not, by the weight of authority, render corroboration necessary. *John v. People*, 197 Ill. 48, *People v. Randall*, 133 Mich. 516.

P A. L.

STATUTES—CONSTRUCTION—CONSTITUTIONALITY.—Mandamus to compel D, state auditor, to draw a warrant to pay P for his services as state senator. By act of April 21, 1881, the legislature fixed the pay of members of the legislature at $6.00 per day. An act passed in 1925 provided that "from and after the first day of January, 1928," the pay should be $10.00 per day. This act made no allusion to the pay to be received by the members of the 1926-27 assembly. The 1926-27 assembly passed an emergency act fixing the pay for members of the 1926-27 assembly at $10.00 per day. By the Indiana Constitution "* * * no increase of compensation shall take effect during the session at which such increase shall be made." Article 4, Sec. 29. D claims the act of 1925 is still in force and the act of 1926-27 unconstitutional. *Held*. Judgment for D below reversed. The 1925 act took effect at once, revoking the act of 1881. Thus the act of 1927 was constitutional, it not being an increase, since no provision for payment was in force to be increased. Willoughby and Meyrs, J. J., dissenting. *State ex rel. Meydl v. Bowman*, Supreme Court of Indiana, April 19, 1927, 156 N. E. 399.

The presumption is in favor of the constitutionality of a statute. 6 R. C. L. 97. Where "statutes are capable of a construction that will make them constitutional, they will be so construed, and their validity upheld, on the theory that the legislature intended to enact a constitutional law." *Thorlton v. Gurl D. Co.*, 184 Ind. 637, *Crittenberger v. State, etc., Trust Co.*, 189 Ind. 411; *Cincinnati etc. Ry. Co. v. McCullom*, 183 Ind. 556. Even though the construction adopted does not appear to be as natural as the other. 6 R. C. L. 78, *State v. Wollen*, 128 Tenn. 456. Grave doubts of its unconstitutionality are insufficient to overthrow it. *United States v. Standard Brewery*, 251 U. S. 210; *Bratton v. Chandler*, 260 U. S. 110. Its unconstitutionality must be clear and palpable. *State v. Martin*, Ind., 139 N. E. 282; *Carr v. State*, 157 Ind. 241, *State v. Joseph*, 175 Ala. 579. And to doubt is to sustain the validity of a statute. *Wilson v. Fargo*, N. D., 186 N. W 263. But where a statute clearly transgresses the authority vested in the legislature, the court must declare it unconstitutional. 6 R. C. L. 72. A repeal does not take effect until the new statute goes into effect and becomes operative. So where an act does not go into operation until a future date, former statutes, repealed thereby, do not become repealed until such future date. 25 R. C. L. 932; *State v. Edwards*, 136 Mo. 360; *McArthur v. Franklin*, 16 Ohio St. 193, 36 Cyc. 1081. Such a statute speaks from the date it becomes effective, and not from the date of its enactment. *Price v. Hopkins*, 13 Mich. 318, *State ex rel Beunjes v. Brockelman*, Mo., 24 S. W. 209; *Patterson Foundry & Mach. Co. v. Ohio River Power Co.*, 99 Ohio St. 429. However, an act will take effect from the date of filing in all the counties, although some provisions of the act may, by the terms thereof, not be fully operative until a later period. *State v. Indiana Board*, 155 Ind. 414; *Sudbury v. Board*, 157 Ind. 446. The case turns on the intent of the legislature in passing the 1925 act. It can scarcely be said the intent

to make that act effective only in 1929 is clear beyond all doubt. Thus since to doubt is to sustain, and the rule is to find an act constitutional if at all possible, though the construction adopted does not appear to be as natural as the other, the majority opinion seems right in holding the 1927 act constitutional, the act of 1881 being revoked in 1925 by the act of that date.

B. B. C.