Indiana Law Journal

Volume 3 | Issue 5 Article 11

2-1928

Recent Case Notes

RECENT CASE NOTES

CONFLICT OF LAWS—BILLS AND NOTES—JOINDER.—A note made and payable in Illinois contained a power of attorney to confess judgment and the general provision that any extension of time whatever should not relieve the makers. The payee and accommodation indorser indorsed the note in Indiana over to appellant, who presented it to makers at maturity. They dishonored and the indorsers were notified. The makers brought action against payee, indorser and appellant asking that note be declared void on the grounds of fraud in procurement. Appellant filed cross-complaint, alleging indorsement to him by payee and indorser. Makers dismissed original action and defaulted on cross-complaint; payee and indorser enter general denial. Judgment given for appellant against makers and payee only. Appellant moved for new trial against all defendants, including indorser. *Held:* New trial denied and judgment affirmed. *Smith v. Zabel,* Appellate Court of Indiana, June 30, 1927, 157 N. E. 551.

The purpose of a cross-complaint is to obtain full relief for all parties and complete determination of the controversy set forth by the complaint. *Rooker v. Fidelity Trust Co.,* 191 Ind. 141. But any new and distinct matter which does not grow out of the complaint is not germane to the issue. Appellant's cross-complaint against indorsers is an independent cause of action from the original complaint and constitutes a counterclaim. *Wainwright v. P. H. and F. M. Roots Co.,* 176 Ind. 682.

A note is governed by the law of the state in which it is made and payable. *Crum v. Brightwell,* 69 Ind. App. 404. But an indorsement is governed by the law of the state in which it is made. *Hunt v. Standart,* 15 Ind. 33. Certainty of time of payment is essential to negotiability in Illinois. *McClenachen v. Davis,* 243 Ill. 87, 90 N. E. 265. The note in question provided for a general extension of time regardless of maturity. This differs from extension of time after maturity and makes the note non-negotiable in Illinois. *Stitzell v. Miller,* 250 Ill. 72, 95 N. E. 53. In Indiana, provisions for extension of time make the notes non-negotiable as against indorsers or as inland bills of exchange. *Wayne County Natl. Bank v. Cook,* 73 Ind. App. 404; *Mitchell v. St. Mary,* 148 Ind. 111; *Matchett v. Anderson Foundry Works,* 29 Ind. App. 207.

A note is so far negotiable by indorsement as to vest title thereof in each indorsee successively. *Burns Ann. Statutes* 1926, sec. 11342. A holder of such a note may bring an action thereon in his own name, sec. 11343. *McWhorton v. Norris,* 9 Ind. App. 490. Any such assignee, having used due diligence against maker may have action against indorsers. *Burns Ann. Statutes* 1926, sec. 11345. Appellant had title to the note but did not show an attempt to confess judgment against maker. A complaint which does not show use of due diligence against maker of such a note is faulty. *Clark v. Trueblood,* 16 Ind. App. 98; *Spears v. Thompson,* 30 Ind. App. 267. Failure to use due diligence by confessing judgment against maker at maturity releases indorser of such a note. *Roberts v. Masters,* 40 Ind. 461; *Thompson v. Campbell,* 121 Ind. 398; *Mix v. State Bank,* 13 Ind. 521. Likewise the maker and indorser on a note which is not negotiable may not

be joined as defendants without using due diligence against the maker first, or by showing an excuse which would have relieved maker in an action against him alone. *Couch v. First Natl. Bank of Thorntown*, 64 Ind. 92; *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510. Appellant having judgment against three defendants cannot recover against indorser jointly with them. C. W. D.

MASTER AND SERVANT—COURSE OF EMPLOYMENT—WORKMEN'S COMPENSATION ACT.—Deceased, who lived at Huntington, was in appellant's employ as a huckster driver, his route being out of South Whitley, which town was some sixteen to eighteen miles from his home. In order to reach his work, deceased drove his own car from Huntington to South Whitley. After finishing his route and storing the truck, deceased was returning to Huntington in the evening when the accident occurred. The Industrial Board found that this accident arose out of and in the course of decedent's employment. *Question*—Are injuries received while going to or from work considered as arising out of or within the course of employment? *Held:* Reversed. *Ditzler Poultry Co. v. Forsythe*, Appellate Court of Indiana, April 29, 1927, 156 N. E. 406.

Workman going to or returning from employment is not within the Workmen's Compensation Act—*Elliason v. Western Coal and Coke Co.*, 202 N. W. 485. A servant is acting within the course of his employment when he is engaged in doing, for his master, either the act consciously and specifically directed or an act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural, direct and logical result of it. *Meechem on Agency*, Vol. II, Sec. 1879. Plant worker, traveling to and from the plant, is not "in the course of employment," within Workmen's Compensation Law. *Gibbs v. Macy & Co.*, 212 N. Y. S. 428. Generally, an employee who is injured while on his way to or from work is not entitled to compensation, in the absence of special circumstances bringing the accident within the scope of the employment. *Comstock v. Bivens*, 239 Pac. 869. Ordinarily, injury to an employee while traveling on a public road, on his way to or from his place of work, by conveyance not furnished by the employer, and not paid for the time consumed in going and coming, and not on or in immediate proximity to his employer's premises, does not arise out of the employment within the Workmen's Compensation Act. *Brown v. Dept. of Labor and Industries*, 237 Pac. 733. An employee, injured in an accident, on his way to work and on premises not owned or controlled by his employer, is not entitled to compensation under the Workmen's Compensation Law. *Wilkins v. Shannon Coal Co.*, 82 Penn. Sup. Ct. 128. The case of *Wertz v. Reynolds*, 133 N. E. 393, an Indiana case, indirectly supports the decision of this case, although it is not directly in point.

The decision seems to be in accord with the weight of authority.

R. W. M.

PARTITION—AGREEMENT TO PARTITION—STATUTE OF FRAUDS.—Action for partition of real estate, parties being children and only heirs of one Henster. Heirs executed agreement on April 18, 1924, to appoint commissioners to apportion real estate in five parts, making a map with value of each part marked thereon. The land was divided into ten parcels, two to go to each heir, a map was drawn, but values were listed on a separate sheet

of paper. On May 10, 1924, heirs signed agreement to draw lots for their shares, and "To quitclaim deed to each other in a legal way to establish title." After notice to all heirs, a drawing was held March 3, 1926, but plaintiffs refused to attend and draw. Plaintiffs contend they are not bound by the agreements. *Held:* Affirmed. The plaintiffs, by signing agreement to daw lots for land shares are estopped to demand partition. *Hensler et al. v. Alberding et al.*, Appellate Court of Indiana, October 6, 1927, 158 N. E. 243.

The plaintiffs have little basis for claiming their right to partition. The main contentions are that agreements are uncertain and indefinite, and that contracts had been violated since the land was divided into ten parcels instead of five, and no values were marked on the map prepared. Plaintiffs knew of the failure of the commissioners to act according to the contract of April 18 when they signed the supplemental agreement for drawing lots on May 10. The fact they continued the acts for voluntary partitition must be taken as an acceptance of the acts of the commissioners under contract of April 18. After the contract for drawing was executed "it was land, not money, which the parties were seeking to divide, and whether a value was fixed upon the lands, expressed in dollars, or not, was not a essential thing." *Beaver v. Trittipo*, 24 Ind. 41. There is no doubt that the contract for drawing lots is valid. "Any method of allotment of share to cotenants which is just and fair would be sustained. 20 R. C. L. 717. In some cases the parcels are distributed among the various parties by drawing lots. *Paddock v. Shields et al.*, 57 Miss. 340.

In Indiana it has been frequently held that "Defendant may set up in a bar of action for partition a prior parol partition. *Moore v. Kerr*, 46 Ind. 468; *Hauk v. McComas*, 98 Ind. 460; *Savage v. Lee*, 101 Ind. 514. The only party who can successfully interpose the Statute of Frauds to the parol partition is a party to the contract, or his privies or representatives, and this is no avail if the contract has been consummated by possession. *Savage v. Lee, supra.* A contract which is within the Statute of Frauds is not void, but only voidable. *Burgardner v. Edwards*, 85 Ind. 117. It seems obvious from these authorities that a written contract for partition is valid and enforceable in Indiana. Where there has been one valid partition of land, that may be pleaded in bar of another partition. *Moore v. Kerr et al., supra.*

Some states hold that "An agreement against the institution of partition proceedings is void because it is an unreasonable restraint upon the enjoyment and use of the property. *Haeussler v. Missouri Iron Co.*, 16 L. R. A. 220, but the weight of authority is the other way. Though "A bill in Equity for partition is a matter of right", *Howey v. Goings*, 13 Ill. 95, "The right of cotenants to bind themselves to waive the right of partition seems to be well established", 20 R. C. L. 717, note. The whole question is covered by the rule of Equity that "Equity will not award partition at the suit of one in violation of his own agreement." *Hill v. Reno*, 112 Ill. 639; *Dee v. Dee*, 212 Ill. 338 A. V. R.

PHYSICIANS AND SURGEONS—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.—The appellee brought an action to recover damages for injuries alleged to have been sustained by her while a patient under the care and treatment of appellant, an X-ray specialist, because of his alleged malpractice and

negligence. From a verdict and judgment for plaintiff of $2,500 the defendant appealed. *Held:* Judgment reversed. *McCoy v. Buck,* Appellate Court of Indiana, July 1, 1927, 157 N. E. 456.

In considering the appellee's allegation of negligent and unskilled use of the X-ray machine the court accepted the doctrine of *Edwards v. Uland,* 193 Ind. 376, 140 N. E. 546, to the effect that a physician or surgeon—and included an X-ray operator—is not an insurer, and is bound only to possess reasonable skill and use ordinary care in his diagnosis and attempt to effect a cure. *English v. Free,* 205 Pa. 624, 55 Atl. 777; *Champion v. Kieth,* 17 Okl. 204, 87 Pac. 845; *Dye v. Corbin,* 59 W. Va. 266, 53 S. E. 147; *Warner v. Packer,* 123 N. Y. Supp. 725; *Longfellow v. Vernon,* 57 Ind. App. 611, 105 N. E. 178. "If the maxim *'res ipsa loquitur'* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.' *Ewing v. Goode,* (c. c.) 78 F. 442.

The appellee's case failed as she did not introduce competent evidence to prove incompetency of the defendant or to show any negligence on his part that resulted in the injury to her. Only those who themselves possess the skill required to administer such treatment are qualified to testify as to whether there was negligence in the method of treatment. This well-defined rule of law applies where the treatment in question is, as here, such a specialized art of healing of which a layman can have no knowledge. *Ewing v. Goode,* (c. c.) 78 F. 442; *Adolay v. Miller,* 60 Ind. App. 656, 111 N. E. 313; *Longfellow v. Vernon,* 57 Ind. App. 611, 105 N. E. 178; *Jackson v. Burnham,* 20 Colo., 532, 39 Pac. 577; *Sawyer v. Berthold,* 116 Minn. 441, 134 N. W. 123. Here the appellee offered no evidence of negligence or incompetence on part of defendant other than the method of applying the instruments. For the jury to determine, without the aid of expert testimony, whether the services rendered by the appellant were done with reasonable care and skillfulness would be to permit a determination of that question from mere speculation and conjecture. G. R. R.

QUIET TITLE—PARTIES NOT IN ESSE—DOCTRINE OF VIRTUAL REPRESENTATION.—Henry Pierce, in 1869, settled land on his wife for life, then on his unmarried daughter Adeline for life, then on Adeline's children. In 1871 Adeline married one Evans, and the result of the marriage was a son, George. In 1880 Adeline divorced Evans, and in 1881 married one Bearss. In the same year she brought suit to quiet title, joining as defendants all the parties then living who were interested, among them, her son George, represented by a guardian *ad litum.* The court decreed that Adeline was the fee simple title holder. Subsequent to the entering of that decree the present complainant was born, the daughter of Adeline and her second husband, Bearss. Adeline had sold the land. Through eighteen *mesne* conveyances it came to the respondent. Complainant contends she was not represented in the suit giving the fee simple to her mother; and she prays for a decree settling on herself the fee simple of an undivided one-half interest subject to a life estate in Adeline. Judgment for respondent. Appeal. *Held:* That complainant was virtually represented by her half-brother George in the former suit to quiet title, and is, therefore, bound

by the decree, although she was not *in esse* when it was entered. *Bearss v. Corbett*, Ind. App., 158 N. E. 299. Dissenting opinion, 152 N. E. 866.

The court, in holding that complainant was represented in the former suit, for the first time in Indiana applied the doctrine of virtual representation to remaindermen not *in esse*. The weight of authority in other jurisdictions, where the doctrine has been applied to decrees quieting title, seems to be in accord. *Miller v. Ry. Co.*, 132 U. S. 662; *Gray v. Smith*, 83 Fed. 824; *Mathews v. Lightner*, 85 Minn. 333, 88 N. W. 922, 89 A. S. R. 558; *Akley v. Bassett*, 68 Cal. App. 270, 228 P. 1057; *Masonic Home v. Hieatt Bros.*, 197 Ky. 301, 247 S. W. 34; *Edwards v. Harrison*, Mo., 236 S. W. 328; *Buchan v. German Amer. Land Co.*, 180 Iowa 911, 164 N. W. 119; *Drake v. Frazer*, 105 Neb. 162, 179 N. W. 393, 11 A. L. R. 766. Virtual representation has also bound parties not *in esse* in decrees of foreclosure and sale, *Bernard v. Bernard*, 76 S. C. 364, 60 S. E. 700, 128 A. S. R. 852; in a judgment on an action to disentail the estate, *Bennett v. Flemming*, 105 Ohio St. 352, 137 N. E. 900; in a decree appointing a new trustee with powers not given him by the deed creating the trust, *Cary v. Cary*, 309 Ill. 30, 141 N. E. 156; in a decree construing a will, *Lide v. Wells*, 190 N. C. 37, 128 S. E. 477; in a decree removing cloud from title, *Loring v. Hildreth*, 170 Mass. 328, 49 N. E. 652; and, in British courts, alteration of family settlements, *Re Wells, Boyer v. McLean*, (1913) 1 Ch. 848, *Re New*, (1901) 2 Ch. 534; in decrees quieting title, *Giffard v. Hort*, 1 Sch. & Lef., 386; and in determination of interests under a will, *Re Peppitt's Estate, Chester v. Phillips*, (18786) 4 Ch. D. 230. On facts substantially the same as the principal case, a decree was not binding on afterborn children because children *in esse* of the same class alleged the afterborn children took no interest. *Weberpals v. Jenny*, 300 Ill. 145, 13 N. E. 62. A decree settling the fee in the life tenant before any remaindermen were born did not bind the remaindermen because their class of devisees was unrepresented. *Downey v. Seib*, 185 N. Y. 427, 78 N. E. 66, 113 A. S. R. 926, 8 L. R. A. (N. S.) 49. The application of the doctrine is not limited to parties not *in esse*. *Longworth v. Duff*, 297 Ill. 479, 130 N. E. 690; *Calles v. Dressler*, 315 Ill. 142, 146 N. E. 162.

For more elaborate disquisitions of the doctrine of virtual representation, see Ann. Cas., 1913C, 659; 15 R. C. L. 1024; 20 R. C. L. 669; 8 L. R. A. (N. S.) 49; and 97 A. S. R. 762. D. J.

REPLEVIN—SALES—EQUITY—ASSIGNMENT OF TITLE.—Nov. 19, 1925, James Chapman, a retail automobile dealer by a written contract agreed to sell an auto to William Sherfick for $1,745.25, to be paid $495.00 in cash, remainder in three installments payable one, two and three months after date, the first two installments $50.00 each and the third $1,150.25. Sherfick gave Chapman his promissory note for $1,250.25, the aggregate of the three installments. As a part of the contract Sherfick acknowledged receipt of the auto, title to remain in Chapman until consideration was fully paid. Sherfick made no application to the secretary of state for a certificate of title to the car as required by the Act of Mar. 11, 1921 (Sections 10110-10124, Burns' 1926) and received no certificate of title or registration certificate. On the day of the conditional sale, Chapman assigned and sold the note to appellant, Guaranty Discount Corporation, for $1,200.00. At time of sale of note, Chapman delivered to appellant his signed statement that the auto had been actually delivered to and accepted

by the purchaser. Chapman assigned to the appellant all his right, title and interest in said auto. Appellant at time it purchased note did not require Sherfick to procure a certificate of title issued by Secretary of State and took no steps to see whether there had been a compliance with the statute. Sherfick, in fact, piad no part of the consideration, did not take possession of the car, which, without appellant's knowledge, remained in Chapman's salesroom, and Dec. 10, 1925, was sold by Chapman to Bowers (appellee), who paid cash and bought without notice of the previous contract of sale and the assignment thereof. Chapman paid to the appellant the first two installments on the Sherfick contact. The third was not paid when due and the appellant then learned that the car had not been delivered to Sherfick but had been sold to Bowers. Chapman, being insolvent, appellant sues Bowers to replevy the car. *Held:* Judgment for D below affirmed. *Guaranty Discount Corporation v. Bowers.* Appellate Court, Indiana, Oct. 7, 1927, 158 N. E. 231.

It is a well established principle of the law that a party in order to recover in replevin must rely upon the strength of his own title and not upon the weakness or lack of title in his adversary. *Aultman & Co. v. Forgey,* 10 Ind. App. 397; *Kennedy v. Shaw,* 38 Ind. 474; *Cobbey on Replevin,* sec. 753; *Watson's Works Practice,* sec. 569. By the law of sales one can not transfer to another a better title than he himself has. *Lett v. Eastern Moline Plow Co.,* 46 Ind. App. 56; *Sears v. Sprout,* 24 Ind. App. 313; *Dunbar v. Rawles,* 28 Ind. 225. But this general rule is qualified by a rule equally as well settled, to the effect that where the owner of a chattel, after he has sold it to one person, wrongfully sells and delivers it to another, the first purchaser is estopped to question the second purchaser's right to the property, if the second transaction was made possible by reason of the fraud or negligence of the person to whom the first sale was made. 2 *Pomeroy's Eq. Jur.* (4th ed.) 1492; *Fisher v. Knox,* 53 Am. Dec. 503; *Judson v. Corcoran,* 58 U. S. (17 How.) 612.

Here appellant and appellee were bona fide purchasers, with appellant's purchase prior in time. Appellant contends that such priority, vested title in it and that Chapman at the time of the subsequent sale had no interest which he could convey to the appellee. This contention in itself is sound, but it appears from the facts that the appellant at the time of the assignment of the contract failed to require a compliance with the certificate of title act (Burns' Ann. St. 1926, secs. 10110 and 10124) which provides that no certificate of registration of any vehicle shall be furnished by the Secretary of State unless the applicant therefor shall have applied and received from the Secretary of State, a certificate of title containing a description of the vehicle and that in event of sale or transfer of ownership of the vehicle for which an original certificate has been issued, "the original holder of such certificate shall endorse upon the back of the same an assignment thereof, with warranty of title, in form printed thereon, with a statement of all liens and incumbrances on said vehicle and deliver the same to the purchaser or transferee at the time of the delivery to him of such vehicle." It is further provided that before an owner may operate an auto upon the highways of the state he must display in the driver's compartment of the machine his receipt of registration. This statute was enacted for the protection of the owners of motor vehicles, of those holding licenses thereon and of the public. The appellant,

knowing at the time of his purchase of the contract, that Sherfick under its terms was the equitable owner of the car and entitled to have possession, should have seen that the statute was complied with. The appellant by its negligence in failing to take this simple precaution made the subsequent sale possible. By an application of the rules hereinbefore stated, it is clearly evident that the appellant through its own negligence caused what prior interest it had to be postponed to the subsequent purchaser, who therefore has a superior title and is protected. R. H. L.