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Recent Case Notes

RECENT CASE NOTES

AUTOMOBILES—DUTY TO STOP, LOOK, AND LISTEN—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK.—P sued and recovered for wrongful death of deceased who was killed when struck by one of D's trains running 60 miles per hour, at a crossing. The view of deceased was obstructed until he was about 20 feet from the first rail, and deceased had slowed down to about 5 or 6 miles per hour though he did not stop. *Held*: Judgment reversed for D. *Baltimore & Ohio R. Co. v. Goodman*, Supreme Court of the United States, Oct. 31, 1927, 48 Sup. Ct. Rep. 24.

The court states as its rule that a driver knows he must stop for a train, and that if he "cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look * * * if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk." Only ordinary precaution is required. *Curtis v. St. Louis & S. F. R. Co.*, 96 Ark, 394, 131 S. W. 947, 34 L. R. A. (N. S.) 466. *Lutz v. Cleveland, C. C. & St. L. Ry. Co.*, 59 Ind. App. 16, 108 N. E. 886. *Chicago & A. Ry. Co. v. Louderback*, 125 Ill. App. 323. *St. Louis & S. F. R. Co. v. Model Laundry*, 42 Okla. 501, 141 P. 970. Ordinary precaution may require one to get out and go ahead to look and listen. *Chicago, etc. R. Co. v. Thomas*, 155 Ind. 634, 58 N. E. 1040. *Mankewicz v. Lehigh Valley R. Co.*, 214 Pa. St. 386, 63 Atl. 604. But that precaution is not required as a matter of law but is usually a question for the jury. *Huckshold v. St. Louis etc., R. Co.*, 90 Mo. 548, 2 S. W. 794. *Dolan v. Delaware etc. Canal Co.* 71 N. Y. 285. *Chicago City R. Co. v. Barker* 209 Ill. 321, 70 N. E. 624. But generally the driver need not stop, and looking and listening as a prudent man would do is sufficient. *Georgia Pac. R. R. v. Lee*, 92 Ala. 262, 9 Sou. 230. *Dickinson v. Erie R. R.* 81 N. J. L. 464, 81 Atl. 104. *Pittsburgh C. C. and St. L. R. R. v. Terrell*, 177 Ind. 447, 95 N. E. 1109. If the test as stated lays down the mandatory rule that a driver must stop and go ahead to look and listen to absolve himself from blame when his view is partly obstructed, it is clearly contrary to the general rule and a wrong decision, imposing an unwarranted burden on automobile drivers, for no prudent man would do so in all cases.

It may be the test merely applies the general rule as to assumption of risk and states no new law. A driver knows he must stop for the train. If the test as stated means if the driver can be sure there is no danger without getting out of his machine then he need not get out, but if he cannot be sure then he must get out, else there is an assumption of risk; then the case presents no new law. If he drives onto the track without taking all due precaution and is not sure there is no danger it may be said there is an assumption of risk. It would seem the court had this in mind, from its use of the word "otherwise" and the phrase "does so at his own risk." But to have an assumption of risk, the one injured must have had full and present knowledge of the danger, otherwise there is no assumption. *Wright v. City of St. Cloud*, 54 Minn. 94, 55 N. W. 819. It could be argued with considerable force that there could be no assumption of risk unless the one injured knew a train was coming, i. e., there is no danger from a railway crossing unless a train is coming. Thus his failure to make sure no train is coming is negligence if anything, and not an assumption of risk.

The court was probably trying to apply the assumption of risk rule, and not to state some new law. But it is to be doubted whether that rule can be applied to such facts, and the practical results of the decision probably will be to make it mandatory on drivers in all cases to get out and look if they wish to free themselves of any blame. The principal case was cited and followed in *Leuthold v. Penn. R. R. Co.*, U. S. Dist. Ct. 26 Ohio L. R. 99, the court there stating it (the instant case) establishes a precise and mandatory rule for autoists at any railroad crossing.

It is to be regretted Justice Holmes did not set out the basis of his opinion more fully. As it is, the case is very unsatisfactory.

B. B. C.

CRIMINAL LAW—HOMICIDE—ARREST—SELF-DEFENSE—RESISTANCE OF OFFICER.—Appellant, a deputy game warden, while engaged in duties of his office arrested a violator of fish and game law. Violator and companion, attempting to escape pushed off from shore in a row boat. Appellant, waded after them, caught hold of boat, and sought to hold on despite blows delivered by accused by means of a boat oar. In the struggle ensuing, appellant shot and wounded the accused violator. Appellant was prosecuted for assault and battery with premeditated malice and intent to kill. Guilty. Appellant appeals, assigning as error instructions given by the court (1) Court in defining assault and battery omitted word, "unlawful." (2) Instructed that before a defendant can exercise the right to self-defense he must be free from fault and if his own unauthorized acts brought on the assault he cannot claim the right of self-defense. (3) If prisoner resisted arrest, appellant would not be authorized to put prisoner's life in danger in order to overcome his resistance and if appellant in order to overcome prisoner's resistance used a dangerous and deadly weapon in such a manner as to endanger prisoner's life, then appellant should be guilty of assault and battery at least. *Held*: Reversed. *Durham v. State*, Supreme Court of Indiana, Dec. 23, 1927, 159 N. E. 145.

Before a court will declare an instruction erroneous it must be satisfied that alleged erroneous language when considered as part of entire charge, is harmful to appellant. *Eacock v. State*, 169 Ind. 488; *Weigand v. State*, 178 Ind. 623; *Hiatt v. State*, 189 Ind. 524; *Bredenderf v. State*, 193 Ind. 675. Where instructions on self-defense are abstract it is error to refuse proper requests correctly applying the law to the particular facts. *Malone v. State*, 176 Ind. 338; *Fleming v. State*, 136 Ind. 149; *Banks v. State*, 157 Ind. 190; *Eby v. State*, 165 Ind. 112; *Dunn v. State*, 166 Ind. 694.

If after notice of the intention to arrest, the party either flees or forcibly resists, the officer may use all necessary means to affect the arrest. Burns Ind. Statutes 1926, sec. 2159. Where an officer informs the person sought to be arrested of his purpose to arrest him and he refuses to submit, the officer having authority to make such arrest may use sufficient force to overcome such resistance even to the taking of life. *Plummer v. State*, 135 Ind. 308. General rule that in case of misdemeanor an officer has no right except in self-defense to kill an offender, either in attemping to arrest or in preventing an escape. 2 R. C. L. 30. Authority of officers to arrest without a warrant extends only to misdemeanors committed within their view. *Jackson v. State*, 116 Ind. 464; *Powell v. State*, 187 Ind. 76; *Tribbey v. State*, 189 Ind. 205; but in making an arrest either for felony or misdemeanor an officer may exert such force necessary to overcome resistance he encounters or to subdue efforts to escape. 13 R. C. L. 178. An officer

must of necessity be the agressor and his mission is not accomplished when he wards off an assault; but he must press forward and accomplish his object and is not bound to put off arrest till a more favorable time. *North Carolina v. U. S.*, 74 Fed. 734; *Roberts v. Jailor*, Fed. Cas. 15, 463. If an officer is resisted before he has used needless force he may then press forward and overcome such resistance even to taking a life if absolutely necessary. 1 Bishop Crim. Proc. 160.

When a person, being without fault is in a place where he has a right to be and is violently assaulted, he may without retreating repel force by force and if in the reasonable exercise of his right to self-defense his assailant is killed, he is justified. *King v. State*, 187 Ind. 228; *Page v. State*, 141 Ind. 236; *Smith v. Smith*, 142 Ind. 228. An Officer who is resisted can avail himself of the usual rights of self-defense and is further protected by a special protection which is thrown around him by law because of the necessity of aggression. 2 R. C. L. 30. Mikel in Clark Crim. Proc. (2nd ed.) sec. 17.

A. L. B.

CRIMINAL LAW—JUDGMENT—HABEAS CORPUS—FINES.—Petitioner entered a pleas of guilty in a liquor case tried in a city court and was fined and given a prison sentence, but the prison sentence was suspended. The court had power to give a jail sentence not to exceed six months. Petitioner did not appeal. The judge later committed petitioner to the county jail for failure to pay his fine and costs. Petitioner's exceptions to the return to his writ of habeas corpus was that the court had no jurisdiction whatever in cases where the penalty exceeds imprisonment for six months, that the judgment was void, and that the judge had no power to issue the writ of commitment. The court overruled the exceptions, and petitioner appealed. *Held*: Judgement affirmed. The sentence was not void but invalid only as to the excess. Martin J. (dissenting). *Hunnicutt v. Franhiger, Supreme Court of Indiana*, Oct. 28, 1927. 158 N. E. 572.

Where the court has jurisdiction of the subject matter of the action and of the person of the defendant, the judgment rendered thereon is not void. *Lowery v. Howard*, 103 Ind. 440. *Peters v. Koepke*, 156 Ind. 35. A judgment which is not void cannot be attacked collaterally by habeas corpus. Burns 1926, sec. 1200; *Baker v. Krietenstein*, 185 Ind. 693. The restraint of which petitioner complains, in the principal case is not under that part of the judgment which exceeds the jurisdiction of the court. The prevailing rule is that an excessive sentence is valid as to so much of it as is authorized by law and void only as to the excess, provided the sentence is severable so that the lawful part may be performed without performing the unlawful part. *In re Fanton*, (Nebr.) 76 N. W. 447. There is very little authority on this point in Indiana. The case of *Perry v. Pernet*, 165 Ind. 67, supports this rule although the decision in that case is also upheld on other grounds. In case the valid and invalid portions of the sentence are separable, the prisoner will not be discharged on habeas corpus until he has served the legal portion of the sentence. *In re Taylor*, (S. D.) 64 N. W. 253, *Ex parte Bulger*, 60 Cal. 438. The assessment of punishment less than that prescribed by law does not render the verdict invalid. *State v. Arnold*, 144 Ind. 651. Commitment to enforce a fine is an execution of a judgment within the power of the city courts, Indiana Acts. 1921, p. 409.

M. R. H.

DESCENT AND DISTRIBUTION—TRACING TITLE—DETERMINING ANCESTOR. —Action by appellants wherein they claim that they are the owners in fee simple of certain real estate, and pray that their title be quieted vs. appellees. The title to the land in quo was formerly vested in Wm. Owen, who was married twice, appellants being children by his first wife; appellee Levi Owen being his only surviving child by his second wife, Isabelle, who held title to his land, by virtue of her marriage to Wm. Owen, and his widow, and died during subsequent coverture, leaving Seth Shields, her second husband, and the remaining appellees, her children. Appellants aver that appellee Levi Owen has been absent and unheard of for more than seven years and should be declared dead. Appellants claim title as the half-brothers of Levi Owen who are of the blood of Wm. Owen deceased, while appellees, other than Levi Owen, claims title as his half-brothers who are of the blood of Isabelle Owen Shields, deceased. *Held*: Jd. for appellees affirmed. In determining from whom estate was derived, title is traced back to person last seised, and not to remote ancestor. *Owen v. Shields*, Appellate Court of Indiana, Nov. 1, 1927, 158 N. E. 517.

Sec. 3337, Burns' 1926, provides that: "If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee simple * * *" Wm. Owen having died intestate and seised of the real estate in quo, the same, being one-third of his lands, descended to his widow Isabelle Owen in fee simple, under the provisions of sec. 3337. Sec. 3342, Burns' 1926, provides that: "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage * * * and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." Sec. 3330, Burns' 1926 provides that: "Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit." As Isabelle Owen was the owner of the real estate in fee simple at the time of her death the descent of the same to those entitled thereto must be from her and not from Wm. Owen, under sec. 3342. In determining from whom an estate came the rule is to trace the title back to the person last seised. It is the immediate and not the remote ancestor from whom the descent comes. *Murphy v. Henry*, 35 Ind. 442; *Smith v. Smith*, 23 Ind. 202; *Gray v. Swerer*, 47 Ind. App. 384; *Gardner v. Collins*, 2 Pet. 58; Washburn, Real Property, Vol. 3, p. 18, sec. 39. In this case the person last seised was Isabelle Owen from whom the land descended by the limitation of the statute to Levi Owen, the only child of the marriage by virtue of which the real estate came to his mother. Levi Owen, while seised of the land in quo by descent from his mother, died intestate leaving as his heirs only kindred of the half-blood, appellants, who were his half-brothers of the blood of his father, and appellees, who were his half-brothers and half-sisters of the blood of his mother, and, as the land descended to him from his mother, under sec. 3330, supra, appellees, as of the blood of the ancestor from whom Levi Owen received the land, became the owners thereof, and appellants have no interest therein.

H. C. L.

INDICTMENT AND AFFIDAVIT—SUFFICIENCY—CONFLICTING TERMS—STATUTE OF LIMITATIONS.—Appellant, Clarence Hunt, was convicted on an affidavit charging him with operating a motor vehicle while in an intoxicated condition. In part, the affidavit read, "* * * on or about the 27th day of Oct., A. D. nineteen hundred 1923 at said county * * * did then and there," etc. Appellant moved to quash the affidavit for the cause that the facts stated did not constitute a public offense. Section 2227, Burns' 1926. The reason being that the offense was laid in two different years, one of which was without the statute of limitations. *Held*: Judgment reversed in favor of the defendant. Justice Gemmill and Martin dissenting. *Hunt v. State*, Supreme Court of Indiana, Dec. 6, 1927. 159 N. E. 149.

The court apparently adheres to technical objections in criminal pleading, though the tendency of modern courts is otherwise. *State v. Sammons*, 95 Ind. 22; 14 R. C. L. 172. It is true that any ambiguities or uncertainties in an indictment or affidavit will be construed most strongly against the state. Ewbank *Crim. Law*, Sec. 251; *Littell v. State*, 133 Ind. 577. But as the dissenting justice points out, this rule must be construed in the light that if the offense is charged with such certainty that such defects do not tend to prejudice the substantial rights of the defendant, they must be disregarded on a motion to quash. Section 2225, cl. 10, Burns' 1926; *Williams v. State*, 188 Ind. 283; *Meyers v. State*, 101 Ind. 379; *Strobhar v. State*, 55 Fla. 167. The court itself says the indictment "must be so certain that the accused may know therefore the distinct charge against him," *Davis v. State*, 196 Ind. 213; *Barber v. State*, Ind., 155 N. E. 819, "that he may plead a conviction or acquittal in bar of another action upon the same offense, and that he may know what he is called upon to answer." *Nigh v. State*, 83 Ind. App. 712; *Mayhew v. State*, 189 Ind. 545. "Nineteen hundred" is an impossible date, being before the statute charging the offense and the general use of automobiles, and hence no date. *State v. O'Donnell*, 81 Me. 271; *Kirts v. State*, Ind., 152 N. E. 1. From such a date the defendant could hardly have been mislead. And where questions are presented upon an appeal, the dissenting justice also points out, the court shall not regard technical errors or defects which did not in the opinion of the court to which the appeal is taken, prejudice the substantial rights of the defendant. Section 2394, Burns' 1926; *Trout v. State*, 107 Ind. 578; *Padgett v. State*, 103 Ind. 550. Where two conflicting dates appear in an indictment, one of which is impossible and apparently a clerical error, the indictment will not be held bad. *Van Immons v. State*, 29 Ohio Circuit Ct. 681; *Saunders v. State*, Okla. Cr. App., 249 P. 1117; *State v. Brooks*, 85 Ia. 366. There may also be two conflicting dates without vitiating the indictment, where the correct one can be determined from the other allegations in the indictment. *State v. Patterson*, 116 Ind. 45; *Cornett v. Commonwealth*, 134 Ky. 613.

The court applies the general rule in regard to bills and notes, that as between written words and Arabic numerals, the written words should prevail. *Natl. Bank of Rockwell v. Sec. Natl. Bank of Lafayette*, 69 Ind. 479. This exactness should prevail where there is a contract entered into between the parties, since both took part in making the instrument; but should it where the state sets out the offense charged against the defendant, from which he is not mislead? Better pleading requires that there be some allegation of time within the period set out by the statute of limitations for bringing the charge. Ewbank *Crim. Law*, Sec. 253. Even though the omis-

sion to allege time at all seems cured by statute. Section 2225, cl. 8, Burns' 1926; *State v. Stumbo*, 26 Mo. 306. Allegation of some time within the period set out by the statute of limitations is material but not essential. *People v. Miller*, 12 Cal. 291. And in a criminal case the defendant may avail himself of the defense of the statute without pleading it specially. *Ulmer v. State*, 14 Ind. 52. On the whole the dissenting opinion seems the stronger, and supported by authority. P. L. C.

WATER AND WATER COURSES—POLLUTION—PLEADING UNDER THE CODE. —This was an action by appellee against appellants for damages to property, and alleged to have been caused by the wrongful discharge of mineral and salt water, from an oil well of appellants, into a natural water course which runs through appellee's lands. The mineral substances pollute the water and render it unfit for the use of stock and kill vegetation; and at times of heavy rain the banks are overflowed and the salt water flowing appellee's land make it untillable and unproductive. Appellants insist that they had the right to use and enjoy their property and to make reasonable use of the water course in carrying on their business of producing oil and that, if without negligence or malice, they in so using their property caused loss to appellee, it was a wrong for which there is no liability. *Held*: Judgment affirmed; that (1) upper landowner has right to discharge water in lower land only in natural ways and quantities; (2) upper landowner pumping salt water into stream, increasing aggregate quantity, making it more injurious to plaintiff's land, was prima facie liable; (3) in an action for pumping salt water from oil well evidence of careful operation under general denial was properly excluded. *Tichnor et al v. Witherspoon*, 158 N. E. 514, Appellate Court of Indiana, Nov. 2, 1927.

It is elementary that "the right of a riparian owner to have the stream flow by his land in its natural condition extends to the quality as well as the quantity of the water," and an upper riparian owner had, prima facie, no right so to use his land or the water of the stream as to cause pollution. *Tetherington v. Donk Bros. Coal etc. Co.*, 232 Ill 522; *Fergurson v. Firmenich Mfg. Co.*, 77 Iowa, 576, *Merrifield v. Lombard*, 13 Allen 16. But this right of a lower riparian owner to have the water come to him free from pollution is subject to the right of the upper owner to make a reasonable use of the water, and whether a use which affects the purity of the water is reasonable is a question of fact to be determined by a consideration of the character and ordinary use of the stream, the extent of the pollution, its necessity for the purpose of making a beneficial use of the water, and the resulting damages to the lower owner." *Hazeltine v. Case*, 46 Wis. 391; *Lawton v. Herrick*, 83 Conn. 417; *McNamara v. Taft*, v96 Mass. 597.—Tiffany, Vol. 1, p. 1142.

The difficulty of the case is not with the principles or their application. It is with the exclusion of appellants' evidence when the court said that the theory on which appellants sought to introduce evidence supporting their contention that they had the right to make a reasonable use of their land in the operation of oil wells so long as they used ordinary and prudent care, was confession and avoidance and not by way of general denial. According to this view if appellants have pleaded correctly they would have made a valid answer if they could show the use was reasonable. Also if the use was unreasonable, diligence and due care is no defense. *Weston Paper Co. v. Pope*, 155 Ind. 394.

This case represents the rule and practice in Indiana. The only, according to some authorities, "astonishing" exception is in the case of ejectment where the defendant's answer may contain a denial of each material statement or allegation in the complaint and be permitted to give in evidence every defense to the action that he may have. Burns' Annotated St. (1926) sec. 1131. The basis of the Indiana rule is conformity with the purposes of code pleading, that (1) to secure certainty and stability in the administration of legal justice; (2) to prevent defendant from taking advantage of plaintiff by hiding his defense; (3) to make the rules of pleading less lax and loose.

There are respectable opinions and decisions with tendencies contra to the rule in this case. *Bruheim v. Stratton,* 129 N. W. 1092, granted an action for conversion when facts showed sufficient cause of action although the complaint was intrespass. The court said, "Respondent relies upon *Dessert L. Co. v. Wadleigh,* 103 Wis. 318—it will be observed that the strict rule laid down there has not been followed by this court. In *Bierl v. Fongen,* 139 Wis. 150—in the light of the very liberal rules for testing the sufficiency of pleading which have been declared in recent years and the progressive tendency to broaden the judicial vision, the criticism of *Desert v. Wadleigh,* would hardly be made today. The general spirit of the decisions as regards essentiality of technical accuracy in pleadings and necessity for a party to stand or fall, under all circumstances, is not in strict harmony with the later day expressions and decisions. "Legal scholarship must show less devotion to logic and more devotion to social reality. The forward-looking scholar will insist that certain and predictable rules shall work well here and now in the social world and that justice shall not be sacrificed on the altar of logic. *Willis, Anglo-American Law,* 133.

P. A. L.