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Recent Case Notes

RECENT CASE NOTES.

BASTARDS—LIMITATION OF ACTIONS—COMMENCEMENT OF ACTIONS.—Bastardy proceeding by State of Indiana, on the relation of Geneva Mourer, against Fred Eacret. On August 2, 1926, relatrix filed her affidavit with a justice of the peace stating defendant, appellee herein, was the father of her unborn child. A writ was immediately issued to one Dutcher, a special constable, for the arrest of defendant. On August 25 relatrix gave birth to a child which was stillborn. On September 18 Dutcher died without having executed or made return of writ. On November 1 the justice of the peace issued a new writ on which defendant was arrested, brought into court and found to be the father of the child, and ordered to appear before the Circuit Court at next term. Defendant filed an answer in court framed on the theory that no action had been commenced against defendant before the birth of the stillborn child and therefore the present action could not be maintained. Plaintiff appeals from the action of the court in overruling plaintiff's demurrer to defendant's answer on the ground of insufficient facts. *Held*: Judgment affirmed. *State ex rel. Mourer v. Eacret*, Appellate Court of Indiana, January 5, 1928. 159 N. E. 473.

Section 1 of the Bastardy Act (section 1049, Burns' 1926) authorizes the commencement of a proceeding in bastardy in a justice of the peace court upon the filing, by a woman, of an affidavit that she has been delivered of, or is pregnant with, a bastard child. Section 20 of the above act (section 1069 Burns' 1926) provides that "The death of a bastard child shall not be cause of abatement or bar to any prosecution for bastardy." But by numerous decisions the Supreme Court of Indiana has held that a proceeding in bastardy cannot be commenced after the death of the child if the child is stillborn. *Canfield v. State ex. rel. Shepherd*, 56 Ind. 168; *Robinson v. State ex rel. Powers*, 128 Ind. 397; *Lewis v. Hershey*, 45 Ind. App. 104.

The correctness of the ruling of the trial court depends upon the date when this action was commenced; if on August 2, a date prior to the delivery of the stillborn child, the judgment should have been reversed; if on November 1, after the birth of the child, the judgment is good. The law is well established in Indiana that the commencement of an action dates from the time a writ is regularly delivered to the officer for service. Section 55, Code Civ. Proc.; Section 332, Burns' 1926; *Fordice v. Hardesty*, 36 Ind. 23; *Alexandria Gas Co. v. Irish*, 152 Ind. 535; *Marshall v. Matson*, 171 Ind. 238. But in order that the issuance of process to a serving officer may operate as a commencement of the action as of the time of the issuance, the writ must be executed or must be kept alive by an alias writ or pluries writs until duly served. There must be no discontinuance of the process in the meantime. *Geisen v. Karol*, 86 Ind. App. —, 159N. E.469. The writ of November 1 cannot be considered as an alias writ. Numerous authorities hold that the original summons must be followed by the appropriate successive processes in order to constitute a single action referable to the date of its issue, and if there is an omission sufficient to work a discontinuance, the commencement of the action will date from the new process. *Hones v. Mackey*, 2 Lack. Leg. N. (Pa.) 375; *Flubright v. Tritt*, 19 N. C.

491; *Hatch v. Alamance R. Co.* 183 N. C. 617; *Geisen v. Karol, supra;* 1 C. J. p. 1155. The death of the special constable to whom the first writ was delivered and the issuance of a second writ to a second constable was sufficient to work a discontinuance.

Since there was no execution of the original writ, and no alias issued thereon, the issuance of the writ of November 1 was an abandonment of the original action, and a commencement of a new one, which could not be maintained in the face of the law denying bastardy proceedings after the death of a stillborn child. The court rightly affirmed the judgment for defendant.

A. V. R.

BILLS AND NOTES—FAILURE OF CONSIDERATION—SALES.—Woods and Son, of Amo, Ind., sent an order for hogs to appellant, of West Plains, Mo., stating that appellee bank would honor a draft for the selling price. In response to an inquiry, appellee wired appellant: "Will honor draft on N. E. Woods and Son." Appellant shipped the hogs to Woods, and sent appellee a draft, in which appellant was both payee and drawer, asking appellee to pay $2,316.37, to be charged to the account of Woods. Some of the hogs were dead, and others sick when they arrived. Woods stopped payment on the draft. Appellant went to Amo, sold the hogs for $410 for benefit of appellee, and sued appellee for the balance. Judgment for appellee. Appeal. *Held*: That Woods' defense of failure of consideration was a good defense for appellee, because appellee's promise was not that of an acceptor, but a mere promise to pay a draft on Woods for any consideration due appellant from Woods on the transaction. Affirmed. *Renfrow v. Citizens' State Bank,* Ind. App., Dec. 8, 1927, 158 N. E. 919.

The case seems right. Except in cases of acceptance for honor, acceptance must be by the drawee, or its creates no legal liability. Section 11491, Burns' 1926; Brannan's Negotiable Instruments Law (4th Ed.) § 132; 3 R. C. L. 1301. Appellee could not have been an honor acceptor, for the statutory requirements of previous protest, writing indicating an honor acceptance, and signing by acceptor had not been met. Burns' (1926) §§ 11520, 11521, and 11524. It follows that appellee's promise amounted only to this, A promise that appellee would stand in the place of Woods for the payment of the draft.

There was an implied warranty that the hogs would be alive and fit for stock purposes. It is an exception to the rule of *caveat emptor* that "when the purchaser has not had an equal opportunity of inspecting such goods or chattels with the seller * * * an implied warranty of their quality, or of their being marketable, or of their fitness for the purpose intended, when such purpose is known to the seller, is raised or recognized in his behalf." *Morse v. Union Stock Yards,* 21 Or. 289, 14 L. R. A. 157; *Merchants, etc., Bank v. Fraze,* 9 Ind. App. 161. A breach of warranty, express or implied, is a good personal defense to an action on a bill or note. *Crist v. Jacoby,* 10 Ind. App. 688; *Pryor v. Ludden & Bates Southern Music House,* 134 Ga. 288, 67 S. E. 654, 28 L. R. A. (N. S.) 267, and note; 3 R. C. L. 947.

Since Woods and Son have a good defense, so also has appellee, for appellee's promise was only to stand in the place of Woods for payment of the draft.

D. J.

CARRIERS—DEGREES OF NEGLIGENCE—DEGREES OF CARE—THE DUTY OWED BY A CARRIER IN PROTECTING ITS PASSENGERS.—P, a railway postal clerk, sues for injuries sustained from the negligent operation of the train, whereby P due to the sudden lurching of the train while rounding a curve at a high rate of speed was thrown from the car. The trial court instructed the jury that, in determining whether D was negligent in the operation of its trains at the time and place where P was injured, it should determine whether D or its servants operated the train by "exercising the highest degree of practical diligence and care or whether such diligence, care, prudence and foresight might have safely guarded P from his alleged injury." *Held*: the instruction was erroneous and case remanded with instructions to jury to determine what would be "reasonable care" on the part of the carrier in protecting its carriers. *Pittsburg, C. C. & St. L. Ry. Co. v. Stephens*, Ind. App. Ct. June 8, 1927, 157 N. E. 58.

Beginning with the case of *Coggs v. Bernard* (Q. B. 2 Lord Raymond 909) negligence and care were divided into degrees but the tendency of modern authority is now opposed to this classification, holding that negligence is merely a failure to bestow the care and skill which the situation demands and hence it is more accurate to call it simply negligence. *Milwaukee Ry. Co. v. Arms*, 91 U. S. 494; *New York Central Ry. Co. v. Lockwood*, 17 Wallace, U. S. 357.

In a like manner quite a few of our courts have shown a tendency to overthrow the theory that care is divided into degrees. These courts have even gone so far as to apply the test of reasonable care according to the circumstances to common carriers. 31 *Yale L. Jour.*, 555; 19 *Columbia L. Rev.* 166. Thus some courts have held erroneous instructions of the trial court which require of common carriers the "highest degree of care." *Union Traction Co. v. Berry*, 188 Ind. 514; *Seldon v. Sampsell*, 153 Ill. App. 278; *Birmingham Light & Power Co. v. Barrett*, 58 South. 760. The courts in taking this position say, "Negligence is the neglect or violation of the duty to use care, there can be no degrees of negligence and hence no degrees of duty; the court is required to define the duty which the law imposes and also to state the rule fixing the standard of care which will measure up to such duty; the duty remains the same under all circumstances and is defined as 'due care,' 'ordinary care' or 'reasonable care,' which terms have the same significance." They also say, "the standard of care measuring up to such duty is the care that a person of ordinary prudence would regard as reasonably necessary or proper under the circumstances of the particular case. *Union Traction Co. v. Berry*, 188 Ind. 514; *Raymond v. Portland Ry. Co.*, 100 Me. 529; *Denny v. Chicago Ry.*, 130 N. W. 363.

The authority on the present question is not in harmony and no general rule can be laid down. In general however, it may be said that instructions embodying emphatic words as "great care," "utmost care" or "highest care," in defining care of common carriers toward passengers have not been held erroneous. See cases 32 A. L. R. 1190. Thus the common carrier according to the majority of the jurisdictions is required to protect its passengers by the exercise of the highest degree of care under the existing circumstances of the case. See cases 32 A. L. R. 1190. The underlying policy for this strict accountability to passengers is obvious. The law places a high valuation upon human life and for this reason it requires

from those whose business or occupation involves great risk of life, a peculiar degree of vigilance. *Treadwell v. Whittier*, 22 Pac. 266; *Virginia Law Rev.*, Jan. 1928, p. 203. It may be that the standard "highest degree of care" is nothing more than ordinary care applied to the circumstances and conditions of the particular case. Evidently the Indiana court did not take this view.

R. H. L.

CRIMINAL LAW—ARREST—PLEA—SEARCH AND SEIZURE—ADMISSIBILITY OF EVIDENCE.—An indictment charged appellant with transporting liquor in violation of the liquor law, Sec. 17, c48, Acts 1925. The county sheriff after being informed that appellant had been transporting liquor watched him and saw him load a keg into an automobile. He followed appellant to the city and there questioned him for failure to have a tail light burning on the car. The officer saw a keg in plain view on the car and on appellant's admitting it contained liquor, the officer placed him under arrest and seized the keg and contents. Appellant waived arraignment and pleaded not guilty. Later he was granted leave to withdraw his plea. He then moved to quash the indictment; this motion was overruled. No other plea was entered; on conviction appellant moved for a new trial. This motion was also overruled and appeal was brought. *Held:* Judgment reversed and motion for new trial sustained. *Koscielski v. State*, Supreme Court of Indiana, Dec. 6, 1927. 158 N. E. 902.

In a criminal case the plea forms the issue to be tried. *Andrews v. State*, 146 N. E. 17. Without the plea there is nothing before the court or jury for trial. It is error to proceed to trial without a plea. *Pritchard v. State*, 127 N. E. 545; *Hatfield v. State*, 36 N. E. 664. If a defendant should stand mute and refuse to enter a plea, the court must enter a plea of not guilty for him. Burns Ann. St. 1926, Sec. 2233; *Bennett v. State*, 123 N. E. 797. Where there has been a motion to quash an indictment, which motion has been overruled, the defendant must plead immediately thereafter. Burns Ann. St. Sec. 2232. In the present case appellant withdrew his plea of not guilty; after the motion to quash was overruled he was left without plea and further proceeding was error. The question is then properly presented by a motion for a new trial. *Billings v. State*, 7 N. E. 763; *Pritchard v. State, supra.*

Appellant's contention that the evidence of the keg of liquor should not be received because procurred by unlawful search and seizure raises the question of admissibility of evidence as brought to light in *Wallace v. State*, 157 N. E. 657; 3 *Ind. Law Jour.* 151. In the present case there was an arrest and a seizure without a warrant. *Wallace v. State, supra*, refuses to admit evidence taken under a warrant invalid because issued without probable cause. A difference must be noted in the present case in that the initial arrest of the appellant was lawful; an officer may arrest without a warrant when he has reasonable and probable cause to believe a felony is being committed at the time. *Thomas v. State*, 146 N. E. 850; *Murphy v. State*, 151 N. E. 97. Moreover, the appellant was committing a misdemeanor in not having the tail light burning. Persons lawfully arrested for an act done in an officer's presence may be searched without warrant and the facts discovered are admissible against them. *State v. Clausman*, 57 N. E. 541; *Haverstick v. State*, 147 N. E. 625. Such evidence is competent

under Burns Ann. St. Sec. 2720. Mere looking into an automobile by an officer is not a search in the legal sense. *Boyd v. State*, 286 Fed. 930. The arrest in the present case preceeded the taking of the evidence.

A principle is here illustrated which is often lost sight of by courts in considering constitutional rights in cases of search and seizure. The constitution provides against unreasonable search and seizure only. An unreasonable search or seizure lacks a probable cause. *U. S. v. Snyder*, 278 Fed. 650. Courts often overlook the fact that in many instances arrest, search and seizure may be made without a warrant at all and still be lawful. 9 *Am. Bar. Assn. Jour.*, 773. The lawful arrest in the present case gave rise to a probable cause, so in spite of the strict doctrine of *Wallace v. State, supra*, as in force in Indiana at the present time, evidence is nevertheless held admissible when secured without a warrant when the seizure follows a lawful arrest for any purpose.

C. W. D.

FRAUDULENT CONVEYANCES—BULK SALES—STATUTES—CONSTRUCTION THEREOF.—The appellant, plaintiff in the lower court, attempts to hold appellee, defendant in lower court, liable as purchaser of certain fixtures from one Bowen, contrary to the provisions of the Bulk Sales Law. Appellant was at the time of the sale a creditor of Bowen. Appellee's demurrer was sustained on grounds that the sale of the fixtures, being made after Bowen had sold the stock of merchandise to another party unknown to the appellant, was not within the purview of the statute, section 8052, Burns 1926. The facts indicate that the terms of the statute were not complied with, in that no inventory of fixtures was made, nor was any notice of the sale accorded the vendor's creditors. *Held*: the sale of the fixtures, without complying with the conditions of the statute, was void as against the creditors of the vendor. *Hughes-Curry Packing Co. v. Sprague.* Appellate Court of Indiana, Jan. 5, 1928. 159 N. E. 434.

The purpose of the Legislature in enacting this statute was to protect creditors of those engaged in the mercantile business from fraudulent sales, by such merchants, of their stocks of merchandise, or merchandise and fixtures, except upon certain conditions including due notice to such creditors. To permit the mere separation of sales of the merchandise and fixtures to distinct purchasers to prevent the application of the statute would be to defeat the legislative purpose by making it very easy to evade the statute. It is settled law of Indiana and other states that the intent of the Legislature enacting the law will be carried out, when it can be ascertained, although in doing so the strict letter of the statute may not be followed. *Abbot v. Inman*, 35 Ind. 262, 72 N. E. 284; *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790; 15 L. R. A. 775; *Wall v. Platt*, 169 Mass. 398, 48 N. E. 270.

In construing a statute the probable intention of the Legislature enacting the statute should be kept constantly in view, and this legislative intention, as collected from the examination of the whole, as well as separate parts of the statute, should have a controlling influence. *U. S. Saving Fund, etc. Co. v. Harris, et al*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451; *National Car Coupler Co. v. Sullivan*, 73 Ind. App. 442, 126 N. E. 494; *Storms v. Stevens*, 104 Ind. 46, 50, 51, 3 N. E. 401; *Travelers' Ins. Co. v. Kent, et al*, 151 Ind. 349, 354, 50 N. E. 562, 51 N. E. 723.

G. R. R.

MALICIOUS PROSECUTION—FORMER ADJUDICATION—COLLATERAL ATTACK ON JUDGEMENT.—Appellant's complaint charges appellees with malicious prosecution of two suits against him. The complaint shows on its face that the alleged malicious prosecutions were each determined against the appellant. Appellant alleges that the judgments in the original prosecutions were absolutely void, because he was without notice of the charges made against him, and was not permitted to be heard. The complaint, however, does not aver that these facts are shown by the record. Appellees demurred and judgment was given against the appellant. *Question*: Must the complaint state what is shown by the record on this point? *Held*: Yes—Judgment affirmed. *Kirkham v. Bailey*, Nov. 16, 1927. Appellate Court of Indiana, 158 N. E. 596.

A person, who brings his action for malicious prosecution, must prove four things: first, that the prosecution complained of has terminated in his favor; second, that it was instituted maliciously; third, that it was brought without probable cause; and fourth, that it caused him damage. *Burdick's Law of Torts.* Malice, want of probable cause, and the termination of the prosecution in favor of the plaintiff must be alleged in a suit for malicious prosecution. *Helwig v. Beckner*, 149 Ind. 131. It is settled law that an action for malicious prosecution cannot be maintained until the prosecution complained of has been legally terminated in favor of the defendant therein. *Stark v. Bindley*, 152 Ind. 182. The complaint must show that the prosecution has terminated favorably to the party plaintiff. *McCullough v. Rice*, 59 Ind. 580.

Courts speak through their records. It is to these that recourse is had, in the first instance at least, to ascertain the existence, character and validity of a judgment pleaded or interposed in support of some claim or right. Evidence outside the record is not admissible to show that summons was not served on the defendant. *Freeman on Judgments*, Vol. 1, section 375. Where the invalidity of a judgment is sought to be shown by matter extraneous to the record, such attack is collateral, and can not be made by a party to the judgment. *Cohee v. Baer*, 134 Ind. 375. Where the record is silent upon the subject of the service of process, jurisdiction of the person will be presumed in all cases where the attack upon the judgment is a collateral one. *Cavanaugh v. Smith*, 84 Ind. 380. A reply to an answer of former adjudication, which attacks the judgment relied on for want of service on the party against whom it was rendered, must allege what, if anything, the record in the former action shows on the question of notice or service. *Green v. Scharman*, 135 N. E. 3. The above cited cases show the importance of disclosing what the court record shows.

The holding is well supported by decisions. A record of a judgment cannot be impeached collaterally by allegation of matters *de hors* the record, unless the complaint states what is shown by the record in relation to such matters. *Layman v. Hughes*, 152 Ind. 484. Where it is sought to collaterally impeach a judgment for want of notice to the parties against whom it is rendered, the complaint must allege what the record of the judgment sought to be impeached discloses on the subject, or the complaint will be bad. *Bailey v. Rinker*, 146 Ind. 129.

R. W. M.