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Recent Case Notes

RECENT CASE NOTES

ADMISSIBILITY OF EVIDENCE—RES GESTAE—OFFICIAL RECORDS.—Appellee alleged that while he was making repairs on his car at the side of a street in Illinois he was struck and injured by a truck operated by appellant, such accident being caused solely by the negligence of the appellant, an Illinois corporation. At the trial, a policeman who witnessed the accident was permitted to testify that he and others carried appellee some two hundred feet to a drug store where the driver of the truck in the presence of the policeman and appellee made statements which identified appellant as owner of the truck. Also, a certified copy of the record of the secretary of state of Illinois was permitted in evidence to show appellant's application for and receipt of a license bearing a number identical with that of the truck which struck appellee. Verdict was given appellee; appellant moved for a new trial, claiming error in the admission of that evidence. *Held*: Judgment reversed and a new trial granted. *Kepps Express & Van Co. v. Boyd*, Appellate Court of Indiana, February 14, 1928. 160 N. E. 52.

The appellant's objection to admission of the policeman's testimony regarding statements of the truck driver is valid, and new trial was properly granted on that ground. Under the well known rules of evidence declarations of other parties offered through the mouths of witnesses are hearsay and not admissible. An exception to that rule arises in the case where such declarations are used to explain an act, and are part of the *res gestae*. To be part of the *res gestae* the declaration must be made by one of the actors in the event or occurrence, and must be so closely connected with the event as to be considered part of it. *Pittsburgh R. R. Co. v. Haislup*, 39 Ind. App. 394; *O'Conner Co. v. Gillaspy*, 170 Ind. 429. The declaration must be like a verbal part of the event or act. *Indianapolis St. Ry. Co. v. Taylor*, 164 Ind. 155. It is a part of the *res gestae* only when made contemporaneous with the principal fact and appears to be spontaneous. *Indianapolis Traction Terminal Co. v. Gilespy*, 56 Ind. App. 332; *Ft. Wayne Traction Co. v. Roudebush*, 173 Ind. 57. If the circumstances surrounding the declarations are such that there is time for the formation of a declaration, it is no longer part of the verbal act. *Lake Erie etc. Ry. Co. v. Scott*, 83 Ind. App. 357; *Ohio & M. Ry. Co. v. Stein*, 133 Ind. 243. In the present case the lapse of time between the accident and the making of the statements by the driver claerly takes these statements out of *res gestae*.

The admission of the certified copy of the record from the secretary of state of Illinois was proper under the authorities. Public records kept in any public office in any state may be proved in evidence when properly certified. Burns Ann. St. 1926, Sec. 498. Although documents from other states not admissible at common law are not admissible in Indiana unless the law of the other state is proved to show their validity, public records are admissible under common law. *Robinson v. State*, 182 Ind. 329; *Bruner v. State*, 69 Ind. App. 694; *Chamberlain v. Britton*, 136 Ill. App. 290, 84 N. E. 895; *People v. Cairo, V. & C. Ry. Co.*, 251 Ill. 505, 90 N. E. 730.

C. W. D.

BILLS AND NOTES—GOOD FAITH PURCHASER—TEST OF GOOD FAITH—N. I. L. CONSTRUCTION.—One Griffin secured a note from D through fraud.

P sues on the note. D set up fraud, and P replied claiming he bought for himself before maturity in good faith. P later filed another paragraph of reply claiming he bought the note for his wife and sister, and later bought it from them before maturity and for value. Evidence P did not know Griffin, that D was accessible by telephone to P when P bought the note but P did not call D, and P did not call his transferor as a witness. P's oral testimony was the only evidence to show he was a good faith purchaser. Judgment for D below. *Held*: Judgment for D affirmed. P did not prove to the satisfaction of the jury that he was a good faith purchaser. *Woodsmall v. Myers*, Appellate Court of Indiana, November 17, 1927. 158 N. E. 646.

The court stated as its test, that a "purchaser in good faith of negotiable instrument, complete and regular on its face, before it is due is not required to make any inquiry of the transaction out of which the note grew. But, going to the question of his good faith, the jury has a right to consider along with other circumstances, the fact that such inquiry, with reasonable opportunity, was not made." The well settled rule is that mere knowledge of facts sufficient to put a prudent man on inquiry, without actual knowledge, on mere suspicion of an infirmity or defect of title does not preclude a transferee from being a holder in due course unless the circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith; but the existence of such facts may be evidence of bad faith sufficient to take the question to the jury. 8 C. J. 501. *Goodman v. Simonds*, 20 How. 343, 3 R. C. L. 1076. The fact that the purchaser made no inquiries does not show want of good faith. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316. But no man should be permitted to wilfully close his eyes and then excuse himself on the ground that he did not see. *State Nat. Bank v. Bennett*, 8 Ind. App. 679; *Lundean v. Hamilton, Iowa*, 169 N. W. 208, 3 R. C. L. 1075. One with knowledge of suspicious circumstances should make inquiry. *Mae v. Carlson*, 22 S. D. 365; *Pierson v. Huntington*, 82 Vt. 482. See also *Citizens Bank v. Leonhart*, 126 Ind. 206; *Elmore County Bank v. Avant*, 189 Ala. 418. And contra: *Kitchen v. Loudenback*, 48 Ohio St. 177; *McPherrin v. Tittle*, 36 Okla. 510, 44 L. R. A. (N. S.) 395; *Bradwell v. Pryor*, 221 Ill. 602. The principal case apparently tries to apply a test of good faith. It might be doubted whether there were facts here sufficient to create suspicion, and for the jury to use as a basis of bad faith. But the jury had the privilege of disbelieving P's uncorroborated testimony, *Talge Mahogany Co. v. Burrows*, 191 Ind. 167, and P had the burden which he failed to uphold of proving he was a good faith purchaser. *Varney v. Nat. City Bank*, 80 Ind. App. 598. Contra: *Downs v. Horton*, 287 Mo. 414, wherein P need only re-establish his *prima facie* case. See 1 Ind. Law Jour. 49, 501.

The principal case seems sound in result, considering the finding of the jury and the rule in Indiana as to the burden of proof in such cases. But the cases show a confusion as to what the test is under the N. I. L. N. I. L., Sec. 52, Burns 1926, Sec. 11411 states a holder in due course is one who ". . . took in good faith . . ." But by Sec. 56, Burns 1926, Sec. 11415, to constitute notice of an infirmity, the purchaser must have had ". . . knowledge of such facts that his action in taking the instrument amounts to bad faith." It is questionable whether these sections coincide. Some cases apparently tend to make good faith the absence of

bad faith. *Unaka Nat. Bank v. Buttes*, 113 Tenn. 574; but others seem to apply a test of bad faith. *Jennings v. Todd*, 118 Mo. 296. Query whether under the N. I. L. as it is, there is not a gap in which neither test can be applied, *i. e.*, you may have knowledge of such facts as not to have good faith, but which are not sufficient to impute bad faith or notice. It would seem so and a proper field for legislative action.

B. B. C.

EVIDENCE—RES GESTAE—CERTIFIED COPY OF PUBLIC RECORD.—On trial of an action for personal injuries received by appellee when struck by appellant's truck, the court admitted, as part of the res gestae, statements, as to the ownership of the truck and identity of appellant, made by appellant's driver long enough after the accident for a policeman to walk 50 feet to the scene of the accident, then carry appellee 170 feet to a drug store. The court also admitted a certified copy of the record of the secretary of the state of Illinois showing appellant's application for a truck license, without proof of any Illinois statute requiring truck licenses. Both of these admissions are assigned as error. *Held*: That the statements of appellant's driver, made after the policeman had had time to carry appellee to the drug store, were not a part of the *res gestae*, and their admission was error; but that there was no error in admitting the certified copy of the record of appellant's application for truck license. *Kepp's Express & Van Co. v. Boyd*, Indiana Appellate Court, February 14, 1928. 160 N. E. 52.

The *res gestae* doctrine is a real exception to the hearsay rule which requires confrontation, cross-examination and oath, as guaranties of veracity. Wigmore on Evidence, § 1746; *Binns v. State*, 57 Ind. 46. Declarations made at a different time and place, as mere narratives of the event or transaction, are not part of the *res gestae*. *Ry. Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723; *Ry. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174. According to Wigmore, § 1750, there must be three elements present to make evidence such as that in the principal case admissible as part of the *res gestae*: (1) there must be a startling occasion; (2) the declarations must be made while the nervous excitement of the transaction still dominates the reflective powers and before sufficient time has elapsed to fabricate misrepresentative statements; and (3) the statements must relate to the circumstances of the occurrence. It is to be noted concerning the time element—about which most *res gestae* questions arise—that, while concurrence of time between the event and the declarations offered is material, it is not essential. The event and the declarations must be part of one continuous transaction, and there must be no mere narration. *Binns v. State*, 57 Ind. 46; *Jones v. State*, 71 Ind. 66; *Jack v. Life Assn.*, 113 Fed. 49. In the present case, the driver's declarations constituted a simple narrative, and were properly excluded.

The ruling on the statute concerning the admission of certified copies of public records from other states, Burns' (1926), § 498, has been, that documents from other states not admissible under the common law are not admissible in evidence in this state unless the law of such other states is proved to show their validity. *Johnson v. Chambers*, 12 Ind. 102. That is, there is a presumption that the common law prevails. *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Alford v. Baker*, 53 Ind. 279. The opinion of the principal case mentions neither the statute nor the rulings under it. There-

fore, it would seem that the court took judicial notice of the fact that Illinois law requires trucks to have licenses. Or it may be that the court has fallen in with what Wigmore says is the wholesome tendency, in some jurisdictions, to presume the similarity of foreign law. Wigmore on Evidence, § 2573.

D. J.

EXECUTORY CONTRACT TO SELL LAND—EQUITABLE CONVERSION—EFFECT ON RIGHTS OF WIDOW.—Appellee joined her husband in a written contract to convey land. The deed was deposited with a bank to be delivered upon part payment of purchase price and execution of certain mortgages. Before the purchasers complied with the conditions and took the deed, appellee's husband died testate. Appellee elected to take under the law. The purchasers took the deed, but later, because they were insolvent, the court ordered a reconveyance to appellant, administrator of the estate of appellee's husband. The lower court gave appellee one-third interest in the proceeds of the realty, free from all demands of creditors. Appeal. *Held*: That appellee takes the proceeds of the land as personalty, not free from creditors as realty, because the rights were fixed at the time of the husband's death, and at that time he held only the bare legal title which, for purposes of descent, is to be treated as personalty. *Butcher v. Young*, Indiana Appellate Court, November 3, 1927. 158 N. E. 581.

As a result of equity's granting specific performance in cases of land contracts, a doctrine, almost universally recognized, has come into being, viz., the doctrine that, when a valid, enforceable contract for the sale of land has been entered into, the vendor is seized only of the bare legal title, in trust for the vendee; and the vendee is looked upon as the owner. Conversely, the vendee holds the purchase money for the vendor, who is demed to have the substantial interest in it. *Jordan v. Johnson*, 50 Ind. App. 213, 98 N. E. 143; *Kimberlin v. Templeton*, 55 Ind. App. 155, 102 N. E. 160; 1 Pom. Eq. Jur. (4th Ed.), § 105; 3 Id., § 1161; 6. R. C. L. 1076; 57 L. R. A. 643. When the vendor or vendee dies before execution of the contract, the rights are fixed as at the time of death; and descent, distribution, or devises go according to equitable ownership. *Henson v. Ott*, 7 Ind. 512; *In re Deming's Estate*, 112 Ore. 621, 229 Pac. 912; *In re Bernhard's Estate*, 134 Iowa 603, 112 N. W. 86, 12 L. R. A. (N. S.) 1029; *In re Boshart's Estate*, 177 N. Y. S. 567 and 574; *Rhodes v. Meredith*, 260 Ill. 138, Ann. Cas. 1914D, 416, and cases cited in the note; 5 Pom. Eq. Jur. (4th Ed), § 2264. Since, then, in the principal case, the rights were fixed as at time of her husband's death, appellee cannot take the estate as realty. The case is correctly decided.

The court points out, however, that *Butcher v. Young* must not be confused with cases in which an absolute delivery in escrow is made, conditioned upon an event certain to occur. In those cases, delivery to the vendee relates back to the time of delivery in escrow. *Newman v. Fidler*, 177 Ind. 220, 97 N. E. 785; *Martin v. Caldwell*, 49 Ind. App. 1, 96 N. E. 660.

D. J.

TELEPHONES AND TELEGRAPHS—PUBLIC SERVICE COMMISSION—POLICE POWER—EMINENT DOMAIN.—On a petition for a rehearing of an order by the Public Service Commission for the appellee to furnish without compensation a drop connection for a toll line connecting the appellee and

the Rochester Telephone Co. The Appellate Court in 156 N. E. 469 found the commission's orders to be reasonable and ordered them followed. The appellee and the Rochester Telephone Co. were connected by a telephone line since 1895, and were both furnishing telephone service for their respective localities. The appellee was formerly connected with the Bell system for its toll service at Wabash, but is now directed to connect with that system through Rochester. The business over the one connecting line has so increased that there is need for an additional line to provide the public with proper service. The Rochester Telephone Co. was ordered to furnish a new connecting line, and the appellee to provide for proper drop connection for it. Appellee contends this is an unconstitutional taking of private property without compensation. *Held*: Rehearing denied. *McCardle, et al. v. Akron Telephone Co.*, Appellate Court of Indiana, February 14, 1928. 160 N. E. 48.

Appellee is a public service corporation and as such is subject to regulation by the public service commission, *Public Service Comm., et al. v. City of Indianapolis, et al.*, 193 Ind. 37, unless otherwise provided by legislative enactment, and such regulative power by the well settled doctrine is in the exercise of police power. 26 R. C. L. 513. The legislature in the exercise of the police power establishes the standard of reasonably adequate facilities, which is only a re-enactment of the common law, and the commission by its rules and regulations administers this standard. The enforcement of regulations enacted in the proper exercise of the police power of the state cannot be resisted as a taking of private property without compensation in violation of constitutional rights and immunities. *Stone v. Fritts*, 169 Ind. 361; *State v. Richcreek*, 167 Ind. 217. These companies had one connecting line dedicated to a public use and the new toll line became a public necessity. The orders, however, were not to create a new use but only to regulate the old use in order to provide adequate facilities for public service. The police power must pass the test of reasonableness, *Michigan State Telephone Co. v. Mich. Ry. Comm.*, 193 Mich. 515, and it will do so when some social interest can be found to be protected, *Cincinnati, Indianapolis & Western Ry. Co. v. City of Connersville*, 170 Ind. 316, as in the principal case, the general prosperity and welfare of the community. The present authority supports the proposition that an order for a physical connection is upheld under police power and not eminent domain. *Pacific Tel. Co. v. Wright Dickinson Hotel Co.*, 214 Fed. 666; *Wis. Tel. Co. v. Ry. Comm. Wis.*, 162 Wis. 283, which apparently disapproves of the case appellee relies on, *Pacific Tel. Co. v. Eshleman*, 166 Cal. 640. Inall cases of the exercise of police power there is a justifiable interference with private property, justifiable because the social interest on one side of the balance must outweigh the disturbance of private property rights on the other. The regulation was reasonable in view of the finding of inadequate facilities under Sec. 12744, Burns' 1926.

P. L. C.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—PLEADING.—For the consideration of one dollar, deceased gave plaintiff a sealed option to purchase a certain lot for $6,000. Plaintiff gave due notice of acceptance and tendered the purchase price, but deceased refused to convey to him and sold to defendant, who took with notice. Defendant also refused to convey to plaintiff on tender. Defendant's demurrer to complaint for specific

performance, on the ground that it "failed to allege facts sufficient to constitute a cause of action" was sustained and plaintiff appealed. *Held*: (*inter alia*) A seal "imports a consideration" and a complaint for specific performance need not allege that the contract is fair and equitable. Judgment reversed. *Bauermeister v. Sullivan*, February 17, 1928, Appellate Court of Indiana. 160 N. E. 105.

No consideration is required by the common law for contracts under seal. Statements that a seal "imports a consideration" are the unfortunate result of an endeavor to read into the law of contracts under seal some of the law of informal contracts which developed in a later period of Anglo-American contract law. Williston on Contracts, Sec. 217, Indiana cases, since the adoption of the statute abolishing the distinction between sealed and unsealed instruments (Burns Ann. St. 1926, Sec. 492), have not required consideration in the case of specialties. Equity will grant specific performance of a sealed option without consideration. Pound, Consideration in Equity, 13 Ill. Law Rev. 435; Pomeroy, Equity Jurisprudence (4th Ed.), V, Sec. 2195.

A complaint asking specific performance need not contain allegations that the contract is fair and equitable. If it appears on the face of the complaint that the contract is unfair and inequitable, plaintiff has not stated a cause for specific performance and the complaint is subject to a demurrer for "insufficient facts to constitute a cause of action." *Traction Co. v. Essington*, 54 Ind. App. 286. If the defense requires proof of extrinsic facts, defendant must supply the new matter by answer. Burns Ann. St. 1926, Sec. 370.

M. R. H.