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Recent Case Notes

RECENT CASE NOTES

CARRIERS—NEGLIGENCE—DUTY OF CARRIERS TO PASSENGERS.—The minor son of the plaintiff was a passenger on one of defendant's cars in the city of Terre Haute. The car was a "one man" car and was in the sole charge of the motorman, whose station was near the door which formed the exit of the car. Evans (the deceased son) informed the motorman that he wished to alight at the intersection of 19th street and Beech Street. Upon arrival at the intersection, the motorman stopped the car and opened the door, which was on the east side, in order that Evans might alight. At the time the door was opened and as Evans was alighting from the car, an automobile operated by one Pierce was approaching the traction car along and upon the east side of 19th Street at a dangerous rate of speed. The motorman saw the approaching automobile, but failed to warn Evans thereof. Evans alighted but before he could reach the east curb of the street was struck by the automobile and killed. The Acts of 1917, c. 106, p. 337, make it unlawful for the operator of a motor vehicle to pass a street car at a lateral distance of less than 20 feet, on the streets of any town or city of this state, when such car has been stopped to permit passengers to alight. This action is against the traction company and Pierce, the complaint against the traction company being the alleged negligence of the motorman in failing to warn Evans of the approaching automobile, and in permitting him to leave the car and alight therefrom at the time. Traction company demurred. Overruled. *Held*: Judgment for defendant traction company. *Terre Haute, I. & E. Traction Co. v. Evans.* App. Court, April 5, 1928, 161 N. E. 671.

A motorman of a street car in opening the door to permit passengers to alight has the right to assume, in the absence of knowledge to the contrary, that, in compliance with the statute, an automobilist would pass the street car at a lateral distance of not less than 20 feet. If the width of the street is such as to make it impossible for an automobile to pass at a lateral distance of not less than 20 feet in compliance with the statute, a motorman has a right to assume, in the absence of knowledge to the contrary, that the automobilist will stop while passengers are alighting from the car. *Louisville Traction Co. v. Lottich,* 59 Ind. App. 426; *Elgin Dairy Co. v. Shepherd,* 183 Ind. 466; *Cole Motor Car Co. v. Ludrof,* 111 N. E. 447, Street railway companies operate their cars on tracks laid in streets, and use the streets in common with other vehicles. It follows, therefore, that their duties to passengers alighting from their cars are not the same as the duties of those commercial railways which operate their cars and discharge passengers on their own rights of way over which they have complete control. *Creamer v. West End St. Ry. Co.,* 31 N. E. 391; *Hayes v. United Ry. Co.,* 93 Atl. 226. Street railway companies carrying passengers in ordinary public streets or highways are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with or being run over by other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger and not that of the carrier. It is not a danger against which a carrier is bound to protect the passengers or to give him warning. *Oddy v. West End. St. Ry. Co.,* 59 N. E. 1027; *Ruddy v. Ingebret,* 204 N. W. 630; *Cleveland Ry. Co. v. Arrison,* 159 N. E. 580; *Jacobson v. Omaha & St. B. R. Co.,* 191

N. W. 327. It seems, however, that the following doctrine could have been applied to the facts of this case. This doctrine (the humanitarian doctrine) proceeds upon precepts of humanity and of natural justice, to the end that every person (who owes a duty to use care toward another) shall exercise ordinary care for the protection of that other after seeing him in peril or about to become imperiled, when such injury may be averted without injury to others. *Banks v. Empire Electric Co.*, 2nd series, 4 S. W. 875. The facts as set forth in the case state that the motorman saw the automobile approaching at a dangerous rate of speed and failed to warn Evans thereof. If such an allegation appeared in the complaint, defendants by their demurrer admitted it. Then didn't the motorman have sufficient knowledge of Evans' peril to bring the case within the doctrine just quoted? By opening the doors of the car, the motorman invited Evans to alight. He saw Evans' peril, a peril of which deceased was not cognizant, and as the relation of passenger and carrier had not terminated, did not the motorman owe a duty to Evans which is sufficient to overcome the presumption the court drew from the statute? R. H. L.

CONSTITUTIONAL LAW—COMMERCE—POLICE POWER—TAXATION.—Defendant operated a motor bus between South Bend, Indiana, and Niles, Michigan. His business was chiefly interstate, though he did carry some intrastate passengers. The city of South Bend, by ordinance prohibited the operation of its streets of any bus for hire without a license from the city. Before the license could issue, the applicant was required to file a contract of liability insurance providing for the payment of a judgment for damages to person or property resulting from the negligent operation of the bus within the city. The license fees vary with the seating capacity of the bus; for defendant's bus with seats for twelve, the fee is fifty dollars a year. The ordinance makes no distinction with respect to busses engaged in interstate commerce. Defendant paid the state registration fee but refused to apply for a city license. When prosecuted, he claimed that the ordinance violated the commerce clause of the Federal Constitution. *Held*: Judgment for city reversed. A license fee, imposed on an interstate bus is void as a direct burden on interstate commerce unless limited to an inspection fee, or to a reasonable excise for the use of the streets or highways, or an occupation tax imposed solely on account of intrastate business. *Sprout v. City of South Bend*, Supreme Court of the United States, May 14, 1928, 48 Sup. Ct. 502.

The Supreme Court of Indiana, disregarding defendant's intrastate business, based its decision on the broad ground that, "since defendant used the city streets in the indiscriminate solicitation and acceptance of passengers" he was, "within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety, security, and general welfare of the public." As bus traffic has been largely local in character and the federal government has been slow to legislate in this field, the states have naturally regulated the operation of motor vehicles. See *Motor Carrier Regulation: Federal, State, and Municipal*, D. E. Lilienthall and I. S. Rosenbaum, 26 Columbia Law Rev. 954. As an exercise of the police power, the state may prescribe uniform and non-discriminatory regulations upon the operation, on its highways, of all motor busses, though engaged in interstate commerce. *Morris v. Duby*, 274 U. S. 135; *Kane v.*

New Jersey, 242 U. S. 160. If the business is not national in scope, this may be explained on the theory that the states have concurrent power with the federal government, in the absence of federal legislation. If the business is national in scope and admits only of one uniform system of regulation, this may be explained on the theory that the state may exercise an incidental and indirect regulation, though the power of the federal government is exclusive. The reasonableness of state regulation is always subject to federal inquiry in so far as it affects interstate commerce. *Hendrick v. Maryland*, 235 U. S. 610. A state inspection fee imposed upon interstate busses will be sustained when it does not materially exceed the cost of its supervision. *Adams Express Company v. New York*, 232 U. S. 14; *Foote v. Maryland*, 232 U. S. 494. The states may require automobile insurance of motor busses even though engaged in interstate commerce, if limited to damages suffered in the state by persons other than passengers. *Clark v. Poor*, 274 U. S. 554; *Red Ball Transit Company v. Marshall*, 8 F. (2d) 635. The state may impose a reasonable excise upon busses in interstate commerce as their fair contribution to the cost of the construction and maintenance of its highways; *Clark v. Poor*, 274 U. S. 554; such a tax is a direct burden on interstate commerce when it falls with disproportionate economic weight on the interstate carrier or is so large as to obstruct interstate commerce. *Interstate Busses Corporation v. Blodgett*, 48 Sup. Ct. 230. The license tax is void as an occupation tax unless imposed solely on account of intrastate business. *Postal Telegraph Cable Company v. Charleston*, 153 U. S. 692. The state courts erred in failing to require the city to establish the license fee as one which it might impose constitutionally upon a bus engaged in interstate commerce. For general discussion of motor vehicle regulation see articles in 26 Columbia Law Rev. 954; 22 Illinois Law Rev. 47; 75 University of Pennsylvania Law Rev. 696; 76 University of Pennsylvania Law Rev. 548, 690; and 36 Yale Law Journal, 163. M. R. H.

INFANTS—PRINCIPAL AND SURETY—AVOIDANCE—LIABILITY OF SURETY.—One Clyde McKee, an infant, and known to all parties concerned to be such, purchased an automobile from appellees, making a down payment, and agreeing to pay the balance of $570 in installments. To secure the contract he gave his note signed by himself and the appellants, the latter as sureties. McKee, after part payment, disaffirmed the contract, returned the automobile to appellees, and demanded the return of the money paid by him. Upon appellee's refusal, McKee sued. Appellees filed cross-complaint to recover from appellants, as sureties on the note, the balance remaining unpaid on said contract of purchase. To a finding for appellees, appellants filed motion for a new trial. Motion overruled, and judgment rendered for appellees. This action of the court assigned as error. *Held* —Affirmed. A principal's disaffirmance of his contract by a purely personal plea in the nature of a privilege or protection, such as infancy or coverture, does not have the effect of releasing his sureties under the rule that release of one joint obligor is a release of all, whether principals or sureties. *McKee et al. v. Harwood Automotive Co.*, Appellate Court of Indiana, Feb. 23, 1928, 162 N. E. 62.

The general rule that the release or discharge of a principal releases the surety does not apply where a person *sui juris* guarantees the obliga-

tion of, or becomes surety for, a minor, married woman, or other person incapable of contracting. In such cases the defense is personal and does not affect the liability of the surety. *Garner v. Cook*, 30 Ind. 331; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 309; *Hicks v. Randolph*, 62 Tenn. (3 Baxt.) 352, 27 Am. Rep. 760; *Gates v. Tebbetts*, 83 Neb. 573, 119 N. W. 1120. The possibility of such defenses may be the very reason why the promisee demands a surety, and the latter is held liable in the absence of fraud, duress, deceit, or violation of law or public policy on the part of the promisee. *Winn v. Sanford*, 145 Mass. 302, 14 N. E. 119; *Yale v. Wheelock*, 109 Mass. 502; *Davis v. Statts, supra.* If a joint co-promisor is an infant, the promisee, in an action brought upon the contract, cannot consider the contract as void as to the infant, but must join him as a party defendant. *Wamsley v. Lindenberger*, 2 Rand. 478; *Slocum v. Hooker*, 13 Barb. 536; and if a defendant in an action against two upon contract, sets up his infancy as a defense, the plaintiff may enter a *nolle prosequi* or discontinue as to him, and proceed to judgment against the other defendants. *Kirby v. Cannon*, 9 Ind. 371; *Britton v. Wheeler*, 8 Blackf. 31; *Taylor v. Dansby*, 42 Mich. 82; or of course, the plaintiff may try the question of infancy, and if found against him, may still have judgment against the other defendants. *Cutts v. Gordon*, 13 Me. 474; *Craig v. Van Bebber*, 18 Am. St. Rep. 569. It has been held that where the infant disaffirms his contract and restores the other party to *status quo*, the surety of the minor cannot be held liable further, on the ground that it would be inequitable for the creditor to have both the property and the consideration for the same. *Lagerquist v. Bankers' Bond & Mortg. Guaranty Co.*, 205 N. W. 977 (Iowa); *Baker v. Kennett*, 54 Mo. 802; *Evants v. Taylor*, 18 N. M. 371, 137 Pac. 583; *Nations v. Gregg* (C. C. A.), 290 Fed. 157. However, it does not follow that the creditor has been placed in *status quo* upon receiving back the property, for the benefit of the contract is lost, and the consideration may be of such a nature that it has deteriorated in value. 2 Cal. Law Review, 337. Under the equitable doctrine of subrogation, the rule as laid down in the Lagerquist case is unnecessary, for in every case where one pays the debt for which another is primarily liable, and which that other in equity and good conscience should have paid, he becomes subrogated to the rights of the creditor, and becomes entitled to the debt. *Harper v. McVeigh*, 82 V. 751, 1 S. E. 193; 2 Cal. Law Review, 337. K. J. M.

PAYMENT—RIGHT OF APPROPRIATION.—Defendant Flesher was a building contractor. In February, 1926, he entered into a contract with defendants Burger and Burger, husband and wife, for the building of a residence on a lot owned by them. By the terms of the contract Flesher was to furnish all the labor and the materials. At the time the contract was executed, Flesher had under construction a residence for one Jones, with whom Flesher had a similar contract. The materials for both of these contracts were purchased from the plaintiff lumber company. As the materials were delivered, the plaintiff company charged the same to Flesher. The materials for the Burger residence being charged on one page of the ledger, and the materials for the Jones residence on another page of the ledger. As the work progressed defendants Burgers paid Flesher for the lumber he had purchased of plaintiff company for their

job, except a balance of $73.29. On July 10, 1926, Flesher paid to the plaintiff company $1686.55, but did not at that time give any directions to plaintiff to which account the payment was to be credited. Plaintiff on its own initiative gave credit to Flesher on the Jones account. On October 4, 1926, Flesher made inquiry of plaintiff as to which of his accounts had been given credit for the $1686.55 paid, and upon being informed that the Jones account had received the credit, Flesher stated that it had been his intention to apply this payment to the Burger account, because the latter had been more prompt in paying him. It was thereupon mutually agreed between Flesher and the plaintiff company to transfer this payment to Burger's credit. Plaintiff company accordingly made the change in its ledger. Thereafter, and without the consent or knowledge of Flesher, the plaintiff company made a re-transfer of the credit to the Jones account. Notice of the filing of a lien having been given, suit was commenced by plaintiff company against Burger and Burger to foreclose its lien for the materials furnished for their job. The court below gave a verdit for the plaintiff, but gave credit for the $1686.55. The plaintiff appeals from the verdict. *Held:* Under the facts of this case, the creditor and debtor, on October 4, 1926, had the right by mutual consent, to change, as they did, the application of the payment previously made, and, having done so, it was not thereafter within the power of the creditor at its own instance to change the credit so made. *Kendallville Lumber Co. v. Burger et al,* Appellate Court of Indiana, August 29, 1928. 162 N. E. 713.

A debtor who owes his creditor money on distinct and separate accounts, or debts, may direct his payment to be applied to either, as he pleases. If he omits to make any such appropriation, then the creditor has the right to apply the payments to such debts due to him by the creditor as he may choose. If the debtor pay with one intention, and the creditor receives it with another, the intent of the debtor must govern. Neither party can claim the right, however, to make an appropriation after a controversy has arisen. *Conduitt v. Ryan,* 3 Ind. App. 1, 29 N. E. 160; *Huffman v. Cauble,* 86 Ind. 591; *Lazarus v. Freidheim,* 51 Ark. 371, 11 S. W. 518; *Goodman v. Snow,* 81 Hun. (N. Y.) 225, 30 N. Y. Supp. 672. The reason for the rule is that up to the time of payment the money is the property of the debtor and subject to his control. *Baum v. Trantham,* 42 S. C. 104, 19 S. E. 973, 46 Am. St. Rep. 697.

Where a debtor makes a payment to one to whom he owes several debts and neither makes a specific appropriation of the payment, the court will apply it as equity and justice require, having regard first to the intention of the debtor, if it may be gathered from the circumstances. *U. S. v. Kirkpatrick,* 22 U. S. (9 Wheat.) 720, 6 L. Ed. 199; *Sanborn v. Stark* (C. C.) 31 Fed. 18; *Howland v. Rouch,* 7 Blackf. 236; *King v. Andrews,* 30 Ind. 429; *Farren v. McDowell,* 74 Hun (N. Y.) 176, 26 N. Y. S. 619; *Henry Bill Pub. Co. v. Utley,* 155 Mass. 366, 29 N. E. 635; *Adams Express Co. v. Black,* 62 Ind. 128.

After an appropriation of a payment by the creditor, it cannot be altered, except by mutual consent. *Pearce v. Walker,* 103 Ala. 250, 15 So. 568; *Smith v. Wood,* 1 N. J. Eq. (Saxt) 74; *Chicago Lumber Co. v. Woods,* 53 Iowa 552, 5 N. W. 715; *Hughes et al. v. McDougel et al.,* 17 Ind. 399; *Hahn v. Geiger,* 96 Ill. App. 104.

An appropriation once directed can be changed by the consent of both parties, and in such a case the indebtedness first discharged is revived by implication of law, when there is no express promise. *Rundlett v. Small*, 25 Me. 29. If a particular application was directed at the time of the payment, it was competent for the parties, by mutual consent, to change it afterwards; or, if no application was made at the time, it was competent for the parties afterwards to agree on one different from what the law would have made. *Flarsheim v. Brestrup*, 43 Minn. 298, 45 N. W. 438.

The conclusion reached by the Appellate Court is in accord with the decided weight of authority on the question involved. T. R. D.

RAILROADS—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF COMPLAINT.—Plaintiff, as administrator, sued defendant alleging that decedent was injured by defendant's negligence and without any fault or negligence on the part of the decedent; that decedent was driving a truck along a highway in a careful manner and looked and listened for a car as he approached the crossing, and that defendant's flagman negligently signalled decedent to cross over the crossing in front of an interurban car which killed him. Defendant interposed a demurrer on the ground that under the allegations of the complaint decedent was as a matter of law guilty of contributory negligence. The trial court overruled the demurrer and in the trial by jury a verdict was found for the plaintiff. *Held:* Judgment affirmed. *Terre Haute, Indianapolis & Eastern Traction Co. v. Swalls*, Appellate Court of Indiana, July 20, 1926, 162 N. E. 446.

That the plaintiff, in an action for personal injuries caused by the alleged negligence of the defendant, need not allege or prove freedom from contributory negligence is a settled rule in Indiana. Burns Annotated Statutes, 1926, section 381; *Cleveland, C. C. & St. L. Ry. Co. v. Klee*, 154 Ind. 430, 56 N. E. 234; *Chicago & Eastern Ry. Co. v. Laporte*, 33 App. 691, 71 N. E. 166; *Southern Ry. Co. v. Corps*, 37 App. 586, 76 N. E. 902. The rule was different before the statute, it being then necessary for the plaintiff to allege and prove freedom from contributory negligence unless he was seeking recovery on the theory that the injury complained of was wilfully or intentionally inflicted. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Staat's Adm'r*, 83 App. 680, at 684; *Pennsy. Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185; *Louisville N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807. But if the complaint shows on its face that the injured party was guilty of contributory negligence, or if the plaintiff's evidence establishes that fact, the plaintiff must fail notwithstanding the statute. *Rich v. Evansville & T. H. Ry. Co.*, 31 App. 10, 66 N. E. 1028. Thus, where the plaintiff alleged that he was struck by defendant's train while he was engrossed in watching a freight train which made considerable noise, and that although he could have easily been seen by defendant's servants in charge of the train which struck him, it approached without warning, it was held that the complaint disclosed that the plaintiff was guilty of contributory negligence as a matter of law, and was therefore demurrable. *Van Winkle v. New York & St. L. Ry. Co.*, 34 Ind. App. 478, 76 N. E. 157. The rule is that a complaint is sufficient as against a demurrer if the plaintiff alleges facts disclosing a duty owed by the defendant, and a negligent failure of defendant to perform that duty

with a resulting injury to the plaintiff. *Chicago C. C. & St. L. Ry. Co. v. McStandish,* 167 Ind. 648, 79 N. E. 903; *Lake Erie & Western Ry. Co. v. Bray, Adm'r,* 42 App. 48, at 52, 84 N. E. 1004.

The Indiana rule that contributory negligence is a matter of defense which the defendant must plead and prove is in force in the federal courts. *O'Hara v. Central Ry. Co. of New Jersey,* 183 Fed. 739.

On principle, the Indiana rule seems sound, but many jurisdictions such as Illinois (*West Chicago Street Ry Co. v. Liderman,* 187 Ill. 463, 58 N. E. 367); Massachusetts (*Lane v. Crombie,* 12 Pick. 177); and New York (*Whalen v. Citizen's Gaslight Co.,* 151 N. Y. 70, 45 N. E. 363) are contra.

R. C. H.

WATERS AND WATER COURSES—NONNAVIGABLE LAKE—RELICTION OF WATER.—The United States surveyed the section, of which the land in question is a part, and made a plat thereof in 1834. Wolf Lake was shown on said plat as a nonnavigable lake, and the meander lines were drawn and shown on the plat marking the then shore or water line of the lake. The land was platted into lots and the acreage in each lot above the water line was shown. Pursuant to the Swamp Land Act of 1850 (USCA 982-984) the United States donated the said section to the State of Indiana in 1850, and issued a patent for the same in 1853. The State then executed its patent to the lots in question, which border on the lake, to the remote grantors of the appellee, who is now the owner of said lots by mesne conveyances. The waters of Wolf Lake have gradually receded since the survey, and the land in controversy, by reason of such reliction, is now dry land. Action and cross-complaint to quiet title to land resulting from said reliction. *Held:* That grantees of said lots as riparian owners acquired title to portion which resulted from receding of waters of lake. *State v. Forsyth,* Appellate Court of Indiana, July 17, 1928. 162 N. E. 661.

Meander lines are not boundary lines, but are run simply to determine the sinuosities of the banks. *The Tolleston Club v. State,* 141 Ind. 197; *The Tolleston Club v. Clough,* 146 Ind. 93; *The Tolleston Club v. Lindgren,* 39 Ind. App. 448; *Railroad Co. v. Schurmier,* 7 Wall. 272. Therefore the extent of the appellee's estate is not to be determined by the meander lines as they appear on the plat; but instead, the appellee's remote grantors took as riparian owners. *Live Stock Co. v. Springer,* 35 Ore. 312; *Grant v. Hemphill,* 92 Iowa 218; *Bardwell v. Ames,* 39 Mass. 333; *Stoner v. Rice,* 121 Ind. 51. The appellee, as a riparian proprietor, is entitled to the land resulting from the reliction of the water, as he is the owner of the bed of the lake to the thread thereof or within the boundaries of that particular subdivision. *Ridgway et al. v. Ludlow,* 53 Ind. 248; *Stoner v. Rice, supra; Hilt Ice Co. v. Zahrt,* 29 Ind. App. 476; *Harin v. Jordan,* 140 U. S. 371; *Kean v. Calumet Canal and Improvement Co.,* 190 U. S. 452.

This decision represents the weight of authority—Arkansas, *Rhodes v. Cissel,* 82 Ark. 367; California, *Foss v. Johnstone,* 158 Cal. 119; Idaho, *Donovon Co. v. Hope Mfg. Co.,* 194 Fed. 643; Michigan, *Grand Rapids Ice Co. v. South Grand Rapids Ice Co.,* 102 Mich. 227; Missouri, *Kirkpatrick v. Yates Ice Co.,* 45 Mo. App. 335; New Jersey, *Kanouse v. Stockbower,* 48 N. J. Eq. 42; Ohio, *Bass Lake Co. v. Hollenbeck,* 5 Ohio C. D. 242; Utah, *Poynter v. Chipman,* 8 Utah 442; Florida, *Broward v. Mabry,* 59 Fla. 398; Minnesota, *Tucker v. Mortenson,* 126 Minn. 214; North Carolina, *Hodges*

v. Williams, 95 N. C. 331; Pennsylvania, *Smoulter v. Boyd*, 10 Kulp 199; South Dakota, *Olson v. Huntamer*, 6 S. D. 364; Tennessee, *Webster v. Harris*, 111 Tenn. 668; Washington, *Bernot v. Morrison*, 81 Wash. 538; New York, *Deuterman v. Gainsborg*, 41 N. Y. Supp. 185, being in accord. However a contra doctrine has been adopted in the following jurisdictions: Illinois, *Fuller v. Shedd*, 161 Ill. 462; Iowa, *Carr v. Moore*, 119 Iowa 152; Louisiana, *McDade v. Bossier Levee Board*, 109 La. 625; Massachusetts, *Paine v. Woods*, 108 Mass. 160; Maine, *Bradley v. Rice*, 13 Me. 198; New Hampshire, *Concord Mfg. Co. v. Robertson*, 66 N. H. 1; Wisconsin, *Attorney General ex rel. Askew v. Smith*, 109 Wis. 532; New Brunswick, *Nash v. Newton*, 30 N. B. 610. J. A. B.