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Case Notes

CASE NOTES

CRIMINAL LAW—CONVICTION OF ASSAULT AND BATTERY ON INDICTMENT FOR MANSLAUGHTER HELD NOT ERROR.—The defendant was indicted for manslaughter, the first count of the indictment charging voluntary manslaughter and the second count charging involuntary manslaughter. He was convicted of assault and battery. In his motion to discharge, defendant objected that he was not found guilty of any offense with which he was charged in the indictment. The second count of the indictment charged defendant with the involuntary killing of the deceased by "unlawfully and in a rude, insolent, and angry manner touching beating, striking, and wounding" etc. *Held:* Judgment affirmed. Here the indictment charged all the essentials of assault and battery and a commission of assault and battery was necessarily included in the charge of manslaughter. *Kleopfer v. State, Supreme Court of Indiana,* October 5, 1928, 163 N. E. 93.

Section 2312, Burns' Ann. St. 1926 provides that "on an indictment for an offense consisting of different degrees, defendant may be found not guilty of the degrees charged in the indictment and guilty of any degrees inferior thereto." And Section 2313, Burns' Ann. St. 1926 declares that a defendant may be convicted of any offense the commission of which is necessarily included in that with which defendant is charged in the indictment. The general rule is that persons on trial for an offense are also on trial for all offenses necessarily included in the offense charged. *State v. Hataborough,* 66 Ind. 233. Thus, defendant may be convicted of assault and battery on an indictment for rape, as the former is necessarily included in the latter. *Wright v. State,* 5 Ind. 527; *Reed v. State,* 141 Ind. 116; *Cronin v. State,* 189 Ind. 568. As a charge of robbery necessarily includes a charge of larceny, defendant may, on a charge of robbery be convicted of larceny. *Duffy v. State,* 154 Ind. 250; *Vancleave v. State,* 150 Ind. 273; *Payne v. State,* 194 Ind. 365. Defendant may also, under a charge of murder, be convicted of manslaughter. *Dukes v. State,* 11 Ind. 557; *Carrick v. State,* 18 Ind. 409; *Pigg v. State,* 145 Ind. 560. On a charge of malicious mayhem, there may be conviction of simple mayhem or assault and battery. *State v. Fisher,* 103 Ind. 530.

But on a charge of murder, there can be no conviction of assault and battery or assault, since the latter is only a misdemeanor not included in any of the degrees of felonious homicide, and if an assault and battery exists, it is merged in the homicide. *Wright v. State,* 5 Ind. 527; *Reed v. State,* 141 Ind. 116. It is also held that conviction for assault and battery under an indictment for kidnapping is impossible since full proof of kidnapping may be made without proving assault and battery. *House v. State,* 186 Ind. 593.

The case seems sound and in accord with the decided cases.

R. C. H.

HUSBAND AND WIFE—EVIDENCE.—Husband and wife executed mortgages to secure notes given by the husband for his own debts. The mortgages recited that the mortgagors expressly agreed to pay the sums

secured. They defaulted on the mortgages and in foreclosure proceedings. Subsequently to the judgment in the foreclosure proceedings, they sued to enjoin sale of other land, which they held by entireties, to satisfy the deficiency, alleging that the wife joined in the execution of the mortgages to release her inchoate interest in the realty, and that she was a surety for her husband, without any consideration. *Held:* Judgment for plaintiffs reversed. *Noble County Bank et al v. Waterhouse,* Appellate Court of Indiana, October 11, 1928. 163 N. E. 119.

Burns 1926, Sec. 1174, provides that in the foreclosure of a mortgage a personal judgment may be given against any party who has agreed to pay any sum secured by the mortgage. The joint promise to pay the debt, contained in the mortgage, is as valid as if the promise should be expressed in the note. *Vansell v. Carrithers,* 33 Ind. App. 294. Parol evidence is inadmissable to show that an absolute and unambiguous promise is merely executed to release the inchoate interest in realty. The married woman's disabling statute of 1881 has been changed by the legislature in 1923 to permit a married woman to sign a contract in the capacity of surety, which is valid and binding as to her. Burns' 1926, sec. 8738 and following sections. Property held by husband and wife by entireties is subject to their joint debts. Tiffany on Real Property (2 ed.), p. 655; *Union National Bank of Muncie v. Finley,* 180 Ind. 470.

M. R. H.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—EMPLOYER'S LIABILITY FOR INJURY INCURRED IN ALTERCATION WITH FELLOW WORKER.—A workman while in the course of his employment suffered an injury as the result of an assault and battery by a fellow workman, the altercation having grown out of employment of the two men, and concerned with the task in hand. Compensation was allowed by the Industrial Board, and the employer appealed. *Held,* that this was "an accidental injury arising out of employment," and compensation allowed claimant by the Industrial Board was affirmed, the court saying that "when co-employes are working together it is to be expected that disagreements will arise in connection with their work, and that there may be blows and fighting. Injury from such a source is one of the risks of employment." *Inland Steel Co. v. Flannery,* 136 N. E. 841. Accord: *Mueller v. Klingman* (1919), 125 N. E. 464, 73 Ind. App. 136; *American Steel Foundries v. Melinik* (1920), 126 N. E. 33, 74 Ind. App. 617; *Furst Cut Stone Co. v. Mayo* (1924), 144 N. E. 857, 82 Ind. App. 363; *C. R. I. & P. Ry. v. Industrial Commission* (1919), 123 N. E. 278, 288 Ill. 126; *Taylor Coal Co. v. Industrial Commission* (1922), 134 N. E. 172, 301 Ill. 548. Thus it appears that the test of the liability or nonliability of the employer in such cases lies in the question of whether the fighting was incident to, or connected with, the employment. This seems to be a fair statement of the point of law involved. A certain difficulty arises, however, from the fact that the courts do not always apply the same standards in settling the question of whether the altercation arose as an incident to the employment. In most of the opinions the facts involved are set out in considerable detail, and the variety of decisions reached leaves the reader wondering just what does or does not constitute an altercation "incident to the employment."

For example, where a quarrel arose between two workmen over the relative amount of work done during the day by each, both being employed on the same task but on different shifts, an injury sustained by one as a result of the fight which followed was found to have arisen from his employment, and the employer was held liable: *Payne v. Wall* (1921), 132 N. E. 707, 76 Ind. App. 634. But, where an altercation came about because of the non-repair of the claimant's ladle, the other combatant being a fellow workman whose duties did not include such repair, his injuries were held not to have arisen out of his employment, and the employer not liable: *U. S. Mfg. Co. v. Davis* (1917), 115 N. E. 676, 64 Ind. App. 227.

Similarly, where claimant was assaulted by another and injured, the trouble growing out of the taking of materials for assembly by the claimant from the rack of the other, the injury was held to be "in the line of duty" and compensation was awarded: *Pekin Cooperage Co. v. Industrial Commission*, 120 N. E. 350, 285 Ill. 31. However, where the fight in which the claimant was hurt started because of a complaint made by the claimant as to the other's non-delivery to him on the previous day of a car for the loading of coal in a mine, the delivery of the car being admittedly part of the other's duties, it was held that such an injury was not incident to the employment: *Coal Co. v. Industrial Commission*, 127 N. E. 84, 292 Ill. 463. In connection with the Illinois cases it is interesting to note that the courts there regard as immaterial, in terms, the question as to who was the aggressor, or the comparative size and strength of the combatants: *Swift & Co. v. Industrial Commission*, 122 N. E. 796, 287 Ill. 564.

Moreover, where one was injured by a stray blow when others were fighting, even though the claimant was a peacemaker in the interests of his employer, the injury was held to be out of the course of his employment, and compensation was denied: *Gauros' Case*, 134 N. E. 269, 240 Mass. 399. But where, as a counter-man in a restaurant, claimant was injured in attempting to quell a disturbance among patrons, the injury was held to be within the scope of the employment, and the employer liable: *Broadbent's Case*, 134 N. E. 632, 240 Mass. 449. H. S.

NEGLIGENCE—INTANGIBLE INVASION—EXPLOSIVES—Action by plaintiff against defendant to recover for damages to real estate. Defendant was building a state highway within 180 yards of plaintiff's home. Plaintiff avers that an excessive amount of dynamite was used whereby stones were thrown onto plaintiff's house, tearing holes in the roof, and further that the blast was so powerful that the house was lifted from its foundation, that it was out of line when it settled down again, that it was wrenched and twisted so that the doors would not close, that the windows would not open or close, that all the plaster, wall paper, and porches were torn loose, that his cellar leaked and that his house was completely destroyed. Verdict for plaintiff. Defendant appeals. *Held:* Affirmed. *Schamahorn v. Gehlhausen*, Appellate Court of Indiana, 163 N. E. 289, October 25, 1928.

The decision is correct on any principle and the fact that the defendant was working under a contract with the state should not excuse him where the evidence established negligence. The case, however, is inter-

esting from another standpoint, viz.: the question of recovery of damages for intangible invasion of property.

The weight of authority allows a recovery for tangible invasion, irrespective of negligence. *Cary v. Morrison,* 129 Ind. 177; *Hay v. Cohoes Co.,* 2 N. Y. 159, and the rule is the same although the blasting is done for the state, unless the right to use the adjoining land has been acquired by law. *St. Peter v. Dennison,* 58 N. Y. 416. But the law as to the recovery of damages for intangible invasion, is not at all settled. One line of cases, *Booth v. Rome Ry.,* 140 N. Y. 267; *Sullivan v. Dunham,* 161 N. Y. 290, lay down the rule that negligence is an essential element to the right of recovery. The other line holding that there is as much of a physical invasion in concussion as in the actual casting of debris on the adjoining land, and that negligence need not be established in the tort-feasor is supported by *Lowden v. City of Cincinnati,* 106 N. E. 970, *Faust v. Pope,* 132 Mo. App. 287; *Farnandis v. Gt. Northern Ry.,* 41 Wash. 486; *Hickey v. McCabe,* 71 A. 404, *Colton v. Onderdonk,* 69 Cal. 155.

Indiana follows the weight of authority as to tangible invasion in the case of *Wright v. Compton,* 53 Ind. 337, and allows a recovery without negligence being proved. But in the case of *Logansport v. Dick,* 70 Ind. 65, the court apparently laid down the rule that there must be negligence in all cases even where injury to property is caused by tangible invasion. The case of *Keefer v. State of Ind.,* 174 Ind. 590, held that where there was a tangible invasion, negligence was not necessary. These cases do not overrule each other but from the cases above cited, the only ones having arisen, the doctrine laid down in the principal case seems to be sound that a recovery will be allowed in case of either tangible or intangible invasion where negligence is established, but *Quaere:* Is negligence an essential to the right to recover for intangible invasion in Indiana? Do we follow the New York doctrine that it is essential or would a recovery be allowed in absence of negligence? The court did not decide, and had it so decided it would have been only dictum, so we must wait for a case where that question is the one in issue. A. L. B.

WILLS—SPECIFIC LEGACIES—DEMONSTRATIVE LEGACIES.—Testator died leaving a will which, in part, is as follows: "I bequeath to my daughter, Mabel Waters . . . five thousand dollars, in cash out of the Burbank estate, Pittsburg, Pa." This was followed by an item making a bequest to his son and bequeathing and devising the residue of the estate to his wife. It appears that the testator had a one-eighth interest in the Burbank estate and that the settlement of this estate was pending at the time of the execution of the above mentioned will. After the probate of the will it became known that the testator's interest in the Burbank estate would amount to only $2,400, and a controversy arose as to whether, under the will, the daughter would receive the sum of $2,400 and no more or, in addition to the $2,400, would receive from the other assets of the estate a sum sufficient to make up the legacy of $5,000 named in the will. This suit was brought by appellee, administrator, with will annexed, to have the will construed. The lower court held that the bequest to the daughter was a specific legacy and that if the Burbank estate should fail to yield $5,000 the legacy to the daughter would fail to the extent of the deficit. Judgment was given accordingly and this appeal was taken. *Held:* Judg-

ment reversed. The legacy is demonstrative and not specific, and the legatee is entitled to have the deficiency made up from other assets of testator's estate. *Waters v. Selleck et al.*, Appellate Court of Indiana, Oct. 11, 1928; 163 N. E. 233.

A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature and which can be satisfied only by the delivery and receipt of the particular thing given. *Roquet v. Eldridge*, 118 Ind. 147; *Gordon v. James*, 39 So. 18 (Miss.); *Nusly v. Curtis*, 85 Pac. 846 (Colo.). A demonstrative legacy is a gift of money or other property payable out of or charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund, or to evince an intent to relieve the general estate from liability in case the fund fails. *Spinney v. Eaton*, 87 Atl. 378 (Me.); *Rogers v. Rogers*, 45 S. E. 176 (S. C.), *Roquet v. Eldridge, supra*. In order to hold a legacy demonstrative it must appear that the testator intended to make an unconditional gift in the nature of a general legacy and the bequest must be given with reference to a particular fund as a primary source of payment. *Stilphen's Appeal*, 60 Atl. 888 (Me.); *Rogers v. Rogers, supra*. Courts are averse to construing legacies to be specific and will not unless it clearly appear that the testator so intended. *Spinney v. Eaton, supra; In re Snyder*, 66 Atl. 157 (Pa.); *Wilcox v. Wilcox*, 95 Mass. 252. In case of doubt as between a demonstrative or a specific legacy the courts incline towards the construction which classifies the legacy as demonstrative. *Allen v. Allen* (N. J.), 74 Atl. 274. The court in construing the will in quo pointed out that from the wording of the instrument it is clear that testator did not know the value of his interest in the Burbank estate, but believed it would be more than $6,000. The court also says that it is clear that the intention of the testator was to bequeath to his daughter $5,000 in money irrespective of the character of the property which made up the testator's interest in that estate. The testator does not say that his daughter shall in no event participate in the general estate. Furthermore, nothing in the will points to a clear intention on the part of testator that the bequest be specific. This construction of the instrument and the court's holding that the bequest is demonstrative is in line with the decided weight of authority. *Welch's Appeal*, 28 Pa. 363; *White v. White*, 53 S. E. 371 (S. C.); *Giddings v. Seward*, 16 N. Y. 365; *Byrne v. Hume*, 49 N. W 576 (Mich.), *Kinaday v. Sinnott*, 179 U. S. 606. H. C. L.