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Recent Case Notes

RECENT CASE NOTES

CRIMINAL LAW—SEARCHES AND SEIZURES—INTOXICATING LIQUORS.—Appellant was convicted and sentenced for possessing and using a still for the manufacture of intoxicating liquor in violation of Sec. 6, c. 48, Acts 1925. (Sec. 2719, Burns 1926.) A still, whiskey, mash, and other equipment of an illicit whiskey manufacturing plant was found in a house raided by officers under authority of a search warrant, and one Byron Smith, also found in the house, was taken into custody. Appellant objected to the introduction by the state of testimony of Smith, who was convicted prior to appellant's trial, to the effect that appellant was owner of the still and liquor, and owner and in possession and control of the place searched. This testimony was in direct conflict with that given by appellant, who objects on the theory that the authorities had no knowledge of this witness (Smith) being in or about the premises except such as they procured while there executing a warrant which appellant alleges was illegal. No attack was made upon the search warrant by motion to quash, or other pleading, but appellant, to sustain his objection to the admission, as evidence, of testimony as to what was seized by the officers and what was disclosed to them at that time, introduced evidence which proved there was not such a showing of probable cause for the issuance of the warrant as was held to be necessary in *Wallace v. State*, 199 Ind. 317, 157 N. E. 657. Appellant moved for a new trial, alleging that the above mentioned evidence was incompetent and that the finding of the court was contrary to law and not sustained by sufficient evidence. The overruling of this motion is assigned as error. *Held:* Affirmed. *Walker v. State*, Supreme Court of Ind., 163 N. E. 229.

It is unnecessary to consider here the question of whether, without a formal attack upon the search warrant, its validity may be determined upon objection to testimony obtained by aid thereof, because appellant disclaimed ownership or control of the premises or the still in question; and illegality of a search warrant is not available to one not interested in the property searched or found; nor can objection be made by such stranger to the introduction of the evidence obtained by the search. *Piercefield v. State of Indiana*, 198 Ind. 440, 154 N. E. 4; *Walker v. State*, 194 Ind. 402, 142 N. E. 16; *Snedegar v. State*, 196 Ind. 254, 146 N. E. 849; *Speybroeck v. State*, 200 Ind. ——, 155 N. E. 817; *Earle v. State*, 194 Ind. 165, 142 N. E. 405; *Hines v. State*, 197 Ind. 575, 150 N. E. 371. The consideration of the above question is unnecessary for the further reason that the testimony of Byron Smith was sufficient in itself to support the finding that appellant had possession of a still as charged. Admission of incompetent evidence is not ground for reversal where there is conclusive, competent evidence of the defendant's guilt. *Sanderson v. State*, 82 N. E. 525, 169 Ind. 301; *Robinson v. State*, 110 N. E. 980, 184 Ind. 208. And the admission of evidence secured by an alleged unlawful search is held to be not prejudicial to a defendant in a liquor prosecution, when other evidence sustains the conviction. *Van Tornhaut et al. v. State*, 199 Ind. 481, 157 N. E. 100. The testimony of Smith, though in direct conflict with appellant's testimony, must be considered as conclusive and competent evidence since the credi-

bility of witnesses is for the trier of facts, whose finding, supported by evidence, is conclusive on appeal. *Winters v. State*, 200 Ind. ——, 160 N. E. 294; *Piercefield v. State*, supra; *Lowery v. State*, 196 Ind. 316, 147 N. E. 151, 148 N. E. 197; *Hinkle v. State*, 91 N. E. 1090, 174 Ind. 276; *Malone v. State*, 96 N. E. 1, 176 Ind. 338. The appellant's objection to Smith's testimony on the theory that the authorities had no knowledge of Smith's being in or about the premises except that procured while executing an illegal warrant, would avail him nothing, even had the search been illegal, since appellant could not by such an objection close the mouths of witnesses against him as to facts existing prior to the search. K. J. M.

LICENSES—RECEIVERSHIPS—PRIORITY.—One Schindler was appointed receiver of the Consumers' Service Company Jan. 27, 1925. The order appointing him authorized him to conduct and manage the business of the company until further order of the court. In November, 1927, the receiver purchased of the Chemical Sales Corporation, alcohol, to be resold in the filling stations of the company of which he was receiver, to the amount of $2,866.00, and accepted a draft drawn on him in that amount, payable December 19, 1927. In March, 1928, $1,000.00 was paid by the receiver to apply on account of said draft, leaving $1,886.00 still due. The Petitioner, Chemical Sales Corporation, asks that the claim in above amount be preferred over a claim of the State of Indiana. The state claims that it is entitled to preference, for the reason that the receiver collected $103,356.00 license fees that have not been turned over to the state, although the state made frequent demands on the receiver for this money. The funds and assets are not sufficient to pay the state's claim. These collections were made by the receiver under Burns' Ann. St. 1926, Secs. 10178, 10179 and 10181, which provide for the imposition of a license fee of 3½c per gallon on the use of all gasoline used in the state, and provide that the dealer in gasoline shall collect such license fees from the purchaser, and pay the same to the auditor of the state. The Act further provides that, if any dealer fail or refuse to make prompt payment of said fees, he shall be subject to punishment by fine or imprisonment. *Held: State* entitled to priority. *Shipe v. Consumers' Service Co. et al.* Dist. Court, N. D. Ind.; South Bend Division, Aug. 29, 1928, 28 Fed. (2d) 53.

Under the order of the court the receiver became a dealer in gasoline. Therefore by virtue of the statute which requires a dealer to collect a tax from the buyer and pay it to the state, the receiver became a trustee of all license fees collected and held same in trust for the state. Burns' Ann. St. 1926, Sec. 10178. Where a transaction creates a fiduciary relation, the trustee or receiver should not and cannot profit thereby, and the cestui que trust is entitled to prior payment out of the funds in the hands of the receiver. *Carley v. Graves*, 48 N. W. 710; *Michigan Steamship Co. v. Thornton*, 136 Fed. 134; *Massey et al. v. Fisher*, 62 Fed. 958. A claim of a state for a license tax is a prior lien over claims of general creditors. *Marshall v. People of State of New York*, 41 Sp. Ct. Rp. 143; *Sweet v. All Package Grocery Stores Co.*, 262 Fed. 727; *Waite v. Worcester Brewing Co.*, 57 N. E. 176. When a court of chancery takes possession of property and operates the same through a receiver, expenses for the operation of same, after the appointment of the receiver may be made a preferred

claim. *Kneeland v. American Loan and Trust Co.*, 136 U. S. 80; *Barton v. Barbour*, 104 U. S. 126. Yet this should be done with extreme caution and if possible, with the consent or acquiescence of the parties interested in the fund. *Wallace v. Loomis*, 97 U. S. 146; *Mackeel v. Hotchkiss*, 60 N. E. 524; *Freer v. Davis*, 43 S. E. 172. The fact that the supplies are purchased by a receiver is of itself notice that the estate is insolvent and persons selling supplies to a receiver, if expecting to be preferred over other creditors, must see to it that the court is advised thereof and a preference given; they cannot deal with the receiver under the presumption that the court will later give them a preference. Even though the tax money collected and held in trust is mingled with the receivership assets, so that the identical money cannot be traced, this does not prevent the claim being a preferred one. *First National Bank v. Hummel*, 23 Pac. 986. R. H. L.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—STATUTORY INTERPRETATION.—Appellee was employed by appellant as a general helper in the latter's business as dealer in fruits and vegetables. Appellant's son frequently drove the truck in transporting fruits and vegetables while appellee went along to assist in loading and unloading. On one of such trips the son of the appellant in negligently starting the truck caused severe injury to appellee. The appellee averred that appellant had not complied with Workmen's Compensation Act requiring employer to insure workmen, and had not given any notice of not operating under the act. Appellant claims the court has no jurisdiction, that appellee could only apply to the Industrial Board for adjustment of compensation, and since negligence was alleged against him personally he is not liable. *Held:* Damages under common law liability may be recovered for the injury caused by another employee of appellant. *Diamond v. Cleary*, Appellate Court of Indiana, June 19, 1928, 162 N. E. 372.

The Indiana Workmen's Compensation Act applies to all employers and employees except those made specifically exempt by the statute as provided in Burns' Ann. St., Secs. 9447, 9448. Also, an employer may elect not to operate under the act by giving certain notices as specified in the statute. All employers, in absence of proof to the contrary, are conclusively presumed to have accepted to operate under the act. *Hagenback, etc. Shows Co. v. Teppert*, 66 Ind. App. 261. Where such presumption is not rebutted the parties are bound by the provisions of the act. *American Coal Mining Co. v. Lewis*, 77 Ind. App. 374. However, under the provisions of Burns' Sec. 9519, any employer who neglects to comply with the provisions of the act, not having exempted himself as provided, is liable to an injured employee either for compensation under the act or damages at common law. In the present case the employer did not comply with the provisions of the act in properly insuring his employee, nor did he give notice of election not to operate under the act. The appellee can treat his employer as not having elected not to operate under the act and so may bring action at law for damages. *Talge Mahogany Co. v. Burrows*, 191 Ind. 167.

The appellant contends the injury was here caused by a fellow servant and so a defense for him at law. But by Sec. 10 of the Compensation Act, Burns', Sec. 9455, an employer "who elects not to operate under this act" is deprived of the common law fellow servant defense. Appellant did not

so elect; he is conclusively presumed to be operating under the act. It seems therefore that the act was meant to supplant entirely all the common law in reference to master and servant liability relations. The act is considered contractual and its provisions enter into all employment contracts. *Rogers v. Rogers*, 70 Ind. App. 659; *McDowell v. Duer*, 18 Ind. App. 440. Although the appellant did not elect not to operate under the act, he is bound to comply with the insurance provisions of the act or be liable to an action at law without the common law defenses of which the act itself deprives him. *Terre Haute I. & E. Traction Co. v. Hayes*, 195 Ind. 638; *Chesapeake & O. Ry. Co. v. Hull*, 78 Ind. App. 341. The courts have come to construe the act liberally as in *United Paperboard Co. v. Lewis*, 65 Ind. App. 356, and *Standard Cabinet Co. v. Landgrove*, 65 Ind. App. 356. Yet, while that part of the act in Burns' Sec. 9455 deprives of common law defenses those "who elect not to operate under the act," this election does not allow one to disclaim operation under the act as a whole (and so claim common law privileges and defenses) but only to disclaim need for compliance with provisions in reference to insurance and compensation. In fact because of the contractual nature of the act, it follows that all employers (except agricultural, etc.) are bound by the positive provisions of the act although they should "elect not to operate under the act," such election going only to determine the basis on which employer's liability should rest. C. W. D.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—INSTRUCTION.—Appellee was operating an automobile north on Broadway and appellant was operating an automobile east on 25th Street; both streets being public streets and intersecting at right angles. Appellant was driving thirty-five miles per hour and failed to yield the right of way to the appellee, who was driver from right, and who entered into the intersection before the appellant. The cars collided. Appellee brings this action to recover for damage to his car. Among other instructions given by the lower court were the following: No. 5. Unless the freedom of such contributory negligence is established by a preponderance of the evidence in the cause, it is your duty to return a verdict for the defendant. No. 6. The burden on the question of contributory negligence in actions for damage to property, under the law in this state, is upon the plaintiff. No. 11. If the automobile which injured the plaintiff was being operated at a speed in excess of the speed authorized by the statute, this would justify an inference that the operator was driving at a negligent rate of speed, unless the jury should believe from other evidence that under the circumstances such rate was not unlawful and unreasonable. Appellant assigns instructions No. 5 and No. 11 as error and insists that the court should have instructed that a driver coming from the right must approach an intersection with the same degree of care as a driver coming on his left. Appellant did not tender such an instruction. *Held:* Judgment affirmed. *Bodner v. LaFleur*, March 30, 1928. Appellate Court of Indiana, 161 N. E. 696.

Instructions No. 5 and No. 6 taken together seem to fairly represent the law of this state. The negligence charged was not to be presumed from the mere happening of the accident, but in order to recover, it must appear from a preponderance of the evidence that the accident was one

which in the exercise of reasonable care and foresight the appellant ought to have anticipated and prevented. *Lathrop v. Frank Bird Transfer Company*, 81 Ind. App. 549. The Appellate court in that part of their decision dealing with instruction No. 5, say: "It was not necessary that this instruction should state that the burden of proving that the appellee was guilty of contributory negligence rested upon the appellant." To avoid ambiguity the court should have gone farther than "it was not necessary." It was not only not necessary but, in fact, it would have been error to so place the burden. This the court admits by saying that instruction No. 6 is a correct statement of the law, which it is. *The Pennsylvania Company v. Gallentine*, 77 Ind. 322; *Ingle v. Cleveland, Cincinnati, Chicago and St. Louis R. Co.*, 197 Ind. 263; *Koplovitz v. Jensen*, 197 Ind. 475; *Steele v. City of Bloomington*, 83 Ind. App. 73; *Julius Kellar Construction Co. et al. v. Herklin et al.*, 59 Ind. App. 472. It is true that instruction No. 11, taken alone, was possibly one-sided and unfair to the appellant; however, the jury had already been instructed that the burden was on the appellee to show freedom from contributory negligence, and so instruction No. 6 takes the unfairness out of instruction No. 11. Each instruction is to be considered in connection with all the other instructions given, and if they together correctly state the law, they are sufficient. *Citizens' Street Railway Co. v. Merl*, 26 Ind. App. 284; *The Evansville and Crawfordsville Rd. Co. v. Duncan*, 28 Ind. 441; *Baltimore and Ohio Rd. Co. v. Ranier*, 84 Ind. App. 542; *Terre Haute, Indianapolis and Eastern Traction Co. v. Hayes*, 195 Ind. 638. The failure of the appellant to ask for an instruction dealing with the obligations of a driver coming from the right, constitutes a waiver of any alleged error in the court's failing to so instruct. *Standard Forgings Co. v. Saffel*, 176 Ind. 417; *National City Bank v. Kirk*, 85 Ind. App. 120; *Reissner et al. v. Oxley et al.*, 80 Ind. 580. J. A. B.

NEGLIGENCE—MUNICIPAL CORPORATIONS—FURNISHING WATER—Plaintiff owned and operated nine greenhouses, all under glass and controlled and heated by a system of steam boilers and pipes and water pumps. In the winter of 1923 and the spring of 1924 plaintiff had many thousands of flowers and plants growing in his greenhouses, and the most destructive pest which he was required to combat was a small red spider. The only practical way of combatting and destroying it was by chilling, killing and blowing it off by forceful spraying of water at least three times a week, at which time it was necessary to have 60 pounds pressure. The defendant city had for 13 years previous to the winter of 1923 supplied plaintiff with the necessary pressure. On March 14, 1924, and for 13 days following, defendant negligently, and without warning to plaintiff, caused the water pressure in his water pipes and water hose at his place of business to be stopped so that no water would run through them. And though the defendant later furnished plaintiff with water, it at times failed to supply the water regularly and constantly, as his business required. By reason of such negligence the plaintiff was greatly damaged in being unable to properly combat the above-mentioned red spider. The defendant demurred to the complaint on the ground that there was no contract existing between the parties upon which this action could be maintained. The court below overruled the demurrer. Judgment was given for the plaintiff and the de-

fendant appeals. *Held:* The appellant, appellee and trial court having construed the complaint as being a complaint for damages occasioned by defendant's negligence, and the case having been tried on that theory in the court below, the Appellate Court will determine the issues on the theory that the complaint is predicated on negligence. That a city is liable for negligence in supplying water for consumption of its inhabitants on same principle as a private corporation. *City of Huntingburg v. Morgen,* Appellate Court of Indiana, June 29, 1928, 162 N. E. 255.

The court, in holding the defendant municipality liable for the damages occasioned by the negligence of the municipality in supplying the plaintiff with proper water pressure, continued to follow a long line of decisions handed down by the courts of last resort in Indiana, all of which hold municipalities liable for the negligent performance of purely ministerial functions. *Brinkmeyer v. City of Evansville,* 29 Ind. 187; *Ross v. City of Madison,* 1 Ind. 281, 48 Am. Dec. 361; *Stackhouse v. City of Lafayette,* 26 Ind. 17, 89 Am. Dec. 450; *Roll v. City of Indianapolis,* 52 Ind. 547; *City of Greencastle v. Martin,* 74 Ind. 451; *Aiken v. City of Columbus,* 167 Ind. 139; *City of Indianapolis, v. Williams, Guardian,* 58 Ind. 447.

This rule is generally adhered to in other jurisdictions. *Sheldon v. Village of Kalamazoo,* 24 Mich. 383; *Stanley v. Inhabitants of Town of Sangerville,* 119 Me. 28, 109 Atl. 190, 9 A. L. R. 348; *McEntee v. Kingston Water Co.,* 165 N. Y. 27, 58 N. E. 785; *Watson v. Inhabitants of Needham,* 161 Mass. 404, 37 N. E. 204, 24 L. R. A. 287.

The function of a city in selling and distributing water to its citizens is of a private nature, voluntarily assumed by it for the advantage of the people of the city. Responsibility for the acts of persons representing it in such a business falls upon the city through the relation of master and servant and the maxim of "respondeat superior" applies. The following adjudications uphold this liability upon the ground that the city, in conducting such business, is acting in its proprietary capacity: *Lynch v. City of Springfield,* 174 Mass. 430, 54 N. E. 871; *Hourigan v. City of Norwich,* 77 Conn. 358, 59 Atl. 487; *City of Chicago v. Selz, Schwab & Co.,* 202 Ill. 545, 67 N. E. 386; *Bullmaster v. City of St. Joseph,* 70 Mo. App. 60; *Philadelphia v. Gilmartin,* 71 Pa. 140. The power of a city to construct and maintain waterworks is not a political or governmental function, but a private and corporate one. *Illinois Trust & avings Bank v. Arkansas City,* 22 C. C. A. 171, 40 U. S. App. 257, 76 F. 271, 34 L. R. A. 518; *sas City,* 22 C. C. A. 171, 40 U. S. App. 257, 76 F. 271, 34 L. R. A. 518; *Pikes Peak Power Co. v. Colorado Springs,* 44 C. C. A. 330, 105 F. 1; *Omaha Water Co. v. Omaha,* 77 C. C. A. 267, 147 F. 1, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 61.

The courts almost universally hold that fire protection is a governmental function, and that neither the municipality, nor a private corporation contracting with the city for the performance of this function, are liable for negligently performing such function. *H. R. Moch Co., Inc., v. Rensselaer Water Co.,* 247 N. Y. 160, 159 N. E. 896; *Fitch v. Seymour Water Co.,* 139 Ind. 214, 37 N. E. 982, 47 Am. St. Rep. 258; *Jennie DePauw Mem., etc., Church v. New Albany Water Works,* 193 Ind. 368, 140 N. E. 540, 27 A. L. R. 1274; *Larimore v. Indianapolis Water Co.,* 197 Ind. 457, 151 N. E. 333. There are a few contra jurisdictions in regard to the lia-

bility of a private corporation for the negligent supplying of water in case of fire. *Gorrell v. Greensboro Water Supply Co.*, 124 N. C. 328, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340, 12 S. W. 554; and *Woodburry v. Tampa Waterworks Co.*, 57 Fla. 243, 49 So. 556, 21 L. R. A. (N. S.) 1034.

T. R. D.

SCHOOLS AND SCHOOL DISTRICTS—NEGLIGENCE—STATE LIABILITY FOR TORTS.—Action by appellant, a 12-year-old school girl, against the township in which she resided, and others, to recover damages for injuries sustained by her when the school hack in which she was riding overturned. Original complaint charged all appellees with negligence. The township entered a demurrer, which was sustained. Appellant filed an amended complaint as to the other appellees, but refused to plead further as to the township. *Held:* Complaint was demurrable as respects the school township. Affirmed. *Forrester v. Somerlott et al.*, Ind. App., Oct. 11, 1928, 163 N. E. 121.

School corporations, as a part of the educational system of the State, are agencies of the State. *Jordan v. City of Logansport*, 178 Ind. 629, 99 N. E. 1061; *Ehle v. State ex rel. Wissler*, 191 Ind. 502, 133 N. E. 748; and, as such, they are not subject to an action for damages for injuries received by any one on account of negligence of officers or agents. *Freel v. School City of Crawfordsville*, 142 Ind. 27, 41 N. E. 312, 37 L. R. A. 301; *Board of Commissioners of Jasper County v. Allman*, 142 Ind. 573, 42 N. E. 206; *Talbott v. Board of Commissioners of the County of St. Joseph*, 42 Ind. App. 198, 85 N. E. 376.

That the school corporation is an agent of the State seems unquestionable; that the State is not liable for negligence of its officers and agents is undoubtedly the general rule in Indiana; but that the doctrine of State irresponsibility should be the law is, on principle, very questionable. This doctrine, based on a theory of State sovereignty, has its roots in the now exploded belief in the divine right and prerogative of kings. Borchard, 28 Columbia L. R. 577, at 583. The modern trend of legal philosophy seems to be toward treating the State as a personality and holding it liable for its torts the same as an individual. German and French courts have advanced this far. Idem, 773, 774. The doctrine that a county or a municipality is answerable in damages for personal injuries caused by its negligence in keeping streets, sidewalks, bridges, and crossings, is well established. *Town of Newcastle v. Grubbs*, 171 Ind. 482, 86 N. E. 757; *Board of Commissioners of Huntington County v. Huffman, Admr.*, 134 Ind. 1, 31 N. E. 570; *Glantz v. City of South Bend*, 106 Ind. 305, 6 N. E. 632; *City of Fort Wayne v. Patterson*, 3 Ind. App. 34, 29 N. E. 167. And a distinction, based upon principle and equitable considerations, between the cases just cited and the present one, is hard to draw. When a person is injured by the tort of a municipality, the municipality ought to pay the injured party damages just the same as he would be paid were he injured by the tort of any other corporation.

D. J.