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Recent Case Notes

RECENT CASE NOTES

CRIMINAL LAW—CONSPIRACY—EFFECT OF PAYMENT OF CO-CONSPIRATORS —The defendant was charged by affidavit in two counts with conspiracy to commit a felony and with transporting intoxicating liquor in an automobile. Three others were also charged with the same offenses in the same affidavit, but the defendant was tried separately and convicted on the conspiracy count. Defendant had employed, and paid, the others named in the affidavit to go to Chicago from Indianapolis in defendant's car and bring back liquor from a place specified by the defendant. The liquor was obtained as directed and brought back by these persons as far as the outskirts of Indianapolis, where two deputies arrested them. Defendant contended that since he formulated the plan and made all the arrangements in Chicago and Indianapolis for the transportation of the liquor and had employed the co-defendants as agents to assist him, directing each what to do, that he could not be guilty of a criminal conspiracy. In other words, he says that one can not conspire with his employees to commit a felony. *Held:* Judgment affirmed. The elements of criminal conspiracy were sufficiently proved. *Jorman v. State,* Supreme Court of Indiana, December 4, 1928, 163 N. E. 837.

One can not conspire with himself (12 C. J. 542); and to constitute a conspiracy there must be a combination by two or more people by some concerted action to accomplish some unlawful or criminal purpose by some criminal or unlawful means. *Brewster v. State,* 186 Ind. 369.

However, the fact that a salary was paid by one to another would not preclude a conspiracy between them as it was not inconsistent with a full and active participation in the scheme. *Hyde v. U. S.,* 225 U. S. 347. And one's participation in a criminal conspiracy is not excused by showing that the service he was employed to render called for such participation. *Hardy v. U. S.,* 256 Fed. 284.

It is not essential for the formation of a conspiracy that any formal agreement exist between the parties to do the act charged; it is enough if the minds of the parties meet understandingly, so that an intelligent and deliberate agreement is brought about to do the things charged, although the agreement need not be manifested in any formal words. *McGee v. State,* 111 Ind. 378; *Musser v. State,* 157 Ind. 423; *Eacock v. State,* 169 Ind. 488. And of course a conspiracy may be proved by circumstantial evidence. *Archer v. State,* 106 Ind. 426; *Cook v. State,* 169 Ind. 430; *Musser v. State,* 157 Ind. 423.

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

CRIMINAL LAW—LAWFUL ARREST—SEARCH AND SEIZURE—INTOXICATING LIQUORS—Defendant was charged with unlawful and felonious transportation of intoxicating liquor under section 2720 Burns 1926. Defendant was lawfully arrested while driving an automobile for committing a misdemeanor. The officers in searching the automobile, found intoxicating liquor. Defendant found guilty; motion for new trial overruled. Overruling of

motion assigned as error. *Held:* That the admission of the evidence of the three police officers as to what they found during the search of Defendant's automobile was competent evidence, and the Judgment Affirmed. *Allgaier v. State,* Supreme Court of Indiana. January 4, 1929. 164 N. E. 315.

A peace officer can arrest a person for committing a misdemeanor without a warrant. The officer making the lawful arrest has the right to search the person and to seize evidence tending to establish the crime for which the accused was arrested, or other crimes. Sections 27 and 36 Cornelius Search and Seizure. After the lawful arrest of the appellant, as incidental to the same, the officer had a right to search the automobile, in which the accused was riding at the time of the arrest without a search warrant. *Haverstick v. State,* 196 Indiana 145. *Koscielske v. State,* 158 N. E. 902. The principal case is to be distinguished from *Wallace v. State,* 157 N. E. 657, in that in the principal case the arrest itself was lawful, and the search and seizure was an incident to that lawful arrest; whereas in the Wallace case the arrest was illegal, hence no right to make the subsequent search and seizure. Mere possession of liquor in automobile is not sufficient to justify a conviction for transportation therein. *Dresser v. State,* 194 Indiana 8. Transportation means conveying from one place to another. *Hammell v. State,* 198 Indiana 45, 152 N. E. 161. Person placed under arrest before search was made on charge of misdemeanor can not have any evidence so found suppressed. Liquor found under such circumstances is competent in prosecution for transportation of liquor. *Haverstick v. State,* supra, *Jameson v. State,* 196 Indiana 483. Section 2715 Burns 1926, prohibiting transportation of "vinous or spirituous liquor," is applicable to alcohol or whiskey, without proof that it is intoxicating or that it was intended for beverage purposes. *Chandsie v. State,* 163 N. E. 266. S. M. C.

INTERLOCUTORY JUDGMENT—WHAT CONSTITUTES—APPEAL AND ERROR—To an action for divorce by husband against wife, defendant filed a cross-complaint, was granted a divorce thereunder and alimony in the sum of $1,500. After plaintiff's motion for a new trial was overruled, he appealed. After the appeal was perfected, the cause was redocketed in the trial court; and on defendant's verified petition, plaintiff was ordered to pay defendant $400 for attorney's fees and expenses in defending the appeal. From that order or judgment plaintiff appealed, but did not file a transcript and assignment of errors within 30 days nor did he file a bond, as required in appeals from interlocutory orders by sec. 713, Burns 1926. *Held:* The judgment appealed from was not interlocutory, therefore not governed by sec. 713, Burns 1926. Cause transferred to Appellate Court. *Cirtin v. Cirtin,* Sup. Ct., Ind., Apr. 6, 1928, 164 N. E. 493.

"Interlocutory" in law means that which does not decide the cause, but settles some intervening matter relating to the cause. Words And Phrases, Second Series, 1149. An interlocutory judgment, decree, or order seems to be one rendered during the course of the trial of the cause, before final judgment, and which does not touch the merits of the cause so as to affect the rights of the parties. *Pfeiffer v. Crane,* 89 Ind. 485, *Mac-Saw-Ba Club v. Coffin,* 169 Ind. 204, 82 N. E. 461, *Neyens v. Flesher,* 39 Ind. App. 399, 79 N. E. 1087, Words And Phrases, Second Series, 1149, 1152. Tested by

these principles, since the order in question was entered after a final judgment on the merits of the cause itself, the order does not seem to be interlocutory, and an appeal from it is not restricted by sec. 73, Burns 1926.

Because the order is not on a cause included in sec. 1356, Burns 1926, its appeal was rightly transferred to the Appellate Court. D. J.

MORTGAGEE—RIGHT OF SUBROGATION—The defendant, Estella Moore, on Dec. 23, 1921, borrowed $1,500 from the Greensburg Nat. Bank and executed a note therefor secured by a mortgage on her real estate. The defendant and her husband were indebted to the Farmers Trust Co. of Indianapolis to the sum of $12,000. This debt was evidenced by their promissory note, secured by a mortgage on real estate owned by her husband. They were also indebted to the appellant herein for $4,000 which was evidenced by their note and secured by a mortgage on real estate of the husband. This last mortgage was junior to the one held by the Trust Co. Suits were brought to foreclose these last two mortgages and a decree was given ordering the lands covered by the mortgages to be sold and the proceeds applied first to payment of the Trust Co. and second to the payment of appellants. A deficiency judgment was granted against the appellee Moore. Upon sale of the lands, there was a deficiency and appellant received nothing upon its judgment. Estella Moore applied to appellee, Aetna Life Ins. Co. for and received a loan of $2,000 to pay off the indebtedness to the Greensburg Nat. Bank. A note was given to the Insurance company for said loan and a mortgage covering the same land covered by the Greensburg Bank Mortgage. The debt to the Greensburg Bank was paid whereupon it released its mortgage. Appellee insurance company at the same time it made the loan had no actual knowledge of the existence of the deficiency judgment against Moore and the same was not shown upon the abstract of title furnished the insurance company for its examination prior to its making the loan. Insurance company claims it is subrogated to the rights of the Greensburg Bank. *First Nat. Bank of Westport v. Moore, et al.*, Appellate Court of Indiana, Nov. 15, 1928; 163 N. E. 602. *Held*: Insurance company entitled to be subrogated.

The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and includes every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience should have been paid by the latter. *Davis v. Schlemmer*, Admr., 150 Ind. 472; *Miller v. Winchell*, 70 N. Y. 437; *Spaulding v. Harvey*, 129 Ind. 106. A person who may be compelled to pay a debt, or the protection of whose property or interest requires that he pay it, is not a volunteer. *Sidener v. Pavey*, 77 Ind. 241; *Warford v. Hawkins*, 150 Ind. 489; *Farmers Bank v. Erie R. R. Co.*, 72 N. Y. 188. Nor is one, who at the instance of the debtor advances money to be used by the debtor in the payment of a prior security, a mere stranger, volunteer or intermeddler in his affairs. *Sidener v. Pavey*, 77 Ind. 241; *Shattuck v. Cox*, 128 Ind. 293; *Arnold v. Green*, 116 N. Y. 566. Applying the principles as here laid down, the appellant, Westpoint Nat. Bank, is in no worse position than it would have been if the mortgage to the Greensburg Bank had not been paid and no injustice is done by it, for it can not complain that subrogation makes its position less favorable than it would

have been if the Insurance company had not advanced the money with which the mortgage was paid off. Having made the loan without actual knowledge of the existence of the deficiency judgment, it is immaterial that a release instead of as assignment was made. No innocent third party having intervened equity will give relief against the mistake, and the person advancing the money with which the mortgage was paid off will be treated as an equitable assignee of the claim paid. *Southern Cotton Oil Co. v. Napoleon Hill Cotton Co.*, 158 S. W. 1082; *Sidener v. Percy*, 77 Ind. 241; *Loan Assn. v. Sparks*, 111 Fed. 652. R. H. L.

TORTS—CONSENT—RIGHT OF ACTION—Action by appellee, Roy Hardesty, as administrator of the estate of Arretta Hardesty, against appellant, for damages for the death of the deceased. It appeared that appellant, a practicing physician, for a consideration and with the consent of the deceased, performed an operation upon her for the purpose of procuring an abortion, and that she died immediately following and as a result of the operation. *Held:* Judgment against appellant affirmed. *Martin v. Hardesty*, Appellate Court of Indiana, Nov. 22, 1928, 163 N. E. 610.

Sec. 2435, Burns' Ann. St. 1926, makes it a criminal offense to perform an operation upon a woman with intent to procure an abortion, unless the operation is necessary to save human life. In sec. 2436, Burns' Ann. St. 1926, it is likewise made a criminal offense to submit to an operation with intent thereby to procure an abortion except when done by a physician for the purpose of saving the life of mother or child. Sec. 292, Burns' Ann. St. 1926, provides that, when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. Appellant contends that Aretta Hardesty, had she lived, could not have maintained the action against appellant, for the reason that she consented to the illegal act of which complaint is made and it is therefore insisted that, under the above statute, (sec. 292), the personal representative has no cause of action. The general rule at common law was that voluntary consent to a tort was a complete defense against civil liability therefor. But this rule had its exception in that consent to do an act which in itself was unlawful, forbidden by positive law, and for the doing of which a penalty was attached, was no defense to an action for damages by the injured party. *Adams v. Waggoner*, 33 Ind. 531; 38 Cyc. 530; *Logan v. Austin*, 1 Stew. (Ala.) 476; *Shay v. Thompson*, 59 Wis. 540; *Morris v. Miller*, (Neb.), 119 N. W. 458; *Mathew v. Ollerton*, Comb. 218; *Stout v. Wren*, 1 Hawks. 420.

It results, therefore, that the consent of the deceased to the acts of the appellant do not exonerate him from liability to respond in damages, because the acts consented to were such as the law will not countenance. Hence under sec. 292, Burns' Ann. St. 1926, the personal representative has a good cause of action. *Milliken v. Heddesheimer*, (Ohio) 144 N. E. 264; *Hancock v. Hullett*, (Ala.) 82 So. 522; *Miller v. Boyer* (Wis.) 68 N. W. 869. Although a few jurisdictions have held *contra*, the decision in the present case is supported by the weight of authority. H. C. L.