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Recent Case Notes

RECENT CASE NOTES

CONTRACT—PROMISE TO COMPENSATE PUBLIC OFFICERS FOR PERFORMING OFFICIAL DUTY.—Plaintiff Sherif was requested to imprison John H. Ferguson, a man of unsound mind and a menace to the community if left running at large. Plaintiff kept Ferguson in jail for nine months in 1921 until his term as sheriff expired. Ferguson was boisterous, filthy in his habits, and it was a trying job to care for him. A few days after the commitment of Ferguson to jail, his children and guardian came to Plaintiff, Sheriff and assured him that he should be paid for the care and attention that he bestowed upon Ferguson. All the attention bestowed by Plaintiff upon Ferguson was necessary for the preservation of his health and cleanilness. Demurrer to complaint sustained. Plaintiff appeals. Judgment below affirmed. A sheriff as a part of his official duties, is required to take charge of all persons committed to the jail of his county, and it is his official duty to take proper care of such persons, such as their condition may require while they are so confined in jail, and he is allowed for such services only such fees or amounts as are prescribed by Statute. *Gehrett v. Ferguson's Estate, et al.* (Appellate Cour of Indiana, Div. No. 1, Oct. 8, 1925) 149 N. E. 86.

The County jail is the proper place for commitment of insane persons Burns' Ann. St., 1914, Sec. 9429—"It is the duty of the sheriff to receive and keep in jail persons adjudged insane until they can be taken to a State Hospital for the insane." *(State v. Barr* 173 Ind. 446; *Evansville Ice Co. v. Winsor,* 148 Ind. 682; *Leeds v. Defrees,* 1901, 157 Ind. 392.) Caring for a person duly adjudged insane and committed to the county jail is a part of the official duty of the sheriff. *(Board of Commissioners of Benton Co. v. Hannan,* 101 Ind. 551; *Board of Commissioners of Carroll Co. v. Gresham,* 101 Ind. 53.) It is a fundamental principle of law that a promise by a third person to compensate an officer for performing an official duty for which the law fixes his pay is without consideration and void. *(Board of Commissioners of Marshall Co. v. Burkey, Adm'r,* 1 Ind. App. 565, 27 N. E. 1108.) But when a sheriff agrees to do and does more than his official duty there is sufficient consideration to support a promise to pay. *(Bronnenberg v. Coburn,* 110 Ind. 169); *(Hartley v. Inhabitants of Granville,* 102 N. E. 942). It has been held, however, that a promise to compensate a public official for the performance of his official duty is void as against public policy. *(Board of Commissioners of Carroll Co. v. Gresham,* 101 Ind. 53.) Had the money for Ferguson's care been voluntarily paid over to the sheriff, he would have been able to retain it as against the County. *(Byrum v. Board of Commissioners,* 100 Ind. 90); *Wright v. Board of Commissioners,* 98 Ind. 88). The criminal act of the sheriff in extracting the money from the heirs cannot be set up in a civil action by the Board of Commissioner to recover the money. *(Board of Com. of Carroll County v. Gresham);* *(Donaldson v. Board of County Com.,* 92 Ind. 80). That a sheriff cannot recover a general reward for the capture of a criminal because such action comes within his official duty see *(Hayden v. Songer et al.* 56 Ind. 42). A. E. B.

DEDICATION OF LAND—DEFECTIVE PUBLIC HIGHWAY—ADMISSIBILITY OF EVIDENCE—EXCESSIVE DAMAGES.—Appellee's minor daughter died as the result of an accident due to the alleged negligence of appellant in failing to properly guard a washout in the highway within the city limits. The city claimed that the proceeding before the county board by whom the highway was located and improved, and that no legal highway was estabilised

for the repair of which the city could be held liable. The highway was located on land conveyed to the county board in trust for that purpose, and the highway had been in general use by the public for 8 months preceding the accident Appellee recovered a verdict for $5,000, of which $1,500 was remitted and judgment given for $3,500. *Held:* A legal proceeding is not the only way a public highway may be established. A road may become public by dedication and the evidence was sufficient to show a dedication in this case. It was not error to allow appellee to introduce evidence, over the objection of appellant, as to the physical condition of his wife at the time of the accident to show the extent of his pecuniary loss. The judgment held not reversible upon the ground of excessive damages, where there was nothing in the record to show that the damages awarded were the result of prejudice, partiality, or corruption. *City of Michigan City v. Szczepanek,* Ind. App. Ct., Jan. 29, 1926.

Like a contract, a dedication consists of an offer and an acceptance. The intention to dedicate the land to the public must have been actual, and clearly indicated by acts or condust. *Shellhouse v. State* (1886) 110 Ind. 509-513. The acceptance need not be formal, and general use by the public will amount to an implied acceptance. *Summers v. State* (1875) 51 Ind. 201-204; *City of Hammond v. Maher* (1903) 30 Ind. App. 286, 65 N. E. 1055. In an action for wrongful death or injury, the condition of plaintiff's family may be considered by the jury in fixing the amount of damages to be awarded. *Terre Haute, etc., Traction Co. v. McDermott* (1924) 82 Ind. App. 614, 145 N. E. 782. The court correctly stated the rules as to excessive damages by saying that there must be some evidence in the record to induce the court to believe that the award was influenced by prejudice, partiality, or corruption, to justify it in reversing a judgment upon that ground. *Terre Haute, etc., Traction Co. v. McDermott (Supra).*

C. F. R.

FRAUD—FALSE STATEMENTS CONCERNING PROPERTY—COVENANTS OF WARRANTY.—Action by appellant against appellee to recover amount alleged to be due on a promissory note given by appellee as part consideration of a contract for exchange of real estate. Appellant represented to the agents of appellee that the farm actually consisted of 158 acres, though described in the deed to him as containing 140.05 acres more or less; that the farm had a frontage of one-third of a mile on the new channel of the Kankakee River. These representations were false though appellant believed them to be true at the time they were made. The appellee acted upon them to his damage. In addition to an answer in denial, appellee filed a counter-claim for damages for the fraudulent representations. *Held,* that where plaintiff made a false statement as to the acreage of the farm on which the defendant acted to his damage he was liable in deceit therefor, even though he believed the statement to be true; that such presentations, being material representations collateral to the title, were not merged in a warranty deed, and purchaser was not limited to a suit on the covenants of warranty. *Williams v. Hume,* App. Ct. of Ind. Nov. 6, 1925, 149 N. E. 355.

"False and fraudulent representations upon the sale of real estate are grounds for damages when the representations relate to some matter collateral to the title of property and the right of possession which follows its acquisition, such as the location, quantity, quality and condition of the land." United States Supreme Court, in *Andrees v. St. Louis Smelting, etc., Co.* (1888) 130 U. S. 643, 9 S. et. 645, 32 L. Ed. 1054; *Bainconi v. Smith* (1892) 3 Ariz. 326, 28 P. 881; *Peabody v. Phelps,* 9 Cal. 213; Kent, Cowin, 285, 484. If a party for the purpose of inducing another to act upon it, makes an unqualified statement as to the material facts suscept-

ible of knowledge, which statement turns out to be false, the statement thus made will have the force and effect of positive fraud and will render the party making the same liable, in an action for deceit, to the party who contracts in reliance upon the truth of the statement. *Maywood Stock, etc., Co. v. Pratt* (1915) 60 Ind. App. 131, 110 N. E. 243; *Wheatcraft v. Myers* (1914) 57 Ind. App. 371, 377, 107 N. E. 81.

To constitute remedial fraud the representation must be made with knowledge of their falsity or in culpable ignorance of the truth. *(New v. Jackson* (1912), 50 Ind. App. 120; 95 N. E. 328); *(Anderson v. Evansville Brewing Assn.* (1912) 49 Ind. App. 403; 97 N. E. 445).

G. L.

PLEADING—FORGERY—ESTOPPEL—NEW PROMISE.—Appeal from a judgment for plaintiffs in an action to recover on certain promissory notes purporting to have been executed by defendant Randall as principal and Larch and appellant as sureties, and also to foreclose a mortgage dated seven months after the notes were given and "made to secure and completely indemnify the said Aaron Larch and Charles Hartlep on account of their suretyship for the said Randall on five promissory notes." To an answer of general denial and payment, plaintiffs filed a reply, the material averments of which were that the appellant ratified the notes and agreed to pay them, and that the maker with full knowledge that the notes purported to be binding on him as maker, although he now pleads a denial of their execution, agreed to pay them and is now estopped to deny their execution.—*Hartlep v. Murphy,* Md. Sup. Ct., Jan. 27, 1926; 150 N. E.

Overruling the demurrer to this reply was error. There are not sufficient facts alleged to constitute an estoppel. Estoppel by conduct requires that there be facts known to one party that were not known to the other. A failure to allege such facts discloses no element of an estoppel by conduct. *Hosford v. Johnson,* 74 Ind. 479. Furthermore the answer was broad enough to embrace forgery, and to be sufficient, the reply must meet and avoid that defense. In this jurisdiction it is possible to make this debt binding only by showing a new promise supported by a new and valid consideration. *Barkley v. Barkley,* 182 Ind. 322. Where one person has signed the name of another to a note under such circumstances as to constitute a forgery, such instrument can not be ratified or confirmed, and in the absence of an estoppel, there can be no recovery except upon a new promise. *Henry v. Heeb,* 114 Ind. 275.

And in order to recover on such new promise the plaintiff must sue upon it, alleging in his complaint the subsequent promise to pay the note, and the consideration by which that promise is supported. To allege in the complaint that the defendants are indebted on the note, and upon a defense being pleaded which shows that it is void and incapable of ratification, to reply that the defendants are bound on a different and subsequent promise is a departure in pleading and makes the reply insufficient to withstand a demurrer. 381 Burns 1926, 357 Burns 1914. *Shaw v. Jones,* 156 Ind. 60.

P. L. V.

INDIANA DOCKET

APPELLATE COURT

12194 AMOS V. AMERICAN TRUST CO. Howard County. *Affirmed.* McMahan, J. Jan. 8, 1926.

A finding that depositor had received full value on the surrender of a certificate of deposit was sufficient to preclude a further right of recovery thereof.

12317 BALTIMORE & OHIO R. R. CO. V. FAUST, EXECUTRIX. Dekalb County. *Petition denied.* McMahan, J. Jan. 14, 1926.

Railroad companies are liable under the interstate commerce law when one of their employes is injured in the act of preparing a car for interstate transportation or in a work so closely connected thereto as to be a part of it. Thus where the decedent was killed while doing work on car that had been removed from use in interstate commerce he was nevertheless held to be engaged in interstate commerce and recovery for his death was allowed.

12409 BARDSLEY V. BARDSLEY. Huntington County. *Affirmed.* Nichols, C. J. Jan. 14, 1926.

Wife's purchase of personality at public auction conducted by husband held valid and enforcible by husband. Defense of statute of frauds if not raised in trial is waived.

12467 BEATTIE, *et al.* V. KIMBLE. Industrial Board. *Reversed.* Thompson, J. Jan. 27, 1926.

Per Curiam.

12077 BURLEY TOBACCO V. ROGERS. Jefferson County. *Reversed.* McMahan, J. Jan. 27, 1926.

The promise of one party is valid consideration for the promise of another. A valid contract may rest upon such mutual promises. Fraudulent representations made by promoters or their agents are not binding on a corporation which is organized later, unless it accepts the contracts with actual notice of the statements. The liability of the corporation on such contracts is based on adoption, not on agency.

12222 C. I. & W. R. R. V. HORTON. Johnson County. *Affirmed.* Jan. 8, 1926. *Per Curiam.*

12230 CALIFORNIA PRUNE GROWERS V. JAGERS CO. Marion County. *Reversed.* Nichols, C. J. Jan. 29, 1926.

Where, under contract for the sale of goods it was provided that payment for the goods should be made against draft with documents attached, it was held that the buyer has no right of inspection before payment of the transaction unless the contract shows a custom of inspection.

12214 DARK TOBACCO ASSOCIATION V. ROBERTSON. Warrick County. *Reversed.* McMahan, J. Jan. 6, 1926.

Corporations organized for profit and not for profit which are affected by Sec. 4085 Burns Ann. St., 1914 or Sec. 4098a Burns Ann. St. Sup., 1921, may not do business in Indiana as foreign corporations if they could not do business there as domestic corporations. This is a public policy to be implied from these statutes and also from Sec. 4088 Burns Ann. St., 1914 and Sec. 4098c Burns Ann. St. Sup., 1921. Mere ways and possibilities of oppression or other illegal act does not tend to prove illegality.

12289 DAVIS, Director General, v. KELLER. Vigo County. *Reversed.* Nichols, C. J. Jan. 27, 1926.

Complaint charging negligence in R. R. employe for a failure to give child immediate attention when injured was held bad for not averring said employe knew that child was injured by train or that injury created emergent demand for his attention. Held that necessary attention was given by calling medical aid five minutes after the injury. R. R. track with switch passed between end of a street which was used by pedestrians and was not fenced. This is not an attractive nuisance and the R. R. Co. was under no duty to fence it off where such fencing was not required by statute.

12264 DOLLMAN v. PAULEY. Marion County. *Affirmed.* Jan. 29, 1926. *Per Curiam.*

12526 FORT WAYNE PAPER CO. AND AMERICAN INSURANCE CO. v. TOBEY. Industrial Board. McMahan, J. Jan. 15, 1926.

Industrial Board is competent to receive evidence as to cause of death to injured party and also evidence showing that he was under a duty to support his wife although she was living apart from him.

12315 HARMENING, *et al.* v. HARMENING, *et al.* Marion County. *Reversed.* Dausman, J. Jan. 27, 1926.

In an action to prevent the probate of a will upon the grounds that two of the three attesting witnesses signed the will before the testarix, it was held that the order of signing is immaerial where all who participate are present at the same time and their acts are part of one continuous transaction.

12325 HAGERSTFWN v. LIBERTY POWER CO. Fayette County. *Reversed.* Enloe, P. J. Jan. 12, 1926.

One who entered into contract with the Board of Trustees of the town whereby the light plant was to be turned over to him as operator with the understanding that he would make an engagement for the supply of current without operation of the town light plant, did not become an agent with authority to make any contract in behalf of the town, but he simply became an operator to furnish electric current to the town and one contracting with him to supply current for ten years acquired no rights against the town.

12260 HAWKINS v. MOTOR BANK OF DENVER. Delaware County. *Affirmed.* Enloe, P. J. Jan. 15, 1926.

An original instrument from another state may be admitted in evidence and does not come under Sec. 471 Burns Ann. St., 1914, which provides for the admission in evidence of records of another state. Those instruments which are not original, coming from another state, come under this section and must be authenticated before they are admissible.

12333 HILL, *et al.* v. BECKETT. Dearborn County. *Affirmed.* Jan. 29, 1926. *Per Curiam.*

12246 INLAND STEEL CO. v. JELENOVIC, *et al.* Industrial Board. *Affirmed.* Remy, J. Jan. 27, 1926.

Application for compensation under workmen's compensation act by dependents residing in what is now the kingdom of the Serbs, Croats, and Slovenes but which was part of Austria-Hungary at the time of the death of the deceased. *Held* that the statute of limitations was suspended at declaration of war against Austria-Hungary and began to run again only upon the signing of the peace treaty with that country and not upon the prior recognition of the Serb-Croat-Slovene state by the United States.

12473 JEFFERSON SCHOOL TOWNSHIP v. GRAVES. Howard County. *Affirmed.* Enloe, P. J. Jan. 7, 1926.

A teacher who holds a license issued to her by the state superintendent of public instruction which authorizes her to teach certain subjects may

recover her salary under contract to teach made with the township trustee who discharged her upon failure to make a passing grade in subjects which he requested her to teach but which were not covered by her license.

12229 JONES, *et al.* v. JONES, *et al.* Hendricks County. *Petition denied.* Nichols, C. J. Jan. 6, 1926.

Title to real estate is not involved in an action for partition. No appeal will lie from an interlocutory decree. When title to land is indirectly put in issue the judgment for partition is conclusive as to rights of the parties and from such judgment an appeal may be taken after a motion for a new trial has been ruled upon.

12522 JOHNSON v. SWONDER. Industrial Board. *Reversed.* Nichols, C. J. Jan. 28, 1926.

Employe is not engaged in maritime employment and hence may recover before the industrial board under its jurisdiction when he met his death while upholstering a speed boat which was moored to the Indiana bank of the Ohio River.

12342 JORDAN v. PEACOCK. Delaware County. *Reversed.* Remy, J.. Jan. 7, 1926.

Having appointed three commissioners for the purpose of recounting the ballots cast in a primary election of a nominee for county commissioner in which election paper ballots were used, the court after recounting reëntered judgment against petitioning candidate and made an order against him allowing each of the recount commissioners $10 per day for 14 days. Since paper ballots were used at the election, the recount comes under the acts of 1881, Sec. 6298 R. S., which makes no provision for votes by a voting machine and which allows $3.00 per day for the services of recount commissioners and $5.00 for the services of the clerk.

11951 MICHIGAN CITY v. SZCZEPANEK. St. Joseph County. *Affirmed.* Remy, J. Jan. 29, 1926.

Legal proceedings before a board of county commissioners is not the only way to establish a road as a public highway. It may be done by users after due notice under the statute.

12038 P. C. C. & ST. L. R. R. CO. v. DAVIS. Monroe County. *Affirmed.* McMahan, J. Jan. 26, 1926.

Action by administrator to recover damages for death caused by train striking automobile in which deceased was riding. *Held:* evidence sufficient to sustain the verdict under either count of negligence or count founded on the doctrine of last clear chance.

12307 SMITH v. KEMERLY, *et al.* Madison County. *Reversed.* Thompson, J. Jan. 6, 1926.

In a hypothetical question propounded to an expert witness the contestant of a will assuming a state of facts which would tend to prove monomania, asked if under such state of facts, in the opinion of the witness, the decedent, at the time of making his will, was of sound or unsound mind. More than 20 witnesses testified and there was evidence from which the jury might have found that the decedent was of unsound mind at the time of making the will. The court erred in sustaining objections to this question and in giving to the jury a peremptory instruction directing a verdict for the appellees, proponents of the will.

12135 SHEENAN CONSTRUCTION v. HURST. Marion County. *Affirmed.* Nichols, C. J. Jan. 28, 1926.

Appellee sued for ⅛ of the net profit of road contract promised him for his preparation of estimates and personal supervision of the work. *Held:* that failure to mention advances of weekly salary in the complaint was

not a material variance; and that *remittitur* ordered by court as a condition to overrule appellant's motion for a new trial was proper since it inured to appellant's benefit.

12321 U. S. FIDELITY COMPANY, *et al.* v. MACKSVILLE COMPANY, *et al.* Marion County. *Affirmed.* Enloe, P. J. Jan. 27, 1926.

Creditors of an insolvent construction company are entitled to share *pro rata* in funds retained by the state highway commission until after the completion of the road.

12253 WATERS v. CITY OF SOUTH BEND. St. Joseph County. *Affirmed.* Nichols, C. J. Jan. 7, 1926.

A city may not lease, sell, license, or barter a part of public street for private purposes. The theory of estoppel is not applicable here against a municipal corporation.

12416 ZINN AND COMPANY v. SIMON COMPANY. Huntington County. *Affirmed.* Jan. 15, 1926.

Per Curiam.

SUPREME COURT

24398 ALDREDGE v. STATE, and 24399, ALDREDGE v. STATE. Posey County. *Reversed. Per curiam.*

These cases were reversed in keeping with the decision in the case of *McDaniel v. State*, 24397, decided at this term and given above. The court held that where a search warrant was used on several succeeding days before the evidence was found upon which the appellant was arrested, it was error to admit such evidence at trial.

24737 BERRY v. STATE. Marion County. *Affirmed.* Willoughby, J. Jan. 26, 1926.

Where one is arrested by an officer for violating the traffic rules and upon questioning by that officer voluntarily discloses that he has liquor in the car, in violation of the law, then an arrest for violating the liquor laws upon this evidence is valid, and evidence obtained under these circumstances is admissible.

24487 BUSCH v. STATE. Delaware County. *Reversed.* Myers, J. Jan. 6, 1926.

Affidavit charging violation of liquor law in the language of Burns Ann. St. Sup., 1921, Sec. 8356d, 8356t, is sufficient without further particularity. The affidavit is not required to negative the exception set forth in the statute. Where accused was tried on amended affidavit in circuit court and, after pleading guilty to liquor charge in city court, this testimony was taken as to his statements at prior trial held earlier, it was error to bring out in any way the fact that he pleaded guilty, as such testimony tended to make jury infer he had pleaded guilty to same affidavit.

24352 FIELDS v. NICHOLSON. Martin County. *Reversed.* Ewbank, C. J. Jan. 5, 1926.

In the absence of proof that voters knew the candidate was ineligible, the mere fact of ineligibility is not enough to give candidate who received a less number of votes right to the office. Publication of an article purporting to be signed by candidate pledging himself, if elected, to refund part of salary and make no charge for office rent constitutes offer of reward to secure election within meaning of Const. Art. 2, Sec. 6 relative to ineligibility. Candidate who is ineligible under Const. Art. 2, Sec. 6, is also ineligible to office. Burns' Ann. Stat. 1914, 7008.

24378 HARTLEP v. MURPHY, *et al.* Newton County. *Reversed.* Ewbank, C. J. Jan. 27, 1926.

To allege in a complaint that the defendants are indebted on certain promissory notes, and upon a defense being pleaded which shows that the notes are void, to reply that at another time and for a different consideration the defendants made another and different promise than the one sued on, is a departure, and makes the reply insufficient to withstand a demurrer (381 Burns' 1926, 363 Burns' 1914).

24982 HERRICK v. STATE. Marion County. *Reversed. Per curiam.* Jan. 6, 1926.

Contempt proceedings by admission of the state prosecuting attorney were defective. Appeal from conviction for contempt based on these proceedings was therefore upheld.

24928 HUNCK v. STATE. Vanderburgh County. *Affirmed.* Ewbank, C. J. Jan. 26, 1926.

In regard to nuisances the statutory provision sufficiently defines and forbids such public operations so as to support judgment passing on conviction for violation of this statute. Cf. Sec. 20, chapter 4, acts of 1917, page 25.

24397 MCDANIEL v. STATE. Posey County. *Reversed. Per curiam.* Jan. 6, 1926.

Where a search warrant was issued and a search was made under it on the day the still in question was seen but prisoner was not taken until four successive searches had been made under the same search warrant on succeeding days, *held:* that when a search under authority of a warrant has once been completed the officer is without authority to do anything further under it.

24886 RADLEY v. STATE. Marion County. *Reversed.* Ewbank, C. J. Jan. 14, 1926.

Appellant while driving his car struck the prosecuting witness, who was waiting for a car. Evidence failed to show intent. *Held:* that intent is necessary to criminal prosecution for assault and battery.

24824 POST v. STATE. Union County. *Reversed.* Ewbank, C. J. Jan. 13, 1926.

An indictment for violation of the liquor laws was not bad because it alleged in a single count that the defendant had done a number of acts which were made punishable by the same section of the statute. Evidence obtained by officers under a search warrant when their acting under the search warrant was in evidence was properly admissible, though the search warrant itself was not put in evidence with formal proof of its sufficiency. An instruction is bad which says: "All the state is required to do is to produce such evidence that will satisfy your minds to the degree of certainty indicative of the guilt of the accused of the charge covered in the indictment, and when this is done you should find the defendant guilty." Court held that jury should believe beyond a reasonable doubt that the defendant was guilty in order to convict him.

24863 SABO v. STATE. Daviess County. *Reversed.* Ewbank, C. J. Jan. 15, 1926.

An affidavit filed with the mayor will not serve the purpose of a pleading until the approval of the prosecuting attorney is endorsed thereon. On appeal the record must show that one charging the unlawful transportation of liquor has been arraigned and entered his plea. Burns Ann. St., 1914, Sec. 2068.

24940 SHACKLETT v. STATE. Marion County. *Affirmed.* Ewbank, C. J. Jan. 28, 1926.

Where the defendant had been convicted of receiving stolen goods upon an inference that he had knowledge of their being stolen goods and this inference was drawn from the evidence partially submitted by two witnesses, who were minors, and who, it was alleged, had stolen the goods and had sold them to the defendant, it was held that since the statute makes accomplices competent to testify as witnesses, when they consent to tesify, the inference was justified if the trial judge believed the testimony of the witnesses, including the two who had stolen the goods and sold them to the defendant.

24912 SMITH v. STATE, and 24913, SMITH v. STATE. Marion County. *Reversed.* Ewbank, C. J. Jan. 8, 1926.

So-called "dynamite caps" are used for igniting high explosives, but do not contain dynamite themselves, and an allegation that such caps were carried concealed and deposited on the land of another is not sufficient allegation to show violation of the statute against the depositing of a cartridge or shell containing a nitro-explosive compound. Sec. 2697 Burns' Ann. St., 1914.

25099 UTTERBACK v. GOOTEE. Green County. *Reversed. Per curiam.* Jan. 14, 1926.

It is error for a court to instruct the jury positively to find for the plaintiff if they find the defendant guilty of certain negligence, because this negligence may not be the proximate cause of the injury.

24985 VUKODONOVITCH v. STATE. Lake County. *Affirmed.* Gemmill, J. Jan. 5, 1926.

Where the wife sold liquor and the husband was in the house the common law presumption of coersion arises. The testimony of the husband was admissible to the effect that he did not order her to do it, and such testimony rebutted the presumption.

25112 WELLS, *et al.* v. WELLS, *et al.* Hancock County. *Reversed. Per curiam.* Jan. 29, 1926.

Where constructive fraud is proved the duty rests on the beneficiary in the transaction to purge himself of disparaging presumptions by competent evidence amounting to clear and unequivocal proof.

25108 WISE v. LAYMAN, *t al.* Cass County. *Affirmed, subject to conditions.* Gemmill, J. Jan. 27, 1926.

In a suit to have a deed declared a mortgage and for an accounting, it was held that, although the deed was a warranty deed absolute upon its face, it should operate as a mortgage, since it appeared that the true consideration was a promise to pay certain liens against the property conveyed, the total of which was much less than its market value and the consideration given in the deed.

24962 WOLFA v. STATE. Marion County. *Reversed.* Willoughby, J. Jan. 14, 1926.

It was held in this case that the evidence was sufficient to sustain a conviction for violation of the liquor laws. Questions of law and fact are not discussed in the opinion, but the decision is rested entirely upon *Burnett v. State*, 149 Northeastern 440, which involves the same principles.