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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

PLEADING—IMMATERIAL VARIANCE OF FINDINGS FROM COMPLAINT—FINDINGS AS ULTIMATE FACTS—REMITTITUR REQUIRED.—Action by appellee to recover one-third of the profits realized from the construction of the *Howard Speedway Road,* Indianapolis. The court found that appellee was to receive one-third of the net profits therefrom as his compensation. The appellee had been paid $500 when the parties agreed that thereafter appellee should receive $35 per week as an advance under their agreement and he was so paid $1,275. The bid on the road was $173,537 and appellant expended $154,494.79, leaving a net profit of $18,039.71, of which sum appellee was entitled to one-third, less the sum theretofore received, with interest, amounting to $5,213.14. Appellant's motion for a new trial was overruled on condition that appellee remit $1,052.97, which was done, and judgment was rendered for the balance. Appellant assigned errors. *Held*: there is no material variance between the complaint and the special findings of the court. The findings generally are a very clear statement of ultimate facts. Appellants cannot complain of a remittitur required as a condition to overruling their motion for a new trial, *Sheehan Const. Co. v. Hurst*— Appellate Court of Indiana, decided Jan. 28, 1926.

A general denial puts the plaintiff to the proof of all of the material allegations of his complaint. To be entitled to recover the plaintiff must declare on one theory and then prove his case accordingly. But an immaterial variance from the complaint is not ground for excluding evidence, *Angell v. Loomis,* 97 Mich. 55 N. W. 1008, nor for reversing a judgment,*Hedrick v. Osbourne & Co.,* 99 Ind. 143; *Louisville, etc. Ry. Co., vs. Phillips,* 112 Ind. 59, 12 N. E. 132. It is expressly provided by Sec. 400, Burns' R. S. 1914, that, "No variance between the allegations in a pleading and the proof is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled." In the principal case appellant failed to show that they were prejudicially misled. When the attention of the court below has not been called to a variance the supreme court will not notice it on appeal. *Huey Co. v. Johnston,* 164 Ind. 489, 73 N. E. 996.

The special findings of fact by the court should be a statement of the ultimate facts in the case, and may be properly corrected or amended to conform to the facts provided any time during the term before final judgment is rendered. *Royse v. Bourne,* 149 Ind. 187., *Jones v. Mayne,* 154 Ind. 400; *Apple v. Smith,* 26 Ind. App. 660, 60 N. E. 456. The court in findings need not show the subordinate facts on which the ultimate fact is based. *Partridge v. Cole,* 127 Atl. 653 (Vt.) The requirement by the court of a remittitur of part of a judgment, amounts to an amendment of its findings, and may be rightly made any time during the period within which a motion for a new trial may be filed. It is quite proper to require a remittitur as a condition to overruling a motion for a new trial. Appellant could not complain of the remittitur anyway for it benefitted them and only errors prejudicial to the party appealing are ground for reversal.

C. F. R.

NEGLIGENCE—DUTY OF SURGEON.—Appellant, as surgeon, performed an abdominal operation on appellee and closed the wound, leaving an absorbent sponge eight inches wide by four inches long in the abdominal cavity, which caused appellee great suffering and sickness. The sole charge against the surgeon was negligence, and the appellee recovered a judgment on the jury's verdict for $9,000. *Held*: judgment for appellee *Reversed* and new

trial granted. *Funk v. Bonham.* Appellate Court, March 10, 1926. N. E.

The evidence in this case discloses that in performing the operation, appellant was assisted by graduate nurses, not the employees of appellant, but regular employees of the hospital; that the sponges used in said operation were prepared beforehand as was the custom, sterilized, and packed six in a box; that they were opened and counted by the sterile nurse who handed them to the surgeon as needed; that following the operation they were removed, counted by a second nurse who reported the number to the sterile nurse and that the latter checked the number and announced them to the surgeon before the incision was closed.

The court says, "It has been expressly held that a surgeon who performs an operation at a hospital, not owned and controlled by himself, and who is assisted in such operation by nurses, not his employees, but employees of such hospital, is not responsible for the negligence of such nurses in failing to correctly count the sponges used in such operation, whereby a sponge is left and sewed up in the body cavity of the patient. *Baker v. Wentworth,* 155 Mass. 338." *In Sims v. Parker,* 41 Ill. App. 284, it was said, "A physician or surgeon, or one who holds himself out as such, is only bound to exercise ordinary skill and care in the treatment of a given case, and in order to hold him liable, it must be shown that he failed to exercise such skill and care." And, again, in the case of *Vassingham v. Berry,* 150 Pac. 139, upon facts very similar to those of the instant case, the court announced the plaintiff's claim, "Common sense dictates that the leaving of sponges in the abdominal cavity is absolutely and totally inconsistent with the exercise of ordinary care." The doctrine advanced in this position of the plaintiff, is too exacting for human affairs. It is tantamount to saying that if ordinary care had been used, no mistake could have occurred. But it is a matter of common knowledge, based upon everyday experience, that even in the exercise of the utmost care, all men do make mistakes."

After citing other authorities, the court concludes, "In this case the appellant and the nurses who assisted him testified as to the manner in which the operation in question was performed. These nurses were graduate nurses of wide experience, and they testified that the method used by the appellant was the "approved method." Several surgeons also testified that the method used by appellant, as to keeping track of sponges, was the method accepted among surgeons generally as being "standard." Tested by the authorities, we must hold that the verdict of the jury in this case was not sustained by any competent evidence and that the motion for a new trial should have been sustained."

P. L. V.

STATUTARY CONSTRUCTION—CRIMINAL LIABILITY—Appellant brings action against the appellee telephone company to recover the penalty for the violation of Sec. 5802, Burns R. S. 1914 and demands judgment for $100 penalty provided for by Sec. 5781.—Appellee owns and operates a general system of telephone lines in city of Bloomington, Indiana and from Dec. 1, 1920 to April 30, 1921 had in appellant's residence a telephone with same connections to central station as telephones of all other patrons. During this time appellee charged him $2.75 per month rental which was the rate established by the Public Service Commission for this form of service. However, during this same period similar subscribers were only required to pay $1.75 per month, a rate less than the charge fixed by the Commission. Appellant charges that appellee was thereby guilty of discrimination and partiality. Appellee answered by a general denial and was discharged on the ground that the penal clause of the statute, Sec. 5802, does not cover the case of discrimination in rates of telephone companies

but is only applicable to discrimination in facilities and connections. *Van Arsdall v. Indiana Bell Telephone Co.* Decided in Indiana Appellate Court, March 11, 1926. 150 N. E.

"Every telephone company with wires wholly or partily within this state and engaged in a general telephone business shall within the local limits of such telephone companies' business supply all applicants for telephone connections and facilities without discrimination or partiality———," Sec. 5802; *Central Insurance Company v. Bradbury,* 106 Ind. 1. Clearly appellees were unjustly discriminating against appellant by charging him a larger sum than other like subscribers as to rates but there was no discrimination in regard to facilities or connections. The penal statute, Sec. 5781, applies only to the body of the act set out in Secs. 5780 and 5802. The former provides for no discrimination in rates by a telegraph company, but the latter which applies to telephone companies is silent as to discrimination in rates. Such an oversight is unfortunate in this case as it seems probable that the legislature intended to prescrible for telephone and telegraph companies in the same manner, but omitted any regulation as to discrimination in rates by a telephone company.

According to the general rule of statutory construction, penal statutes will be strictly construed and strict construction requires the court to confine the operation of the statute to the subjects specified. *Western Union Telegraph Co. v. Steele,* 108 Ind. 163; *Falinestock v. State,* 102 Ind. 156. Penal statutes will not be construed to include anything beyond their letter even though within their spirit, and nothing can be added to them by inference or intendment. R. C. L. Vol. 25, P. 1082; 36 Cyc. 1183. Courts cannot by judicial construction of a statute give to it a legislative intention not fairly within its purview. *Agar v. Pagin,* 39 Ind. App. 567. A court cannot create a penalty by construction but must avoid it by construction, unless it is brought within the letter and necessary meaning of the act creating it. *Western Union Telegraph Co. v. Axtell,* 69 Ind. 199; *Burgh v. State,* 108 Ind. 132; *State v. C. C. C. and St. L. Ry.,* 157 Ind. 288. Since appellant was being charged the rate established by the Public Service Commission, he could not complain. However appellee would be prohibited from charging any other rate, Sec. 112 of Public Service Commission Act as amended in 1919, Acts 1919, p. 709.

A. M. C.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—COMPLAINT BY APPELLANT IN TWO PARAGRAPHS. Appellee invited appellant to become his guest and ride in his automobile from Indianapolis, Indiana, to Danville, Illinois. Appellant accepted. While traveling on a highway west of Covington at the reckless rate of 40 miles an hour appellee lost control of the automobile and ran off road into a ravine, automobile turned over and injured appellant. Appellee contended appellant was guilty of contributory negligence in not taking a train from Crawfordsville to Indianapolis, because he reentered and remained in the automobile after he realized there was peril. *Held:* A person driving an automobile with a guest in the machine must use reasonable care and a guest is not guilty of contributory negligence because he did not get out and refuse to continue the trip.

Majority decision in this case lays down the general rule. "That the operator of an automobile owes to an invited guest the duty of exercising reasonable care in its operation and not to unreasonably expose him to danger. *Perkins v. Galloway* (1918) 194 Ala. 265; *McGeevor v. O'Byrane* (1919) 203 Ala. 266; *Spring v. McCabe* (1921) 53 Ca. App. 330; *Varnett v. Lenig* (1919) 213 Ill. App. 129. Some courts will not say that a guest is guilty of contributory negligence if he does not leave the car when driver is

reckless. Neither is the negligence of the driver imputed to the guest. *Cram v. City of Des Moines,* 185 Iowa, 1292, 172 N. W. 23. It is a moot question as to whether a guest riding in a negligently driven automobile is guilty of contributory negligence. In *Jonesbore and Fairmount Turnpike Co. v. Baldwin,* the court said, "If there is any proposition thoroughly established as a general rule it is this, that a party can not recover compensation for an injury which by reasonable care he could have avoided." Where there is danger and the peril is known whoever encounters it voluntarily and unnecessarily can not be regarded as exercising ordinary prudence and therefore does so at his own risk. *Town of Gosport v. Evans,* 112 Ind. 153. Certainly in the instant cast appellant voluntarily encountered the danger. "The law accounts it negligence for one unless under compulsion to cast himself upon a known peril, from which a prudent person might reasonably anticipate injury." *Morrison v. The Board of Commissions of Shelby County,* 116 Ind. 431; *Lake Shore, etc., Rw. Co. v. Pinchin,* 112 Ind. 592; *Riest v. City of Goshen* 142 Ind. 339; *Evansville and Terre Haute R. R. Co. v. Crist,* 116 Ind. 446. Appellant certainly was not under compulsion and admitted that he anticipated an accident. In *Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. v. Hall,* 46 Ind. App. 219 the court says: "It is well settled that one who voluntarily assumes a dangerous position after notice or knowledge of the danger is ample time to secure a safe place, can not recover for an injury by reason of being in the dangerous position thus assumed." The court cited in *Acherman v. Pere Marquette R. R. Co.,* 58 Ind. App. 212, 108 N. E. 144, "A person who is placed in a dangerous position must exercise his reasoning facilities, and do all that a careful, prudent man would do under the circumstances to avoid injury. The greater the danger, the greater the precaution to be taken." It should be noted that the facts of the foregoing cases do not contain an automobile driver and his guest. But, I see no reason why they should not come under the same general rule of contributory negligence as laid down by the cases cited. *City of Vincennes v. Thuis,* 28 Ind. App. 523, 63 N. E. 315. In this case the vehicle used was a buggy and the driver had a guest with him and both were injured by driver's reckless driving. The court said in this case, "It is as much the duty of the guest to use reasonable care and judgment to learn of and avoid danger as it is the duty of the driver." The rule laid down by these cases is: One can not submit himself to known peril where he has opportunity to escape it, without assuming the risk.

J. C. A.

INDIANA DOCKET

APPELLATE COURT

12562 AURORA BRICK CO. v. BALDRY, JR. Industrial Board. *Reversed,* Nichols, C. J. March 17, 1926.
Per Curiam.

12368 AUTO OWNERS PROTECTIVE EXCHANGE, INC. v. JOHNSON. Lake County. *Affirmed.* March 31, 1926.
Per Curiam.

12569 BERTRAM v. BICKNELL COAL & MINING CO. Industrial Board. *Affirmed.* Thompson J. March 30, 1926.
The court held that the finding of the Industrial Board on the question whether the release was obtained by fraud must be final.

12180 BETSNER, *et al.* v. BETSNER, *et al.* Wabash County. *Affirmed.* McMahan, J. March 31, 1926.
Where the consideration of property is paid by one party and the title is taken in his name and the name of another jointly, on an oral agreement that the joint grantee would make provision for the grantor's child in her will, there can be no constructive trust in the child unless fraud is shown in the procurence of the conveyance by the joint grantee.

12505 BLACK PANTHER OIL CORP., EDMUNDSON, WHIPPLE, & COOCH, RECR. v. FRIEDELL. Grant County. *Affirmed.* Nichols, C. J. March 31, 1926.
Where one of the receivers for an insolvent corporation buys lands with money from his bank account to which was deposited both his own money and money of the corporation there is not sufficient proof to hold that the land so bought was bought with trust money and so should be held for the benefit of creditors.

12617 CHRIST v. JOVANOFF, *et al.* Porter County. *Reversed.* McMahan, J. March 12, 1926.
A proceeding for setting aside a judgment by default is not a proceeding in which a change of venue is proper and it is error for a different court to set aside the default by judgment.

12411 CLAPPER v. NEW PALESTINE MFG. CO., *et al.* Marion County. *Affirmed.* March 18, 1926.
Per Curiam.

12300 CLEVELAND, CIN., CHI. & ST. LOUIS R. R. CO. v. COOK, *et al.* Boone County. *Affirmed.* McMahan, J. March 10, 1926.
Under Section 5248 Burns' 1914, if a railroad relocates tracks which are more than a mile in length and is a mile away from the former location it is liable in damages to an abutting owner on the old right of way.

12157 CLEVELAND, CIN., CHI. & ST. LOUIS R. R. v. SUMMITVILLE DRAIN, TILE CO. Madison County. *Reversed.* McMahan, J. March 30, 1926.
Clause C, section 5544 Burns' 1914, which provides that where there are no competing lines a railroad may not charge more for a longer haul than a shorter haul is held to apply only "to cases of shipments made over a direct and ordinary route." Thus it does not apply where the destination of the shipment is not on the main route between the two points.

12506 EDMONDSON, *et al* v. FRIEDELL, *et al.* Grant County. *Affirmed.* Enloe, P. J. March 31, 1926.
Where there was no evidence that money used to purchase chattels was illegally taken from the funds of an insolvent corporation, there is no legal basis for recovery of these chattels by the receivers for the corporation.

12217 EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD. v. CITIZENS NAT'L BANK OF PERU, INDIANA. Grant County. *Affirmed.* Thompson, J. March 30, 1926.

Where a bonding company insures a bank against the dishonesty of its named employees the bonding company must defend its bond where a depositor sues the bank for conversion of his securities by such employee.

12256 FIRST NAT'L BK. OF FT. WAYNE v. STRUVER. Allen County. *Affirmed.* March 30, 1926.
Per Curiam.

12359 FISHER v. ROSANDER, *et al.* St. Joseph County. *Affirmed.* Nichols, C. J. March 11, 1926.

Where an owner sells land to one of three partners and receives a note for part of the purchase price, he has a lien against the land for the payment of the note as against the partners themselves.

12459 FULTON v. BANK, *et al.* Wells County. *Reversed.* Nichols, C. J. Enloe, J. *Dissents.* March 17, 1926.

Where a widow has a right to a ⅓ interest in realty, the value of which is more than $20,000, then under Sec. 3014 Burns' 1914 this interest of the widow must be taken free of all claims which lie against the other ⅔ only. Dissenting opinion by Enloe, J.

12299 FUNK v. BONHAM. Owen County. *Reversed.* Enloe, P. J. March 10, 1926.

Where there is a practice in surgical operations for one nurse to count the sponges inserted in the wound and another nurse to count the sponges removed and the doctor is assured that all sponges are removed there is no showing of legal negligence if in fact a sponge was sewed up in the wound. A verdict given against the doctor for negligence on these facts must be set aside.

12263 HESSONG, *et al.* v. WOLF. Marion County. *Affirmed.* Remy, J. March 9, 1926.

After judgment by default a petition at the same term to set outside the default judgment and to allow defendant to plead need not necessarily be granted where it does not comply with Acts 1921, page 277.

12429 JACKSON, *et al.* v. HAYS. Martin County. *Affirmed.* March 18, 1926.
Per Curiam.

12368 JASPER COUNTY FARMS CO. v. ALLEN. Newton County. *Affirmed.* Dausman, J. March 16, 1926.

Where the judgment below is attacked on the ground that the verdict was not supported by the evidence it is presumed on appeal that the evidence was sufficient.

12382 MCKINNEY v. CRAWFORD. Bartholomew County. *Affirmed.* Nichols, C. J. March 17, 1926.

Where a chattel mortgage expressly provides that the property may not be removed from its then present location without the consent of the mortgagee, the mortgagee is within his rights in preventing the sale of the mortgaged property for removal without an arrangement for the application of the proceeds of the sale to the payment of his debt.

12421 MT. PLEASANT COAL CO., *et al.* v. WATTS. Putnam County. *Affirmed.* Nichols, C. J. Enloe, P. J. and McMahan, J. *dissent.* March 11, 1926.

Where the promoters of a corporation agree to pay a seller for his land in stock in the corporation and later employment by it, this agreement is binding on the corporation if it later accepts it.

12500 MASTERS v. CARLTON. Marion County. *Affirmed.* Thompson, J. March 10, 1926.

It is an error for the trial court to reinstate an unverified amended claim against decedent's estate.

12351 MEHNE, TREAS., *et al.* v. DILLON. Duboise County. *Affirmed.* Enloe, P. J. March 18, 1926.

Under Section 14072 Burns' 1926 a board of review is right in assessing a life interest in realty if subject to taxation although the fee is given to charity and is exempt from taxation.

12074 MERRIMAN v. CARNEY. Clinton County. *Affirmed.* McMahan, J. March 16, 1926.

Where there is an appeal for failure to sustain a motion in a trial court and the correctness of that motion can be known only through an abstract that shows close examination on trial, the lower court must be sustained where the record is deficient.

11965 MOGLE v. POLEDOR, *et al.* St. Joseph County. *Affirmed.* McMahan, J. March 17, 1926.

Per Curiam.

11964 MORAN v. POLEDOR, *et al.* St. Joseph County. *Affirmed.* McMahan, J. March 17, 1926.

Where a building has been condemned as a fire hazard under Sec. 7441g Burns' 1914 and the owner or his assignee has not complied with the order to repair or destroy it and has not appealed from the order as allowed by law, there is no showing of proximate cause on these facts to hold such owner liable for the injury to adjoining property which a subsequent fire in the building causes.

12331 MOUCH v. INDIANA ROLLING MILL CO., *et al.* Shelby County. *Reversed.* Enloe, P. J. March 18, 1926.

Contracts are presumed to be predicated upon existing statutes only unless a contrary intention is expressed and hence a contract liability to pay taxes means taxes under the existing laws.

11796 MUNSON v. RUPKER. Morgan County. *Affirmed.* Nichols, C. J. March 16, 1926.

Where one carries a licensee in his automobile he owes him a duty of reasonable care. Nichols, C. J., dissenting, holds that the duty of reasonable care in an action for damages for injury of this kind is owed only to an invited guest and that the licensee runs his own risk.

12283 PETER & BURGHARD STONE CO., *et al.* v. MARION NAT'L BK. OF MARION, IND. Howard County. *Petition Denied.* Nichols, C. J. March 31, 1926.

12245 PITTSBURGH PLATE GLASS CO. v. YOUNG. Miami County. *Reversed.* Nichols, C. J. March 31, 1926.

Where there is a breach of contract of employment, one may rescind and sue at once for breach or he may treat the contract as continuing and sue at the termination thereof. If, however, he elects to sue at the time of breach he cannot later sue at the end of the contract on the theory that it continued.

12277 RANDALL v. CHANEY. Wells County. *Affirmed.* Remy, J. March 19, 1926.

In a case of conditional sale the seller may take the property or sue for the price but he cannot do both.

12261 SMITH v. LESLIE, *et al.* Industrial Board. *Affirmed.* Remy, J. March 10, 1926.

In a claim for accidental death under the Workman's Compensation Act there may be recovery on the ground that the accident was in the course of the employment even though the particular act of the decedent was in violation of the employer's orders.

12221 SPECK v. KRAMER. Vanderburgh County. *Affirmed.* Thompson, J. March 9, 1926.

There is no need to make the allegation more specific where the Plaintiff sets forth that he has advanced money to a corporation in return for stock.

12211 STATE BOARD OF HEALTH OF IND. v. ORT. St. Joseph County. *Affirmed.* Remy, J. March 12, 1926.

Where under the law of 1919 there is an appeal from a condemnation of a school building there is also an appeal from an order about the health conditions of certain school houses are bad since the effect of this order involved a condemnation of this building.

12118 SUPREME TRIBE OF BEN-HUR v. BASTIAN. Sullivan County. *Affirmed.* Nichols, C. J. March 31, 1926.

Where there was a misrepresentation of the insured's age in an insurance policy and where this misrepresentation was corrected by the insured's mother after his decease and the insurance company did not attempt to cancel the policy and return the premium, it was competent for the jury to find that the policy was in force and to allow recovery by the beneficiaries.

12101 TAGGART v. KEEBLER. Elkhart County. *Affirmed.* McMahan, J. March 9, 1926.

Evidence in a personal injury action that the driver of an automobile was insured may not be presented to the jury as part of the evidence on the issue of liability. Where, however, the evidence of insurance is introduced only incidentally as part of a complete statement made by appellant which tended to prove that he acknowledged that he was responsible for appellee's injuries, then such evidence admitted to the jury does not constitute reversible error if the court properly limits its effect by instruction.

12233 TRIBUNE CO. v. RED BALL TRANSIT CO., HINER. Marion County. *Affirmed.* Nichols, C. J. March 31, 1926.

Where there was a written agreement covering advertising for a certain number of issues of the newspaper but that newspaper published several issues each day, it was proper to admit parol testimony of the actual agreement of the parties since the written contract was ambiguous.

12430 UNITED PAPERBOARD CO. v. MUNCIE STEEL SUPPLY CO. Wabash County. *Affirmed.* Nichols, C. J. March 31, 1926.

The sole question presented to the appellate court was the overruling of appellant's motion for a new trial but the court could not pass on this since the motion was not set forth in appellant's brief.

12267 VAN ARSDALL v. INDIANA BELL TELEPHONE CO. Monroe County. *Affirmed.* Nichols, C. J. March 11, 1926.

In the case of telephone companies there is no liability under section 5802 Burns' 1914, where a telephone company charges only the legal rate to some patrons but gives the same service to others for a less sum.

12073 WICHMANN v. NEUSTADT. Marion County. *Affirmed.* Dausman, J. March 9, 1926.

Per Curiam.

12268 WILLIS v. CRAYS. Greene County. *Affirmed.* Nichols, C. J. March 11, 1926.

Where a wife loans her auto to her husband for a special trip and at the time of the accident is riding as his guest, there may still be sufficient evidence to show that he was her agent.

SUPREME COURT

25164 BUCHANAN, BUCHANAN v. MORRIS, KINBERLIN. Johnson County. *Reversed.* Travis, J. March 30, 1926.

On Appeal the parties under the original action may not be varied. It was error to instruct the jury that driving more than fifteen miles an hour in a closely built up resident section was negligence. The statute merely makes such speed *prima facie* evidence of negligence.

24967 COSILITO v. STATE. Elkhart County. *Affirmed.* Gemmill, J. March 19, 1926.

In a criminal action it is not reversible error to refuse permission to the defendant to withdraw his plea of not guilty and file a motion to quash where he did not receive a copy of the charge prior to arraignment but never asked for one and was not injured by its omission.

25015 DARNELL v. STATE. Ekhart County. *Affirmed.* Ewbank, C. J. March 10, 1926.

A search warrant issued to "any constable of said county" is valid under the present law even though under the old law (1852) Section 1727 Burns' 1914, the warrant must be issued to a special constable.

24377 DAVIS v. DAVIS. Gibson County. *Affirmed.* Ewbank, C. J. March 16, 1926.

An agreement between a labor union and a railroad about the suspension of employees which does not in fact bind both parties will not raise liability in the railroad for wages to the employee during the period when he was erroneously suspended.

24696 DAVIS v. STATE. Blackford County. *Reversed.* Ewbank, C. J. March 31, 1926.

Where a prosecutor in a conspiracy case refers to the faith of any of the "amiable defendants" to take the stand to tell where a necessary witness for the state may be found, it is error to permit such a remark to go to the jury where there is no other justification for it. It was also error to admit testimony of drinking by certain of the defendants when it did not appear that the witness was present at the time.

24557 EARL v. STATE. Vigo County. *Affirmed.* Myers, J. March 9, 1926.

Appeal dismissed for want of compliance with rule of court that requires appellant to set out a condensed recital of the evidence in the trial court.

24712 ECKERT v. STATE. Huntington County. Petition for rehearing overruled. Ewbank, C. J. March 18, 1926.

Where by inadvertence a request for oral argument of appeal is ignored the oral argument will not be granted later if the record does not show any ground for changing the decision of the lower court.

25010 FERRIS v. STATE. Jay County. *Certiorari refused.* March 12, 1926. *Per Curiam.*

Where part of the bill of exceptions has been omitted by clerical error the remedy is not a writ of certiorari issued by the higher court but a motion in the trial court for a correction of the record *nunc pro tunc.*

25134 GREATHOUSE v. BOARD OF SCHOOL COMMISSIONERS OF INDPLS. Marion County. *Affirmed.* Willoughby, J. March 31, 1926.

Where there is no showing of fraud or abuse of discretion it is lawful under the Indiana law and under the fourteenth amendment for school commissioners to erect separate schools for colored children if it appears that those schools are adequately equipped to give the colored children similar educational advantages to those enjoyed by white children.

25083 GREEK ORTHODOX CHURCH, ST. TRIAS, *et al.* v. ALEXANDER. Marion County. *Appeal Allowed.* March 12, 1926.

Per Curiam.

Where a surety company signs a bond for appeal on behalf of all the appellants, it is not fatal on appeal if all the appellants do not personally sign the bond themselves.

24432 JORDAN v. WALKER, *et al.* Rush County. *Reversed.* Ewbank, C. J. March 11, 1926.

Property that has been given to a litigant under a replevin bond may not be placed in the custody of a receiver at the mere request of other litigants without the giving of due notice.

24504 KIRTS v. STATE. Warren County. Myers, J. *Affirmed.* March 19, 1926.

The transportation of any quantity of liquor under the law of 1923 was a crime and a mistake in the amount of liquor transported is not reversible error.

24341 LOWE, *et al.* v. IND. HYDRO-ELECTRIC POWER CO. Tippecanoe County. *Affirmed.* Ewbank, C. J. March 19, 1926.

Where an electric light company is organized as a public service corporation and owns lands along a non-navigable river it may, on sufficient showing, have the right to condemn lands for flooding by building a dam for electric purposes under the right of eminent domain.

24659 MORGAN v. STATE. Marion County. *Reversed.* Myers, J. March 12, 1926.

Where an order is made to search a car under the Act 1923, page 108, by an officer without a search warrant and without probable cause of suspicion, the fact that cause of suspicion arises after the searching will not justify the search for intoxicating liquors even though such liquor is found.

24941 MURPHY v. STATE. Knox County. *Affirmed.* Gemmill, J. March 11, 1926.

Where an officer made a lawful arrest of the defendant for violation of the traffic regulations and then found that defendant had intoxicating liquor in his automobile, it was lawful to search the automobile and arrest defendant for violation of the liquor laws without a search warrant.

24418 PINGRY, *et al.* v. INDIANA HYDRO-ELECTRIC POWER CO.

24455 LOWE, *et al.* v. INDIANA HYDRO-ELECTRIC POWER CO.

24456 LOWE, *et al.* v. INDIANA HYDRO-ELECTRIC POWER CO.
Tippecanoe County. *Affirmed.* Ewbank, C. J. March 19, 1926.

Where it is contended that there was not sufficient evidence to justify the condemning of land for flooding purposes under the right of eminent domain, the supreme court could not pass on this question unless the evidence in the trial is set forth in the briefs on appeal in condensed narrative form as required by the fifth sub-division of rule 22.

25106 STATE ON RELATION OF HARRINGTON v. FORTUNE. Original Action. March 9, 1926.

Per Curiam.

Where appellant seeks admission to the bar in a given county in Indiana, the county judge has authority to refuse admission pending his reasonable investigation of the moral character of the appellant.