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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

CRIMINAL LAW—EVIDENCE—WITNESSES—PRIVILEGED COMMUNICATIONS—SEARCHES AND SEIZURE.—Appellant was found guilty of murder in the first degree and sentenced to prison for life. Appellant appeals alleging as error that the trial court erred in admitting certain evidence. His wife was permitted to testify over appellant's objections, that she saw her husband carry a trunk in a wheel-barrow and dump some object into a hole, in which the body of the deceased was later found. The contention of appellant was that the testimony of his wife was not admissible for the reason that it was privileged communication, but the court, *Held:* The act to which his wife had testified to, was not a confidential communication, because the evidence showed in the trial court that he had shielded the contents of the trunk from her knowledge. Appellant also objected to admission of the testimony of the sheriff, to disclose what the sheriff had found in the search of the premises, by virtue of a search warrant, contending that service at the place designated in the warrant, and the consent of his wife to such search was not sufficient because the property was held by entireties, and there was no service on both. *Held:* That service at the place designated in the warrant itself was sufficient. *Smith v. State,* Supreme Court of Indiana, June 24, 1926, 152 N. E. 803.

It is well settled that under the common law one spouse could not be introduced to establish a crime against the other, except where the crime was committed against the other. *Cohen v. United States,* 35 S. Ct. 199. But in Indiana by statute and judicial construction the courts have modified the rule until today only a few remnants of the original privilege is left. Sections 548, 549, 2267, Burns', 1926. The principal case follows the weight of authority in the United States. *Cohen v. United States, supra; New York Life Insurance Co. v. Mason,* 272 F. 28. Wigmore on Evidence (Section 2236), in discussing statutes of this character (privileged communications), says: "In many jurisdictions this fundamental element of confidence is not expressly named in the statutory enactment: it privileges any communication. Some courts, however, have construed this phrase in the spirit of the correct principle, and have implied a limitation to confidential communications. Others have literally applied the words of the statute, which is thus allowed to create an intolerable anomaly in the law of privilege communications. No justification for such an extension of the privilege has ever been attempted, and it must be supposed that this broad statute phrasing originated in advertence." A communication is not inadmissible where it appears to have been made in the presence of others. *Gifford v. Gifford,* 58 Ind. A. 665, 107 N. E. 308. Acts as well as words are held to be communications. *Smith v. State, supra; Perry v. Randall,* 83 Ind. 143.

The same principle not only applies to husband and wife, but to other statutory privileged communications. *Conklin v. Dougherty,* 44 Ind. A. 570, 89 N. E. 893. In conclusion, one may say that Indiana not only follows the weight of authority, but the better line of reasoning, in holding that our statute only protects confidential communication between husband and wife, which grow out of the marital relation, and which but for such relation would not have been communicated. J. O. H.

FALSE PRETENSES—POSTDATED CHECK—STATUTES.—A prosecution under the Indiana statute "making it unlawful to obtain money,—or a thing of value by means of a check,—where the maker or drawer has not sufficient funds in or credit with the bank,—for the payment of same—." The affidavit alleged that appellant being indebted to a firm in the sum of $747.64 for goods theretofore purchased and received, drew a check in payment, dated Sept. 26, 1924, not knowing that he had, and not having, sufficient funds or credit with the bank for the payment of such check. A motion to quash this affidavit was overruled and appellant excepted. The undisputed evidence was that the check was given on Sept. 17, 1924, in payment of an account of goods purchased seven months before; that it was dated ahead at the request of the payee after defendant had told him he did not have the money to meet it; that defendant on Sept. 25, and again four days later, asked the payee to hold the check; that the payee sent the check to the bank for collection on Oct. 15, 1924, but defendant still had no funds in spite of his bona fide intentions. The Ripley Circuit Court found the defendant guilty and he challenged the sufficiency of the evidence by a motion for a new trial. *Held:* The evidence is not sufficient to sustain the finding of guilty, the Attorney-General admitting that so much of Section 2949, Burns' 1926, as purports to declare it a criminal offense to give a check "in payment of an obligation" is not within the title of the act and is therefore unconstiutional. Judgment reversed. *Nedderman v. State*, Supreme Court of Indiana, June 25, 1926, 152 N. E. 800.

Giving a postdated check under an agreement that it shall not be presented for payment until the day it is dated, does not constitute a false pretense as to any present fact and amounts to nothing more than a promise by the drawer to have the money at the bank for the payment of the check at the future date. *Brown v. State*, 166 Ind. 85, 88, 76 N. E. 881; *State v. Ferris*, 171 Ind. 562, 86 N. E. 993. A false pretense, to constitute a crime within our statutes, must rest upon some existing fact. "Both in the nature of things and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretense within the statute; for it must relate either to the past or the present." 2 Bishop—Criminal Law (7th Ed.), Sec. 420.

The subject expressed in the title of the act in question is obtaining money, merchandise, property, credit or a thing of value by means of a check, etc. This prosecution was based on language in the body of the act relating to the payment of any "obligation" by check, etc.

A statute is valid only as far as its provisions relate to the subject expressed in the title and matters properly connected therewith. Sec. 19, Art. 4, Constitution Indiana (Sec. 122, Burns' 1926).

It has been said that if the title of an act fairly gives notice, so as to reasonably lead to an inquiry into the body of the bill, that is all that is necessary. It need not amount to an abstract of its contents. *State v. Arnold*, 140 Ind. 628, 38 N. E. 820. Even viewing the act in this way, however, it seems that the confession of errors and order to quash the indictment were proper. In payment of an obligation by check nothing of value is received at the time, for the long established rule in Indiana is that the giving and taking of a check is prima facie a conditional payment only, and not absolute. *Sutton v. Baldwin*, 146 Ind. 364; *Boyd v. Olvey*, 82 Ind. 294. But if by agreement the parties had made the check absolute payment of the account for which it was given, could it then be

held that nothing of value had been obtained? By so doing would not the defendant have extinguished his civil obligation of $747.64 and have incurred criminal liability of a fine of $100 to $5,000, and from one to five years in prison? C. F. R.

SALES—BREACH OF CONTRACT—SELLER'S RIGHTS—APPELLANT.—The National Importing Company entered into a written contract with the appellee, by the terms of which the appellant purchased of appellee a quantity of prunes to be shipped from California to Indianapolis, Indiana, consigned to order of seller. Prunes were shipped and a draft for purchase price was presented to appellant, as per contract. Appellant refused to pay for or receive the prunes. Appellee stored them for appellant and notified appellant that at a certain time and place the prunes would be sold for his benefit, and appellant would be held responsible for difference between contract price and sale price. This suit is to recover the difference between the contract price and the sale price plus costs of the sale. Appellant admits the contract, shipment of the prunes and his refusal to accept but contends that it was an executory contract, and not executed, and the decision of the court cannot be sustained because there was no evidence as to market value of prunes at place of delivery. *Held:* Judgment of $943.40 should be affirmed. Appellee performed all the provisions of the contract and did everything called upon to do, to place title in appellant. Appellant having breached the contract, appellee sold the prunes as the agent of the appellant and applied the proceeds to the account, and sued for difference between contract price and resale price. *National Importing Company and Others v. California Prune and Apricot Growers*, Appellate Court of Indiana, April 27, 1926, 151 N. E. 626.

Where buyer breaches contract fully executed by seller, latter may store property as for purchaser, and sue for price, or he may sell and apply proceeds to account, and sue for difference, or he may keep the property and recover difference between market and contract price at place and time of delivery. *National Importing Co. v. California Prune and Apricot Growers*, 151 N. E. 626; *Liberty Canning Company v. Lippincott Company*, 80 Ind. App. 184, 137 N. E. 283; *Taylor v. Capp et al.*, 68 Ind. App. 593, 121 N E 37; *Dill v Mumford et al*, 19 Ind. App. 609, 49 N. E. 592; *Dwiggins v. Clark*, 94 Ind. 49; *Fell et al. v. Muller*, 78 Ind. 507; Williston on Contracts, Secs. 1365, 1372. In action of seller for breach, after disposing of property and applying proceeds to account, proof of market price at time and place of delivery is immaterial, damage being the difference in resale and contract price if the vendor keeps goods as belonging to vendee. *Taylor v. Capp et al.*, 68 Ind. App. 593, 121 N. E. 37. If contract is executory and goods still belong to vendor, the measure of damages is the difference between contract price and market price of goods at time when and place where the contract should have been performed. *Ridgley v. Mooney et al.*, 45 N. E. 348, 16 Ind. App. 362; Williston on Sales, Sec. 582-3. A seller, who retakes goods delivered to a buyer, and for which he refuses to pay, in order to recover the difference in the contract price and what he may secure from a resale, must give the buyer notice of the proposed sale of the recovered goods, unless perishable. *Ridgley v. Mooney et al.*, 16 Ind. App. 362, 45 N. E. 348; Williston on Sales, Secs. 543 and 550. The right of action depends on substantial performance of contract by seller, and he cannot recover the price unless there has been a delivery or tender, actual or constructive. *Shipps v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375; *Indianapolis, Peru and Chicago Ry. Co. v. Maguire*, 62 Ind. 140; *Fell et al. v. Muller*, 78 Ind. 507; *Neal et al. v. Shewalter et al.*, 5 Ind. App. 147,

31 N. E. 851. Where seller on buyer's breach chooses to retain property and sell it for buyer's account, and recover difference between resale price and contract price, the averments in complaint must be such as to show that he retained possession for the buyer. *Pillsbury Flour Mills Co. v. Walsh et al.*, 60 Ind. App. 76, 110 N. E. 96; *National Importing Co. et al. v. California Prune and Apricot Growers*, 151 N. E. 626. A. E. B.

WILLS—GIFTS CAUSA MORTIS.—Appellant, as the administrator of the estate of Amy W. Rule, deceased, brought this action, seeking to recover certain personal property which he alleged belonged to the estate. Deceased knew some time in advance that it would be necessary for her to undergo a serious surgical operation from which her recovery would be doubtful according to her own statement. Prior to the operation she rented a lock-box in the safety deposit vault at the Indiana National Bank taking the title in her own name or the appellee who was her brother and placed therein certain personal property, the object of this suit. She also placed a note of directions concerning the distribution of the property in the box. She received two keys, one of which she sent in a letter to appellee along with a note of directions for the disposal of the property which was received by him before her death. In a conversation with a third party who was a witness in the suit she had indicated that she had arranged for the disposal of her property by the note which she had placed in the lock box. In the court below this was held to be valid as a gift causa mortis which decision is affirmed in this court. *Rule v. Fleming.* Decided in Indiana Appellate Court, June 2, 1926. 152 N. E. 181.

A gift causa mortis is a gift of personal property, made by the donor under apprehension of impending death, effectuated by delivery, and defeasible by resumption by the donor, his recovery from that which occasioned his apprehension, or the prior death of the donee. Gardner on Wills, p. 10. Clearly from the weight of authority if anything is left to be done after the decease of the donor, it is an attempted testamentary disposition rather than a gift and is invalid. *Smith v. Ferguson*, 90 Ind. 229; *Martin v. Seibert*, 71 Ind. App. 564. The present title must vest in the donee, revocable only upon the recovery of the donor. This vesting of title is accomplished by delivery; it may be actual, by handing over the subject of the gift, or constructive, by delivery of the means of obtaining possession. *Caylor v. Caylor*, 22 Ind. App. 666. Delivery is not used in the narrow sense of requiring a manual delivery of the chattel into the hands of the recipient but delivery of a key where it is the means of obtaining possession of the gift has been held sufficient. *Coleman v. Parker*, 114 Mass. 30; *Wing v. Merchant*, 57 Me. 383; *Devol v. Dye*, 123 Ind. 321.

It seems evident in this case that the appellee could have taken actual and exclusive possession of the litigated property at any time after the delivery to him of the key to the lock box. Deceased had done everything in her power to invest him with this right and nothing in her behalf remained to be done after her death. The donor must be in such a condition to fear approaching death from a proximate and impending peril and death from such cause will complete the gift. *Smith v. Dorsey*, 38 Ind. 451; *Devol v. Dye*, 123 Ind. 321. In this case all of the requirements of a gift causa mortis are found and it would seem from a review of the authorities on this principle of the law that a correct decision was reached by the court. Upon consideration of the adjudicated cases it appears that the courts have entertained a distrust for this method of alienating property and that each case must be thoroughly considered on its own facts.

R. M. C.

INDIANA DOCKET

SUPREME COURT

24903 GREGG ALYEA v. STATE. Rush County. Petition denied. Willoughby, J. October 27, 1926.

Where a court denies a petition and it does not appear that evidence was heard it must be assumed that the court held the allegation in the petition to be untrue while in law all such allegations must be presumed to be true.

24757 EARL BOOHER ET AL. v. STATE. Greene County. *Affirmed.* Gemmill, J. October 15, 1926.

Where the indictment is for conspiracy to commit a felony and the felony is the illegal transportation of intoxicating liquor it is proper for the purpose of showing the necessary intent to admit evidence of the defendant's dealings with intoxicating liquor even before such dealing was a felony under the Indiana law. The rule for admission of evidence to show intent is wider in conspiracy cases than in most criminal cases.

25111 OTHO BRONNENBERG v. STATE. Madison County. *Affirmed.* Ewbank, J. October 15, 1926.

A verdict which found the defendant "guilty as charged in the affidavit and that he be fined in the sum of $500 and confined in the county jail for the period of six months" is not defective for uncertainty under Section 12347, Burns' 1926.

25057 ARCHIE CAMPBELL v. STATE. Delaware County. *Affirmed.* Gemmill, J. October 6, 1926.

Where by agreement several offences were consolidated and tried at one time it is proper for the jury to bring in as many separate verdicts as there are separate offenses charged.

25076 JEFF FARR v. STATE. Monroe County. *Reversed.* Myers, C. J. October 13, 1926.

Where the defendant is charged with several offenses in dealing with intoxicating liquor and the findings of the court are that he is guilty of selling intoxicating liquor and not guilty of the other charges these findings cannot be sustained unless there is some evidence in the record of an actual sale.

25301 FOSTER & BURCHARD STONE COMPANY ET AL. v. MARION NATIONAL BANK. Howard County. *Affirmed. Per Curiam.* October 5, 1926.

A sub-contractor is not barred from acquiring and foreclosing a lien merely because the principal contract stipulated that the main contractor would secure the release of any mechanic's liens within twenty days. But when the sub-contractor enters into a contract with the contractor agreeing to turn over the work free from all liens it thereby waives all right to enforce the lien against the property in view of the provision in the main contract of which it had knowledge.

24855 FRITZ v. STATE. Howard County. *Affirmed.* Myers, C. J. October 6, 1926.

Where no independent bill of exception is filed covering the misconduct of counsel in the closing argument this matter cannot be reviewed on appeal; and where no bill of exception containing the instructions complained of is filed these likewise cannot be considered on appeal.

25017 ALBERT GIELOW v. STATE. LaPorte County. *Affirmed.* Gemmill, J. October 7, 1926.

While it is true that the mere possession of liquor is not a crime it was not reversible error for the court to refuse to give an instruction covering this in a case where the mere possession was not the foundation for the prosecution.

25035 HENRY GREENING v. STATE. St. Joseph County. *Affirmed.* Gemmill, J. October 8, 1926.

Where the defendant is charged with obtaining money under false pretenses it is sufficient if his criminal acts in obtaining money were part of the enducement for the paying of money.

24599 GUETLING v. STATE. Gibson County. *Affirmed.* Myers, C. J. October 26, 1926.

Where one is carrying sugar that could be used for distilling purposes near a lonely spot where a still had been found and raided, this was sufficient evidence to warrant conviction under a statute which makes it unlawful to "aid or encourage, etc.," in making of liquor in violation of law.

24600 GUETLING v. STATE. Gibson County. *Affirmed.* Myers, C. J. October 26, 1926.

Where one is carrying sugar that could be used for distilling purposes near a lonely spot where a still had been found and raided this was sufficient evidence to warrant conviction under a statute which makes it unlawful to "aid or encourage, etc.," in making of liquor in violation of law.

24982 T. J. HAYS ET AL. v. THOS. BENNINGTON ET AL. Daviess County. Petition denied. Ewbank, J. October 15, 1926.

Where no evidence against the ruling of the lower court is presented in the bill of exception it must be presumed that the lower court acted on some evidence introduced at the trial.

24867 GEORGE T. INSKEEP ET AL. v. STATE EX REL. NEES ET AL. White County. *Affirmed.* Myers, C. J. October 5, 1926.

Objecting petitioners to an assessment for the construction of public improvements by county commissioners must intervene in the proceedings if at all within fifteen days after which the commissioners determine to issue the bonds. Where the commissioners indicate, however, that this would not appear from the previous litigation it would have been proper though not compulsory to have admitted the intervention of the objecting petitioner.

25096 LINDLEY v. STATE. Delaware County. *Reversed.* Ewbank, J. October 26, 1926.

Under the Indiana statute which requires that the court must give written instructions if so requested by counsel, it is error to give oral instructions also since it might mislead the jury as to their relative weight.

25029 CLEVE v. STATE. Gibson County. *Affirmed.* Ewbank, J. October 7, 1926.

A court might not give instructions unless they are pertinent to the law and facts as developed at the trial. Thus if there is direct evidence of certain acts upon which the indictment is laid the court might not give instructions about the use of circumstantial evidence.

25311 FRED J. MUGG ET AL. v. CHAS. E. FENN ET AL. Howard County. *Affirmed.* Gemmill, J. October 28, 1926.

Where a widow has a certain portion of land set off to her under order of court in lieu of $500.00 to which she was entitled, this land comes to her by purchase and not by descent and children of the marriage cannot claim an interest in such land.

24738 ROY MURRY v. STATE. Grant County. *Affirmed.* Myers, C. J., October 29, 1926.

If evidence of transportation of intoxicating liquor is obtained without a warrant or without direct evidence before the search this cannot be raised on appeal unless the objection to the admission of the liquor as evidence is made on this basis.

25313 ALFRED NEAL ET AL. v. BESSIE F. BAKER. Sullivan County. *Reversed. Per Curiam.* October 29, 1926.

A letter in which the decedents promised to give the plaintiff a farm and asked her to return to them was held not to show a sufficient consideration in return for the land according to the written instrument which could be a basis for specific performance later. Furthermore this cannot be enforced as a gift of the land where the plaintiff did not take possession and make improvements. See section 8045, Burns, 1926.

24499 NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY v. FIRST TRUST & SAVINGS BANK, ADMINISTRATOR. Lake County. *Affirmed.* Ewbank, J. October 28, 1926.

Where the instructions that are covered on appeal are filed as a part of the record by order of the trial judge there immediately follows he memoranda signed by the judge. This is a sufficient compliance with the statute requiring an incorporation in the record of all errors complained of under section 717 Burns, 1926.

24695 OTIS SPROUT v. CITY OF SOUTH BEND. St. Joseph County. *Affirmed.* Ewbank, J. October 14, 1926.

A city may validly license and regulate a commercial bus line even though such a line does not operate exclusively within the city or the state and even though its main business is interstate. Since the bus line uses the city streets for commercial purposes a reasonable regulation is constitutional.

25123 STATE BOARD OF TAX COMMISSIONERS, v. STATE EX REL. Indianapolis. Marion County. Petition denied. Gemmill, J. October 26, 1926.

The tax levy under the budget law for cities in Indiana should be established after the publishing and a public hearing. The decision of courts in other states construing the statute different from our are not applicable to this case.

25088 STATE v. LOWDER ET AL. Green County. *Reversed.* Ewbank, J. October 6, 1926.

Where defendants are charged with unlawfully using a seine to catch fish under the Indana statute it was improper to give an instruction saying that if the defendants used the seine to preserve the fish when the pond was drying up he would not be guilty. No such exception appears in the statute, section 2831, 2846 Burns 1926 and the defendant was not justifying his acts as an officer acting to preserve the fish.

25303 STATE EX REL. LESH, V. INDIANA MANUFACTURERS OF DAIRY PRODUCTS ET L. Marion County. *Affirmed. Per Curiam.*

If the findings of fact by a court from conflicting evidence are not unreasonable they will be sustained on appeal. No conclusion of guilt can be drawn by a witness's refusal to testify on the ground of self-inclination.

24944 STATE V. LEONARD. Miami County. *Reversed.* Gemmill J. October 27, 1926.

To prevent the issuance of bonds by a Board of County Commissioners, the objection of tax payers must be filed within fifteen days after the entry of the order for the issuance of the bonds.

34546 LITTLE WONDER LIGHT COMPANY V. VAN SLYKE. Vigo County. *Reversed.* Ewbank, J. October 8, 1926.

When a corporations is solvent, paying dividends, keeping full and accurate books, and its officers are residing within the state and financially responsible there must be a showing of more than disagreements on the Board of Directors and failure to carry out employment contracts to warrant their appointment of a receiver.

APPELLATE COURT

12471 BANK OF SAN PIERRE, V. FRED E. ARNDT ET AL. Starke County. *Reversed.* Remy, J. October 15, 1926.

Where the defendants to suit on a note for payment and the evidence of payment is the transfer of the deed, there is not sufficient evidence to sustain a verdict for defendants if the agreement of the deed itself provided that the conveyance was to protect the owners of the note for interest and other claims while it was not in any way to release the makers from liability on the note itself.

12415 CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY V. AMERICAN TRUST COMPANY. Jasper County. *Reversed.* Remy, J. October 8, 1926.

In an accident case it was error for the court to instruct the jury that the jury was to determine whether the Railway Crossing was in a thickly populated place when there was no evidence or allegation to this effect in the entire procedure; furthermore, it was error for the court to instruct the jury that the Railroad must use "all the facilities it had to give reasonable warning of the approach" of its trains when the duty of the Railroad was to use reasonable care only in giving warning.

12400 CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY V. STIERWALT. Monroe County. *Affirmed.* McMahan, P. J. October 27, 1926.

Under the United States Appliance Act there is an absolute duty imposed on Railroads to provide their cars with such coupling that the connections be made without the brakeman's standing between the car. If under this act an injured employee sues and recovers $42000.00 damages, such damages are not excessive.

12216 CITY OF PERU ET AL. V. KREUTZER ET AL. Miami County. *Reversed.* Nichols, J. October 7, 1926.

Where a party attempts an appeal from sewer assessment under the act of 1919 which required a verified complaint and bond, it was reversible er-

ror to hear such an appeal even though it would be proper under the law as now amended.

12493 CITY NATIONAL BANK OF AUBURN v. EDGAR VAN HOUTEN ET AL. Dekalb County. *Reversed.* Nichols, J. October 27, 1926.

Where a land owner has waived all objections to an assessment for building a sewer he cannot later take advantage of an objection that would valid if he had not given the waiver.

25095 TOM DAPOFF v. STATE. Marion County. *Affirmed.* Willoughby, J. October 5, 1926.

Where the defendants were arrested for speeding in driving their automobile it was lawful for the officer to then search the car for illegal liquor and to use the evidence thus obtained in a charge laid for violating the prohibition law. Where one is arrested for a misdemeanor committed in the presence of an officer his person and vehicle may be searched without violation of the constitutional right prohibiting unreasonable searches and seizures.

24544 DENNY, RECEIVER, v. SCOONOVER. Marion County. *Affirmed.* Nichols, J. October 27, 1926.

Where a receiver for an insurance company had been appointed in Iowa but no receiver had yet been appointed for Indiana and agent of the insurance company who paid all due the company to this receiver under his order, is not liable to the Indiana receiver appointed later.

12536 CHAUNCEY R. DOTY v. JEREMIAH W. DOWD ET AL. Starke County. *Affirmed.* Remy, J. October 6, 1926.

Where a court refused to enter judgment at one term withholding the decision pending on agreement between the parties; and in fact no such agreement is reached and the court enters judgment in the next term, such judgment is considered as of the second term.

12430 HIGHWAY IRON PRODUCTS COMPANY v. PHILLIPS ET AL. Starke County. *Reversed.* Thompson, J. October 26, 1926.

Where the special findings of the jury did not find a change in the original contract the court was not justified in finding as a matter of law that the sureties on the bond incident to the contract were released.

12484 HARLEY D. HOLMES v. ALBERT BUELL. Rush County. *Affirmed.* Nichols, J. October 8, 1926.

On appeal appellant will not be heard to complain of an instruction as stating the issues insufficiently if he failed to tender an instruction which in his opinion properly covered them.

12393 EDITH H. INTON ET AL v. GUSTAVE G. SCHMIDT ET AL. Marion County. Petition denied. McMahan, P. J. October 15, 1926.

No appeal lies from the decision of the circuit court or superior court in a case under the Zoning statutes, since the statute does not expressly provide for an appeal to the appellate court and since no right of appeal is implied in the case of causes before administrative official or board that is reviewed by the circuit court.

12404 LEO KEPPER ET AL. v. AUGUSTA SCHUMAKER ET AL. Laporte County. *Reversed.* Nichols, J. October 8, 1926.

Where a second, childless wife takes certain property by the will of her husband for a number of years and then the property is to go to the chil-

dren of the testator subject to the widow's statutory interest, the widow takes by purchase and not by descent.

12495 HANNA L. MILLER v FORT WAYNE MERCANTILE ACCIDENT ASSOCIATION. Adams County. *Affirmed.* McMahan, P. J. October 8, 1926.

Where under an accident insurance policy no recovery was allowed for injury arising from "voluntary or involuntary, conscious or unconscious inhalation of gas . . . or; from anything accidentally or otherwise taken . . . nor for death or disability caused directly or indirectly, wholly or in part from any poison . . .". The deceased cannot recover if he took poison in the belief that it was medicine. Some cases hold that a policy which provides for no recovery after death results from poison means the conscious taking of poison; but these cases do not apply here.

12465 NATIONAL SURETY COMPANY OF NEW YORK v. STATE EX REL. BOARD OF COMMISSIONERS. Clarke County. *Reversed.* Nichols, J. October 8, 1926.

Where a contract of suretyship is, as between the creditor and the surety, subject to a condition, the surety is discharged if the condition is not performed.

12566 WM. H. NICHOLS GARAGE, INC. v. FRANK J. MILLER. St. Joseph County. *Reversed.* Remy, J. October 12, 1926.

Where one sues for damages and the possession of an automobile and the jury finds on the counter claim that the defendant was entitled to $50.00 this would not amount to a finding on the question of whether or not the plaintiff was entitled to possession of the automobile apart from damages.

12254 PEOPLES TRUST & SAVINGS BANK v. JOHN C. HENNESSEY ET AL. Porter County. *Affirmed.* McMahan, P. J. October 14, 1926.

Where a property owner avails himself of the Barrett law in waiving objection to an assessment and permits the bonds to be issued on this basis the statute of limitations will run against an action for non-payment of the assessment. If the complaint does not set up this agreement and waiver as part of the cause of action within the five year period.

12480 ELMER THOMPSON v. THE TOWN OF FORT BRANCH. Gibson County. *Affirmed.* Nichols, J. October 15, 1926.

No new trial shall be granted on the ground that the damages given by the verdict are too small in a case involving injuries to persons or reputation. Section 611, Burns 1926.

12240 CHARLES F. THORP, ETC. ET AL. v OGLE COAL COMPANY AND SUGAR VALLEY COAL COMPANY. Marion County. *Reversed.* Nichols, J. October 8, 1926.

Where a claimant for prudential reasons refuses to present his claim under a legal obligation he cannot later come to a court of equality and ask allowance upon it.