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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

CONTRACTS—EVIDENCE.—The appellant sued to recover the contract price of certain advertising alleged to have been run in its newspaper pursuant to the contract sued on. The appellee answered by (1) general denial and (2) by averring fraud, alleging rescission of the contract. The contract was that "the advertiser agrees to insert in the Chicago Tribune, owned by the company, on each day of publication," his advertising, and that "the company shall furnish the advertiser" his space. The appellee offered evidence to prove that appellant's agent said at the time that the contract was entered into, that the advertising would be run in all editions of the Chicago Tribune, and that the advertising to be inserted under the heading "Storage, Carting and Forwarding" would be indexed in the classified advertising index. The appellant's objection to this evidence was that it was "wholly immaterial what conversation they might have had before this contract was entered into," and that such evidence was "attempting to prove misrepresentation, and an attempt by parol to vary the terms of a written contract, and on a further ground that the contract provides that 'the advertiser hereby agrees with the company that no representations of any kind have been made to the advertiser by the company, or any of its agents, and that no understanding has been had, or agreement entered into, other than that embodied herein in writing.'"

Held: Parol evidence is admissible to prove what the parties intended by the contract, when the document is ambiguous on its face. *Tribune Co. v. Red Ball Transit Co.*, 151 N. E. 338. Rehearing denied in 151 N. E. 836.

The words of a contract alone, ordinarily, are used to show the intent of the parties making the said contract; *i. e.*, the terms of a contract are *prima facie* evidence of what the parties thereto intended by the contract. The proponent of a contract, therefore, has a good case when he sets out the contract, and the burden of proof that the contract does not express the true intent of the parties is upon the respondent. This may be done by showing fraud in the inducement, as was contended by the appellee in the case reported, supra. That case, however, held that there was no such fraud, because promises to do things in the future, which are not misrepresentations of existing facts, do not constitute fraud. (*Vogel v. Demorestt*, 97 Ind. 440; *Robinson v. Reinhart*, 36 N. E. 519, 137 Ind. 674; *Ayers v. Belvins*, 62 N. E. 305, 28 Ind. App. 104; *Wabash, etc., R. Co. v. Grate*, 102 N. E. 155, 53 Ind. App. 583, 589.) However, the face of a contract may not show the true intent of the parties, because no intent in regard to a particular thing is expressed. There may be either a latent or patent ambiguity. It may be contended that certain terms infer certain facts, and such inferences may as well be erroneous as correct. When such conditions exist, before it is possible for the court to determine whether the terms of the contract have been complied with, it must determine just what the parties did intend by the contract. To arrive at this determination it is proper for the court to hear parol evidence of the parties as to their interpretation of the contract. (*Bates v. Dehaven*, 10 Ind. 319; *City of Vincennes v. Citizens Gas Light Co.*, 31 N. E. 573, 132 Ind. 114, 124, 16 L. R. A. 485; *Gardener v. Gaylors*, 56 N. E. 134, 24 Ind. App. 525; *International Harvester Co. v. Haueisen*, 118 N. E. 320, 66 Ind. App. 370.)—S. B.

CRIMINAL LAW—TRANSPORTATION OF INTOXICATING LIQUOR—POWER OF SUPREME COURT TO REVERSE A LOWER JUDGMENT.—Indictment and conviction for transporting intoxicating liquors under Acts 1917, C. 4, paragraph 4, as amended by Acts 1923, C. 23, paragraph 1. D testified he found the liquors in his woodshed, that he did not know whose it was or where it came from; that he carried it 25 or 30 feet to his house, where he hid it in his attic, where the officers found it. Evidence: D's woodshed was partly torn down, unlocked and accessible to anyone from the alley. A new water line was being laid in the alley. D stated that when he got the liquor there was a machine in the alley "used in that new water line," and that he did not know whether "this stuff came from there or not." No other evidence as to what kind of machine was meant by D; but D used the word "machine" in other connections to indicate an automobile, and D had an automobile. *Held:* Act of D in moving and hiding the liquor insufficient to constitute transportation under the above Acts. Ewbank, J. dissenting. *Hammell v. State*, 152 N. E. 163.

The amended statute provides: It shall be unlawful for any person to . . . transport . . . furnish, or otherwise dispose of any intoxicating liquor. . . . Acts 1923, C. 23, paragraph 1.

Words and phrases are to be given their plain, ordinary meaning, unless such construction will defeat legislative intent. Burns' Ann. St. 1926, paragraph 247. The lower court instructed that the word "transport" as here used means "to carry over or across, to convey from one place to another, or to remove from one place to another." Transport means "to carry or convey from one place to another." Webster's Dictionary, 38 Cyc. 946. *Asher v. State*, 142 N. E. 407. *Eiler v. State*, 149 N. E. 62. Place: "Any particular spot or locality." Webster's Dictionary. "A very indefiinite term, applied to any locality limited by boundaries, however large or however small." 30 Cyc. 1633. Place "applies not only to a building, but also to any inclosure whether covered or not." *Brookline v. Hatch*, 167 Mass. 380. The court here held the moving of the liquor by D from his woodshed 25 or 30 feet to his house was not transportation within the statute. There are no cases holding that moving liquor over such a small distance, of itself, is transportation within the statute. But it would seem not to exceed the usual and ordinary meaning of the word to hold that the moving here of 25 or 30 feet was transporting within the statute, was conveying, "from one place to another." The court refused to take D's reference to the "machine in the alley" to mean an automobile, holding thereby that an inference did not fairly follow that when D moved the liquor from his woodshed to his attic that he thereby assisted in its transportation from some distant point to his attic by the use of an automobile. Ewbank, J. dissenting. The court held there was no evidence from which the court could infer D meant an automobile and that D helped in transporting the liquor over a longer distance. But as to the power of the court to reverse a finding in a lower court on the basis of insufficient evidence "If reasonable men might find (not 'ought to' as was said in *Solomon v. Bitton*) the verdict which has been found, I think no court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges." L. Halsbury in *Metropolitan Ry. Co. v. Wright*, 11 Appeal Cases 152. When the sufficiency of the evidence is challenged on appeal, the court will not weigh the evidence, and if there is any evidence to sustain the verdict it will not be disturbed. *Rosenberg v. State*, 192 Ind. 485. Evidence is

sufficient to sustain a judgment if there is any whatever, reasonably tending to prove the essential facts. *Great Western Coal & Coke Co. v. Servantes*, 150 P. 1042. The question for the court (on appeal) is not whether the conduct ultimately in question . . . was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct which the jury are judging reasonably be thought reasonable? Thayer's Prelim. Treatise on Evidence, p. 209.

It would seem the case is wrong on several grounds. The court might well hold that the actual moving admitted by D is transportation within the common and usual meaning of the word "transport." The court seems cautious beyond reason in view of all of D's testimony in refusing to hold D's reference to a "machine" to mean an automobile, which holding would make the inference contended for by the dissenting judge permissible without argument, and lastly, the court seems to have exceeded its authority in granting a new trial on the basis of insufficient evidence. It can not fairly be said there was no evidence on which the jury could reasonably infer D took part in transporting the liquor over a greater distance to his attic.—B. B. C.

MUNICIPAL CORPORATIONS — MANDAMUS — REINSTATEMENT OF POLICE OFFICER.—Appellees, as Commissioners of Public Safety of the City of South Bend, dismissed appellant, a patrolman, from the police force on the charges of neglect of duty, mental incapacity, and general incompetency. This was an action of mandamus to compel the vacation of the order of dismissal and to require the reinstatement of appellant, who contends that the board reached an erroneous decision, not supported by the evidence; that he was dismissed without a public hearing as required by the statute; and further, that the trial court erred in refusing to admit evidence that the individual members of the board of public safety had expressed their belief that appellant was guilty of the charges against him, previous to the hearing. *Held:* Judgment for appellees affirmed. *State ex rel Szweda v. Davis et al.*, Supreme Court of Indiana, June 2, 1926, 152 N. E. 174.

The statutes pursuant to which appellees assumed to act in dismissing appellant are in substance as follows: "The Commissioners of Public Safety shall have power, for cause assigned, on a public hearing and on due notice . . . to remove or suspend from office . . . any member of the police force. . . . They may be removed for any cause other than politics, after an opportunity for a hearing is given, and the written reasons for such removal shall be entered upon the records of such board. . . ." Sections 10859, 10864 Burns' 1926. The statutes seem to have been strictly complied with. Relator was given notice and a hearing was had in which he appeared before the board with counsel and was allowed to introduce witnesses in his own behalf, to cross-examine witnesses introduced by appellees, and to himself take the stand. It was shown that a stenographer took down all the evidence in shorthand and transcribed it for relator, and that representatives of two newspapers and several other persons were present at the hearing. It appeared that one of the doors admitting the witnesses, one at a time, was locked, but that no one was refused admittance who knocked. The board entered upon its record that after hearing the evidence it found relator guilty as charged and dismissed him from the police force.

The decisions are conclusive that where a member of a police force is summarily dismissed by a board of public safety without a hearing and without any charges against him having been filed, his reinstatement can be compelled by mandamus. *Roth v. State ex rel.*, 158 Ind. 242, 63 N. E. 460; *Shira v. State ex rel.*, 187 Ind. 441, 119 N. E. 833. But, the court point out, "Mandamus will not lie to set aside an erroneous decision of such a board upon a question of fact after a full hearing at which the accused appeared with his attorney and witnesses, cross-examined the witnesses against him, and testified in his own behalf." Where the statutory requirements were complied with as in this case, "The courts have no power in an action of mandamus to review the question whether or not the right conclusion was reached in holding the charges sustained." *State ex rel. v. Board*, 170 Ind. 133, 83 N. E. 83; Throon on Public Officers 396. The court further decides that the hearing was so far a public hearing that it could not be declared a nullity where no showing was made that relator objected at the time, nor that any person sought admission and was rejected. In concluding the court holds that "The evidence indicating that before the hearing individual members of the board had expressed their belief that relator was guilty of the charges against him was properly rejected as not being pertinent to the issue whether or not mandamus would lie to compel the board to reinstate relator." This case is strictly in accord with Indiana authority and on principle seems to be sound law. The doctrine is summed up by quotations from the following cases: "Mandamus will not lie against a public officer, unless the relator shows a clear legal right to have the particular thing done which he asks, nor will it lie to enforce a mere equitable right. Neither will such action lie, except in the absence of other adequate remedy, nor to establish a right; nor to define and impose a duty; and it will not lie to procure the determination of the constitutional validity of a statute." *State ex rel. v. Scheiman*, 179 Ind. 502, 504, 101 N. E. 713; *Steiger v. State ex rel*, 186 Ind. 507, 512, 116 N. E. 913; *Burnsville Turnpike Co. v. State ex rel.*, 119 Ind. 382, 20 N. E. 421, 3 L. R. A. 265; *State ex rel. v. Winterrowd*, 174 Ind. 529, 91 N. E. 965, 92 N. E. 960, 30 L. R. A. (N. S.) 886.—T. L., JR.

WILLS—CONSTRUCTION.—Suit by Frances N. Nichols, as executrix, against Charles S. Alexander and others to construe the will of John S. Nichols, deceased. The will included the following provisions:

"Item 2. I give, devise and bequeath, without any condition whatever, unto my wife, Frances M. Nichols, all the remainder of my property, real, personal and mixed, of every description, wherever situated, absolutely, to have, hold and enjoy and dispose of as she sees fit during her lifetime.

Item 3. At the death of my wife, Frances M. Nichols, I desire that the residue, if any, be converted into cash and divided as follows: * * *"

Trial resulted in a decree that by terms of the will testator "devised and bequeathed" a "life estate in all the real and personal estate" of which testator died seized, with power to sell any part necessary for her support during lifetime, and residue, if any, at her death, under terms of the will to go to legatees named in Item 3 in proportions as set forth therein. Appellant appeals from this decree. *Held:* Judgment reversed. Will created an absolute estate in both real and personal property in legatee. Nichols v. Alexander et al., App. Ct. of Ind. in Banc., July 2, 1926. 152 N. E. 863.

The fundamental principle in construing a will is that the purpose of such construction is to ascertain from the language of the instrument the intention of the testator, and to give effect to it so far as the same may not interfere with the established rules of law. *Fowler v. Duhme*, 128 Ind. 59, *Mulvane v. Rude*, 146 Ind. 476. The intention to be carried into effect is not necessarily or always the effect which existed in testator's mind when the will was executed, but is always that intention which is embodied in and obtained from the language of the will itself. *Reeder v. Antrim*, 64 Ind. App. 83. By his will testator conveyed in general terms both real and personal property. By the common law and the law of this state appellant received an absolute estate in the personal property. When a bequest of personal property is made for life, with a full power of disposition, by will or otherwise, at the pleasure of the devisee, without limitation or restriction as to the time, mode, or purpose of execution of power, the life estate is controlled by an ulimited power of disposition, and an absolute estate in the property is thereby created in the legatee. *Van Gordner v. Smith*, 99 Ind. 404. Appellees contend that the fee in the real estate was not conveyed by the will, and state the common law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate. This rule is in force in this state. *Mulvane v. Ross, supra; Fowler v. Duhme, supra; Ross v. Ross*, 135 Ind. 367. But by a great weight of authority the common law rule is not applicable to this case. Where a general devise of real estate is coupled with a general bequest of personal property, such fact is sufficient to indicate an intention to devise the land in fee. *Reeder v. Antrim*, 112 N. E. 551; *Greiner v. Heins*, 131 N. E. 20. The fact that real estate is included in the same clause with an absolute estate in personal property indicates an intention to devise a fee in the real estate. Schouler, Sec. 1189, Vol. 2. Item 3 of the will in no way affected the force or effect of the provisions of Item 2. A fee simple title, devised by one clause of a will in clear and decisive terms, can not be cut down or modified by a subsequent clause, which merely raises a doubt, or leaves room for contrary inference, nor by any subsequent words which are not as clear and decisive as those by which the estate is devised. *Reeder v. Antrim, supra.* Also, where a bequest is given, coupled with precatory words, which leave legatee free to act or not to act, such words are to be treated as an appeal to the conscience and affections of legatee, and nothing more. *Van Gordner v. Smith, supra.* Appellee's interpretation of the phrase in Item 2 "during her lifetime" as a limitation of the estate is clearly untenable. By the rules of grammatical construction and punctuation the phrase "during her lifetime" was intended to modify the word "dispose", the last of the three verbs.

The decision in this case is clearly in accord with the weight of authority in Indiana, and with logical reasoning.—A. V. R.

INDIANA DOCKET

SUPREME COURT

24979 ALLIED MAGNET WIRE CORPORATION v. TUTTLE. Marion County. *Reversed.* Myers, J., Gemmill, C. J. Dissent. December 21, 1926.

A provision that dividends on preferred stock shall be payable immediately upon the incorporation of a company and that holders of the said stock may have a receiver appointed if such dividends are not paid is *ultra vires* on the grounds that it is against public policy for a corporation so to bind themselves to pay dividends before they can be earned and to permit holders of the preferred stock to destroy the corporation in such a way.

24753 BOARD OF PUBLIC WORKS OF INDIANAPOLIS ET AL. v. STATE EX REL. MCGEE ET AL. Marion County. *Reversed.* Ewbank, J. December 22, 1926.

A writ of mandamus may not be issued to nullify the action of the Board of Public Safety in dismissing a police officer unless it appeared that the board acted beyond its authority.

24726 BOOKOUT v. FOREMAN. Delaware County. *Reversed.* Ewbank, J. December 14, 1926.

It is error to appoint a receiver for a man's property without giving him personal notice of the proceedings unless the case involves such fraud or dangers of injury to the property as to constitute an emergency.

24688 CITY OF HOBART v. STATE. Lake County. *Affirmed.* Ewbank J. December 16, 1926.

Affirmed on authority.

24689 CITY OF HOBART v. STATE. Lake County. *Affimed.* Ewbank, J. December 16, 1926.

Affirmed on authority.

24689 CITY OF HOBART v. STATE. Lake County. *Affirmed.* Ewbank, J. December 16, 1926.

Affirmed on authority.

24691 CITY OF HOBART v. STATE EX REL. ROPER ET AL. Lake County. *Affirmed* Ewbank, J. December 16, 1926.

Where a proper petition has been filed for disannexation from the territory of a municipal corporation, the city council must hear the petition and take action upon it since the relators have the right of appeal from the city council to the decision in an action *de novo* in the circuit court.

24820 DEBUS, ADMINISTRATOR, v. COOK ET AL. Starke County. *Affirmed.* Ewbank, J. December 23, 1926.

Where a wife predeceases her husband her right of dower remained inchoate and she never inherited anything from him even though he murdered her for the express purpose of depriving her heirs of any indirect inheritance of her property.

25027 ELLE V. STATE. Henry County. *Affirmed.* Gemmill, C. J. December 23, 1926.

The word "manufacture" means "to make" and under the Indiana Liquor Laws an instruction which uses the word "manufacture" although the process was not completed is not objectionable.

24728 EVANS V. STATE. Blackford County. *Reversed.* Myers, J. December 7, 1926.

Where a search for illegal liquor was made on a twenty-acre tract of land in a different section from the one specified in the search warrant this was sufficient error in describing the premises in the warrant to require the evidence under this search warrant to be excluded.

24554. HENDERSON ET AL. V. STATE. Lake County. *Affirmed.* Ewbank, J. December 17, 1926.

Even though a complaint shows on its face that it is prematurely brought, this objection is waived if it is not mentioned in the demurrer or the memoranda filed with the demurrer (Section 362, Burns 1926).

24775 HUNSUCKER ET AL. V. MONTEL ET AL. Jackson County. *Reversed.* Gemmill, C. J. December 14, 1926.

In a petition before drainage commissioners, objections to the petition must be filed within ten days or the defects in the petition are waived.

25029 MOORE V. STATE. Gibson County. *Petition overruled.* Ewbank, J. December 14, 1926.

Where a bill of exceptions is insufficient and is later corrected by court order the parties to the litigation are conclusively presumed to know of the corrected bill of exceptions.

24895 MURRAY V. STATE. Jay County. *Affirmed.* Gemmill, C. J. December 14, 1926.

When the record shows that the court entertained the motion to quash and that it was overruled, the appellant will be treated as having withdrawn his plea for that motion.

24983 PIEDMONT V. STATE. Elkhart County. *Affirmed.* Gemmill, C. J. December 8, 1926.

There may be prosecution if the act was an offense under criminal law at the time it was committed even though the law was repealed before the trial occurred. Evidence that the premises were used for liquor by a previous tenant is not admissible under a charge of possession of liquor by the present tenant.

24126 SISTERS OF PROVIDENCE OF ST. MARY'S OF THE WOODS V. LOWER VEIN COAL COMPANY. Vigo County. *Affirmed.* Ewbank, J. Dec. 22, 1926.

Under eminent domain proceedings it is not required that a railroad condemn a right-of-way which shall be straight in connecting the desired points. The act of 1905 covering eminent domain proceedings is held constitutional.

25122 SMITH V. STATE. Marion County. *Affirmed.* Gemmill, C. J. December 17, 1926.

Where the appellant did not request an instruction the court has no ground for reversal or a new trial later, even though this instruction would have been proper had he requested it.

24832 SPRING VALLEY COAL COMPANY v. STATE. Marion County. *Affirmed.* Ewbank, J. December 17, 1926.

Where the plaintiff sues the state of Indiana for money wrongfully paid to the state under state tax he has no cause of action unless it is made to appear that the money was paid under some contract expressed or implied. A taxpayer can not recover money merely because it was paid under an unconstitutional statute or in violation of a statute.

24695 SPROUT v. CITY OF SOUTH BEND. St. Joseph County. *Affirmed.* Petition for rehearing denied. Ewbank, J. December 16, 1926.

The fact that the court does not discuss in detail all the cases cited by counsel does not indicate that they were not fully considered by the court.

24822 STATE EX REL. ADAM v. MARTIN, AUDITOR, ET AL. Jay County. *Reversed.* Ewbank, J. December 8, 1926.

The action of a board of county commissioners in approving a road is a judicial finding and is subject to appeal. If no appeal is taken their decision is binding except for fraud.

25187 STATE EX REL. MCGARR v. DEBAUN, JUDGE OF THE SULLIVAN CIRCUIT COURT. Original action mandate issued. Myers, J. Willoughby, J. and Ewbank, J. dissent. December 22, 1926.

Under Burns 1926, section 1244, a circuit judge must grant a change of judge when properly requested and the supreme court will mandate this action if it is refused. The dissenting opinion goes on the ground that the demand for change of judge was not properly filed.

25329 TAGGART v. KEEBLER. Elkhart County. Cause transferred from Appellate Court. *Reversed.* Per Curiam.

In an action for personal injury received in an automobile accident it is error for the court to permit detailed evidence that the defendant said he was "heavily insured" since this did not bear upon the issue and tended to prejudice against the conscientious care of the defendant.

25074 TERLIZZI v. STATE. Lake County. *Affirmed.* Ewbank, J. December 7, 1926.

It must be an extreme case to warrant the granting of a new trial in order to present new issues and where appellant asks for a new trial after conviction of second degree murder on the ground that she should have pleaded insanity at the trial, there were no sufficient reasons for granting it.

25068 THOMPSON v. STATE. Vanderburg County. *Reversed.* Willoughby, J. (Ewbank, J., concurs in result). December 8, 1926.

Where a search warrant is issued covering an entire house in which several families live but the defendant only occupied three rooms in that house and had a separate entrance for his apartment the description was too indefinite to warrant a search of the premises.

24505 TRAINER v. STATE. Delaware County. *Reversed.* Travis, J. December 8, 1926.

It is error for the lower court to instruct the jury that they should disregard decisions of the Supreme Court in similar cases and decide the pending case entirely on the merits. It is also error for the court to read statutes to the jury as part of its instruction when the charges against the defendant did not involve these statutory provisions.

25128 WINTER v. STATE. Henry County. *Affirmed.* Per Curiam. December 22, 1926.

Where the points and authorities in a brief are not applicable to any alleged error there is no basis for reversal.

25120 YOUNG v. STATE. Vanderburg County. *Affirmed.* Gemmill, C. J. December 21, 1926.

For one to swear falsely in court even on an immaterial matter, this is a contempt of court and may be punished as such.

APPELLATE COURT

12197 BELL v. STOVER, Trustee. Putnam County. *Reversed* on Authority of Hackleman v. Hackleman, 126 N. E. 590. Remy, J. December 23rd, 1926.

12554 BROCK ET AL. v. CLARKSBURG STATE BANK. Decatur County. *Affirmed.* Nichols, J. December 9, 1926.

While an indemnity to protect a bank against the dishonesty of its cashier does not protect the bank against his bad judgment, still if he renews a customer's note in violation of the director's instructions and then secrets the renewed note and this note is uncollectible, the company is liable on the bond.

12381 CENTRAL AMUSEMENT COMPANY v. VAN NOSTRAN. Marion County. *Petition denied.* Nichols, J. December 14, 1926.

In an action for personal injuries against a city for negligence in maintaining its highway, it was not reversible error under the Indiana decisions for a court to permit evidence to go to the jury of others falling at the same place.

12350 CHICAGO, SOUTH BEND AND NORTHERN INDIANA RAILWAY COMPANY v. KNIGHT. St. Joseph County. *Affirmed.* Per Curiam. December 9, 1926.

Per Curiam.

12606 CITY OF INDIANAPOLIS v. FULLGRAF. Marion County. *Affirmed.* Per Curiam. December 22, 1926.

Per Curiam.

12362 J. B. COLT COMPANY v. REECE. Henry County. *Affirmed.* Per Curiam. December 14, 1926.

Per Curiam.

12537 FARMERS TRUST & SAVINGS BANK v. DONNELLY ET AL. Howard County. *Reversed.* McMahan, J. December 14, 1926.

Where there is a conveyance of property to a near relative and the grantor has no property left with which to pay his creditors, a sufficient case has been made out to put the other parties to the proof of actual indebtedness owing by the grantor to the grantee; otherwise it would be presumed that there was no such indebtedness and that the transfer was fraudulent as against prior creditors.

12746 FREYNE BROTHERS v. JAMESON. Industrial Board. *Reversed.* Remy, J. December 7, 1926.

Where a workman has an injury to his finger which results in a fifty per cent. impairment of his hand, the basis for compensation should be for the loss of his finger under the schedule of the statute.

12508 GELLING ET AL. v. CLARK ET AL. Madison County. *Affirmed.* Nichols, J. December 16, 1926.

Where a mortgagor remains in possession after there was a sale under the mortgage and the giving of a final deed when no redemption had occurred it was proper for the court to oust the mortgagor and give the purchaser possession.

12442 GRAY v. GREY ET AL. Jasper County. *Affirmed.* Remy, J. December 16, 1926.

Where there is no actual conflict between the jury's answers to interrogatories and its general verdict and judgment is rendered on the general verdict, there is no error.

GROSSNICKEL v. AVERY *Petition denied.* McMahan, C. J. December 22, 1926.

Communications between physician and patient are not privileged unless it appears that they were so far professional in nature as to come within the rule of privilege.

12567 HEDGES ET AL. v. PAYNE ET AL. Huntington County. *Affirmed.* Nichols, J. December 9, 1926.

Where a will contains a provision giving all property to a brother and sister, share and share alike, and the sister predeceases the brother and the testator, the brother is entitled to all the property as against the surviving children of the deceased sister and other relatives of the testator.

12573 JAQUA v. HESTON ET AL. Jay County. *Affirmed.* Per Curiam. December 14, 1926.

Per Curiam.

12396 IRELAND v. FRANCISCO MINING COMPANY. Daviess County. *Petition denied.* McMahan, C. J. December 10, 1926.

Where a case involves a contract and a deed pursuant to that contract it is not error for the court to fail to discuss the contract in detail if its terms are not significant in bearing on the issue.

12445 ISAACS ET AL. v. WILEY ET AL. Clinton County. *Affirmed.* McMahan, C. J. December 22, 1926.

Where a mortgage incorrectly describes the property and subsequent purchasers have actual notice of the interest which the mortgage was intended to cover and was reported to cover, it is proper for a court of equity to reform the mortgage deed as to all the parties.

12499 KEMB ET AL v. KEMP ET AL. Clinton County. *Affirmed.* McMahan, C. J. December 15, 1926.

Where a testator makes a conveyance of interest in property which does not wholly divest him of title, this is not to be considered such a conveyance as to amount to an advancement where a similar provision is made in the will. Burns, Section 6432, 1926.

12457 HISER ET AL. V. LITCHFIELD. Allen County. *Affirmed.* McMahan, C. J. December 23, 1926.

Where a seller makes false representations of matters of fact to the buyer in the sale of land and the buyer reasonably relies upon these representations to his damage even though a more cautious and experienced purchaser might not have relied upon them, this is sufficient fraud to defeat the purchase.

12403 MAKEEVER ET AL. V. BARKER ET AL. Jasper County. *Affirmed.* Nichols, J. December 9, 1926.

Where directors were surety on certain notes of a corporation and then secured an indemnity bond from the individual stockholders of the corporation the parties to the bond are liable according to its terms, if the directors assign liability for further notes on behalf of the corporation and the corporation goes into bankruptcy.

12513 THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY V. KING. Marion County. *Reversed.* Nichols, J. December 22, 1926.

Under the doctrine of Ray's Ipsa Loquitur there may be recovery where the plaintiff can not tell exactly the negligence causing the injury but the facts themselves speak to denote some negligence on the part of the defendant.

12510 RAPP V. HARROLD. Whitley County. *Affirmed.* Remy, J. December 21, 1926.

If one holds land adversely for twenty years, he acquires good title even though the original owner contributed to the keeping up of the fence by which the adverse owner was making advantageous use of the land.

12028 ROBINSON V. LEWELLEN. Miami County. *Affirmed.* Per Curiam. December 21, 1926.

Per Curiam.

12363 ROBINSON ET AL. V. RICE. Allen County. *Reversed.* Nichols, J. December 16, 1926.

Where the parties to a conveyance had fixed the boundary line by building a fence to indicate the division it is proper to admit evidence of such actions to indicate that the fence was the intended boundary line rather than distances indicated in the deed.

12422 SKUFAKISS ET AL. V. DURAY. Lake County. *Reversed.* Remy, J. December 9, 1926.

Where a landlord re-possesses all his property in an illegal way by the use of force, there is a remedy in Indiana under a criminal statute and it is error to assess damages for any injury that occured when the action is in trespass.

12565 SLUSS V. THERMOID RUBBER COMPANY. Boone County. *Reversed.* Remy, J. December 8, 1926.

Where there has been practically no change in the value of chattels, the plaintiff is entitled only to the chattels themselves and the damages for the difference in value. In such a case liability on the appeal bond would be limited to the difference in value.

12408 SMITH ET AL. V. MINNEMAN ET AL. Dearborn County. *Affirmed.* McMahan, C. J. Thompson, J., not participating. December 8, 1926.

When a grantor places deeds with his bank intending that they be subject to his later changes, there is no delivery to the grantee.

12854 STATE EX REL. WISCONSIN LUMBER & COAL COMPANY V. REITER, Judge of Superior Court. Original action. *Peremptory writ of mandamus issued.* Remy, J. December 22, 1926.

Under the statute, parties must have final judgment in the lower court in order to appeal and if the lower court improperly refuses to enter such a final judgment the appellate court may direct entry of this judgment.

12658 STEWART V. OLD KNOX MINING COMPANY. Industrial Board. *Affirmed.* Per Curiam. Nichols, J., dissents. December 21, 1926.

Case affirmed on authority of Calumet, etc., Company v. Morz, 80 App. 619. Nichols, J., dissents, contending that a one-eyed man who loses his sole eye should receive compensation for total disability and not for the loss of one eye.

12394 STRECKER V. STRECKER. Cass County. *Affirmed.* Nichols, J. December 22, 1926.

A motion in arrest of judgment prevents the filing of a motion for a new trial later if the motion in arrest of judgment was properly overruled.

12380. WELLS, FARGO & COMPANY V. ALLBRIGHT, Administrator. Daviess County. *Affirmed.* Per Curiam. December 10, 1926.

Per Curiam.

12598 WILHELM V. CITY OF INDIANAPOLIS ET AL. Marion County. *Affirmed.* McMahan, C. J. December 22, 1926.

An assessment for a sewer is valid under the statute providing for the drainage of lands partly in the city and partly outside if the sewer contributes to the total drainage even though it does not directly benefit the land itself.

12740 WILLIAMS, ADMINISTRATOR, V. CHAMBERS ET AL. Marion County. *Affirmed.* Nichols, J. December 9, 1926.

Where an agency to sell real estate is given for six months after date, it is construed to include six months from date including the day following the date of the agreement.