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Recent Case Notes (and Indiana Docket)

RECENT CASE NOTES

CHANGE OF VENUE FROM JUDGE—STATUTORY CONSTRUCTION—MANDAMUS.—An original action brought in the Supreme Court of Indiana to compel by mandate, the granting of a change of venue from the judge of the Sullivan Circuit Court. Relator commenced a civil action against Albert Winning, et al. in the Clay Circuit Court in May, 1925. On applcation of the plaintiff in that action a change of venue was granted and the cause was sent to the Sullivan Circuit Court. Defendant in that action timely filed an affidavit for a change of venue from the judge, respondent in this action, on the ground of bias and prejudice in strict conformity with the statute. Respondent overruled the application upon the ground that to his personal knowledge the facts in the affidavit were false, and he refused to name judges or attorneys from whom a special judge could be selected. The defendant reserved a proper exception to the court's ruling, which ruling and exception were in effect at the time of bringing this action. Later the relator orally requested the court to grant the defendant's application for the change but the court refused to comply with his request. The relator alleges that the trial with the respondent sitting as judge would be a nullity and this court is asked to issue a mandate against the respondent, as judge of the Sullivan Circuit Court, directing and commanding him to grant a change of venue in said cause, and follow the statute in granting a change of venue as provided by the law of the State of Indiana. Respondent's defense is that the general rule in regard to granting changes of venue is not applicable to this case because the relator has not, by failing to file an affidavit in compliance with the terms of the Statute, brought himself within the statute entitling him to such change. *Held:* The court directed that the (application for a) change of venue from the judge be sustained as commanded by statute and assessed relator's costs to the respondent. Two of the justice dissented. *State ex rel. McGarr v. Debaun.* Decided in Supreme Court of Indiana, Dev. 22, 1926. 154 N. E. 492.

The rule is well settled in this state that the trial court has no discretion, but must grant an application for a change of venue in civil actions upon the filing of a proper and timely affidavit with the judge before whom the cause is pending as was admittedly done in this case. *Manly v. State,* 52 Ind. 215; *Fidelity & Casualty Co. v. Carroll,* 186 Ind. 633; *Shaw v. State,* 196 Ind. 39. Burns' 1926, Sec. 442—"The court in term or the judge thereof, in vacation, shall change the venue of any civil action upon the application of either party, made upon affidavit showing one or more of the following causes: Seventh—When either party shall make and file an affidavit of the bias, prejudice or interest of the judge before whom the said cause is pending." The reason given by the relator for refusing the application was the falsity of the statements in the affidavit. However it has been held in a number of cases that the duty is imperative upon the filing of the affidavit, regardless of the personal knowledge of the court in relation to the veracity of the facts appearing in the affidavit. The rights of the parties are to be determined solely by what is judicially adduced in due course of law. *Witter v. Taylor,* 7 Ind. 110; *Smith v. Amiss,* 30 Ind. App. 530; *People v. Compton,* 123 Cal. 403; *Lincoln v. Territory,* 8 Okla. 546; *Powers v. Commonwealth,* 24 Ky. L. R. 1007. In denying the application for a change of venue the court committed a reversible error. Therefore, the relator had four possible courses to follow—(1) Bring this action; (2) dismiss his cause of action below; (3) try the case in the face of a

known reversible error available only to his opponent; (4) or commit perjury by incorporating into an affidavit facts which he believed untrue.

If we concede that the respondent failed to perform his duty, we are confronted with the question of a proper remedy. Burns' 1926, Sec. 1244, provides that a mandate may issue from the Supreme Court to lower courts compelling performance of a duty enjoined by law. Mandate is an extraordinary process which should be allowed only upon a showing of plain duty and present power to do the thing demanded, clear legal right of the relator and absence of other adequate legal remedy. *Paddock v. State*, 185 Ind. 650; *State v. Beck*, 175 Ind. 312. There is a very able dissenting opinion which proceeds upon the theory that the relator had no ground for his action inasmuch as he had filed no affidavit for change of venue with the court and that he had an adequate legal remedy without resorting to an action of mandamus. However, a strict construction of the statute and a review of the cases would seem to establish the majority opinion as the best rule in cases of this kind.

R. M. C.

EXTENT OF COURSE OF EMPLOYMENT.—Application before the Industrial Board of Indiana by appellant, as widow and sole dependent of John Fey, deceased, claiming compensation under "the Indiana Workmen's Compensation Act." The decedent had been employed in the appellee's butcher shop for some twenty years, and was recognized by appellee and other employees as having authority to direct operations in the lard and sausage room. When the decedent and Sparks, a co-employee, commenced their work on the morning of decedent's death there was no ill-feeling between them and the altercation in which they subsequently became involved grew out of decedent's attempt to direct the co-employee with reference to building a fire under a large kettle. Heated words passed between them but there was no evidence of decedent's striking or threatening to strike the co-employee. The co-employee struck decedent with a lard ladle and decedent's death ensued. This appeal is from the award on the foregoing finding against the appellant. *Held:* Award reversed. When there is a disagreement or quarrel between co-employees arising out of the work in which they are at the time engaged, and as a result one assaults and injures the other, it will be inferred that the injury arose out of the employment and compensation will be authorized. *Fey v. Bobrink*, Indiana Appellate Court, May 14, 1926. 151 N. E. 705.

It may be said that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or all-advisedly, with a view to further the master's interest, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account. *Meechem, On Agency*, Section 1960.

It has been held that mere words, however abusive or insulting, do not make the person using the same an aggressor so as to prevent compensation under the Workmen's Compensation Law. *Knocks v. Metal Package Corp.* 131 N. E. 741.

When one employee injures another in a quarrel over the manner of working together in a common employment, the accident arises out of the

employment, if it is connected with the employer's work, and in a sense in his interest. *Rydeen v. Monarch Furniture Co.*, 148 N. E. 527.

The death of a workman from a blow by a hammer thrown by a fellow servant as the result of a disagreement arising out of the employer's work, was caused by an accident arising out of and in the course of his employment. *Mueller v. Klingman*, 73 Ind. App. 136. All concur in the rule that the accident to be within the compensation act, must have had its origin in some risk of the employment. No fixed rule to determine what is a risk of employment has been established. Where men are working together at the same work disagreements may be expected to arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmity of temper or words may be expected, and occasionally blows and fighting. Where the disagreement arises out of the employer's work in which two men are engaged and as a result of it one injures the other, it may be inferred that the injury arose out of the employment. *Pekin Cooperage Co. v. Industrial Corp.*, 120 N. E. 530.

The holding of this case seems to be in accordance with the weight of authority.

R. W. M.

TAXATION.—The appellee filed with the appellants its claim for refund of taxes alleged to have been wrongfully assessed for the year of 1919. The alleged wrongful assessment was based on the act of the state board of tax commissioners, which on August 23, 1919, ordered a horizontal increase on all assessments, but was held to be invalid in *Fesler, Auditor v. Bosson*, 189 Ind. 484, 128 N. E. 145, for the reason that the board of state tax commissioners did not have power to equalize the various taxing units of a county, as they attempted to make the increase on the basis of township units. Immediately following this decision the legislature was called in special session, in July, 1920, to remedy the predicament, and as a result it passed the Tuthill-Kiper Act, Acts Sp. Sess. 1920, c. 45, p. 153. On July 31, 1920, the state board of tax commissioners met by virtue of said act, and sent out certificates to the various counties, for the county boards to meet and re-affirm the assessment of the state board, of August 23, 1919. The re-affirming process was completed by August 23, 1920. The theory of the plaintiff's complaint was that the re-affirming of the original assessment they should have had notice as provided in Burns' 1926, 14323, which was not done. *Held:* That notice of time, place and object of hearing by the state board of tax commissioners of the review and re-assessment, under Burns, 1926, 14223 is mandatory, and that the taxpayer not notified is entitled to refund, under Burns' 1926, 14376, of the increase assessed by the board in their horizontal increase of August 23, 1919. *Board of Com'rs of Marion County v. Western Electric Co.*, Supreme Court of Indiana, July 26, 1926, 153 N. E. 177.

In *State v. Cudahy*, 103 Minn. 449, the Minn. Court has taken the view that statutory provisions for notice similar to ours are merely directory and not mandatory. The court said in substance—The equalization proceedings are designed merely to produce a just demand and therefore notice to taxpayers becomes only material when it is sought to bring the person or his property into court. However, in the Minnesota case the taxpayer had an opportunity to appear and resist any increase before payment. But in the Indiana case the taxpayer's remedy was only after payment of an alleged illegal assessment, and on this point is distinguishable. Burns' 1926, 14376.

The Indiana case did not discuss the Federal Constitutional provision, as to due process, but it is now well settled that no assessment upon one's property is constitutional which authorizes the final determination upon such without giving the owner thereof an opportunity for a hearing. It is not, however, necessary that the owner be heard when the assessment is made in the first instance if he is given an opportunity for application for abatement or for appeal. *Hodge v. Muscatine County*, 196 U. S. 276; *Ry. Tax Cases*, 92 U. S. 575; *Spencer v. Merchant*, 125 U. S. 345.

J. O. H.

WOMEN ON THE JURY.—Two cases came before the Supreme Court of Indiana on May 13, 1926, in which the right of a woman to serve on the jury was questioned on account of her sex. In both cases the appellants had been convicted of unlawfully selling, bartering, exchanging, giving away, furnishing and disposing of intoxicating liquor. Both cases were appealed on the ground that a woman had served on the jury when, by reason of her sex, she was not so entitled to serve. *Held:* A woman who is a resident voter of the county and a freeholder or householder may sit on a petit jury in a criminal case. *Moore v. State*, 151 N. E. 689; *Wilkinson v. State*, 151 N. E. 690.

By the nineteenth amendment to the Constitution of the United States, women were given the same voting rights as men. An amendment to section 2 of article 2 of the Constitution of Indiana guarantees to women the right of suffrage on an equality with men. Section 1833 of Burns' Revised Statutes, 1926, states: "To be qualified as a juror, either grand or petit, a person must be a resident voter of the county, and a freeholder or a householder."

These provisions, it would seem, should show conclusively a woman's right to serve as a juror. But the appellants in the cases referred to above direct their arguments on the ground that at common law women were not qualified as jurors in criminal cases. Such arguments, of course, could have no effect, because the qualifications of jurors in Indiana are fixed by statute. The decisions of the cases *supra* are well founded. In *Neal v. Delaware*, 103 U. S. 370, the question of negroes serving on a jury was brought before the Supreme Court of the United States. It was held there that the fifteenth amendment rendered inoperative any provision then existing in the Constitution of a State whereby the right of suffrage was limited to the white race, and that a statute confining the selection of jurors to persons possessing the qualifications of electors was enlarged in its operation so as to embrace all those who, by the Constitution of the State, as modified by the amendment, were entitled to vote. That decision may well be applied to the problem of women serving as jurors. In *Palmer v. State*, 150 N. E. 917, the Indiana Supreme Court said, "By the Nineteenth Amendment to the federal Constitution, a new class of voters was established in this state. By the said amended section of the state Constitution, the qualifications of electors were fixed, and women were given the same voting rights as men. When women became electors in this state, those who were freeholders or householders became eligible to serve as jurors in the county where they were resident voters." That other states agree, in their decisions on this question, with the Indiana court, is shown in *Parus v. State*, 42 Nev. 229, 174 Pac. 706, 4 A. L. R. 140; *People v. Barltz*, 212 Mich. 580, 180 N. W. 423, 12 A. L. R. 520; *State v. Walker*, 192 Iowa 823, 185 N. W. 619; Commonwealth v. Maxwell, 271 Pa. 378, 114 Atl. 825, 16 A. L. R. 1134.

F. S. B.

INDIANA DOCKET

SUPREME COURT.

24556 BARBER v. STATE. Rush County. *Reversed. Per Curiam*, March 31, 1927.

Under Burns' 1926, sec. 2305, it is error for the court to send a jury to view the premises involved in litigation without the consent of all the parties to the case at trial.

25172 GOODMAN v. STATE. White County. *Affirmed.*_ Gemmill, C. J. March 9, 1927.

Where defendant is convicted on circumstantial evidence and the evidence is such that reasonable men might find the defendant guilty or not, then if the jury finds him guilty, there is no ground for reversing the judgment based on the verdict because of insufficient evidence.

25127 HALSTEAD,ET AL. v. STATE. Monroe County. *Affirmed.* Gemmill, C. J. March 18, 1927.

One may be guilty of taking a vehicle or a part of a vehicle under Burns' 1926, sec. 2460, even though at the time of the taking, the vehicle was not capable of movement by its own locomotion.

24666 HOLT v. STATE. Howard County. *Affirmed.* Gemmill, C. J. March 16, 1927.

Motor vehicles at rest upon the highway are within the provision of law requiring motor vehicles to display lights as required in sec. 13, chap. 300, Acts of 1913, with subsequent amendments. (Same points covered previously in *Koplovitz v. Jensen*, 197 Ind. 475, 151 N. E. 390.)

24897 KEISER v. HOWARD. Starke County. *Appeal Dismissed.* Gemmill, C. J. March 30, 1927.

It is required that names of all parties appear in the assignment of errors on appeal and even though a petition has been granted to add the necessary names after the time for perfecting the appeal has elapsed, the appellee is entitled to have the appeal dismissed for lack of necessary parties,

25284 MCCUTCHEON v. STATE. Marion County. *Affirmed.* Martin, J. March 9, 1927.

Evidence that defendant was not mentally vigorous is not evidence of insanity which would justify a new trial where defendant was convicted of murder in the first degree and the evidence was sufficient to justify the verdict.

25087 ROBERTSON v. STATE. Delaware County. *Affirmed.* Gemmill, C. J. March 8, 1927.

If the trial court's instructions contain superfluous matter but are nevertheless correct and clear, they do not contain reversible error.

24756 ROSENCRANS v. TIDRINGTON. Vanderburg County. *Appeal dismissed.* Martin, J. March 30, 1927.

Under Burns' 1926, section 1033, the circuit court must call a jury to determine an applicant's moral character if he requests admission to the bar, but such jury need not be called if the applicant has had ample time

to present his request for a jury and the court has already had his petition and denied his admission to the bar.

APPELLATE COURT.

12795 ALBRIGHT V. HOLDEMAN, ET AL. St. Joseph County. *Affirmed. Per Curiam.* March 31, 1927.
Per Curiam.

12308 BANCROFT, ET AL. V. TOWN OF CHESTERTON, ET AL. LaPorte County. *Reversed.* Thompson, J. March 15, 1927.
Under Burns' 1926, section 11156-11165 it is a requisite that the town board shall assess the costs of a branch sewer against such town or towns as benefit from the same in proportion to the benefit. The town board had no authority to include the cost of such branch sewer in the general cost of the main system in violation of Burns' 1926, sec. 11156-11165.

12753 BANNING V. STEWART. Franklin County. *Affirmed. Per Curiam.* March 30, 1927.
Per Curiam.

12563 BEDRON, ET AL. V. BARAN. Lake County. *Reversed.* Thompson, J. McMahan not participating. March 9th, 1927.
Where an appeal is taken from a justice of the peace to the superior court, it is a requisite that a record of trial before the justice of the peace be certified to the superior court in keeping with the statute, section 11013, Burns' (1926).

12705 BEGEMAN, EXCRX. V. SMITH. Sullivan County. *Rehearing denied.* McMahan, C. J. March 15, 1927.
The statement of a bystander that he had been substituted on a jury by order of the court does not necessarily overcome the entry-book or the trial court to the effect that the sheriff selected the jurymen by order of the court.

12533 BERNE, ET AL. V. USREY. Hamilton County. *Affirmed.* Nichols, J. March 31, 1927.
Where the complaint alleges a conspiracy to defraud in selling securities a particular representation may not be enough to establish fraud but this representation taken with others may show a continuous fraudulent scheme and hence evidence of all the representations is admissible.

12943 BERNSTEIN V. CORBETT, ET AL. Grant County. *Affirmed. Per Curiam.* March 9, 1927.
Per Curiam.

12648 BONHAM V. FINKLE. Wells County. *Affirmed.* Nichols, J. March 18, 1927.
Where a statute makes a certain contract voidable, there is no error for the court's reading it to mean "void"; although, of course, many statutory provisions which use the word "void" are read to be "voidable." Even though a corporation has not complied with the statute in selling stock, it may collect on a promissory note paid for the stock where it appears that the stock was not tendered back upon the discovery of this defect and where it appears that the stock was not in fact valueless.

12783 BRINNEMAN V. BROWN, ET AL. Wells County. *Affirmed. Per Curiam.* March 30, 1927.

Per Curiam.

12661 BROWN V. RHODES. Marion County. *Affirmed.* Nicholas J. March 18, 1927.

Where there is no allegation of fraud, the return of the sheriff that he has served a defendant is conclusive, where the defendant is a resident of the county and does not allege that he had a meritorious offence to the judgment sued on.

12528 CLAYTON V. FLETCHER SAVINGS AND TRUST CO., ET AL. Marion County. *Reversed.* McMahan, C. J. March 10, 1927.

Where courts of law and equity are merged as they are now in Indiana, it is fair to say that the law as well as equity abhors a forfeiture. Where a contract provides that there must be ten days notice given in order to secure a forfeiture of a contract for failure to make the required payments, that is interpreted to mean that the notice must be personal and must actually be received.

12685 COMMONWEALTH CASUALTY CO. V. BUNNER. Randolph County. *Affirmed. Per Curiam.* March 17, 1927.

Per Curiam.

12745 DENASOFF V. THE FOUNDATION COMPANY INDIANA & MICHIGAN ELECTRIC COMPANY. Industrial Board *Reversed.* Nichols, J. March 11, 1927.

Where defendant was injured and signed an agreement for compensation on the basis of total disability and then signed a statement that his total disability had ceased, it was still competent for the Industrial Board within two years after date of these agreements to award him compensation for permanent partial disability.

12638 DIXIE PORTLAND FLOUR COMPANY V. KELSAY-BURNS MILLING COMPANY. Warrick County. *Affirmed.* Nichols, J. March 11, 1927.

The terms of a contract may be fixed by later confirmations as well as by the original papers. Where a contract for delivery contains a dispensation clause under which one of the partners who is a miller and not a broker is to be relieved from performance in case of fire, then if fire does occur, destroying the mill, the said party is relieved from further liability.

12532 EMPLOYER'S FIRE INSURANCE COMPANY V. CONSOLIDATED GARAGE AND SALES COMPANY, ET AL. Marion County. *Reversed.* McMahan, C. J. March 11, 1927.

Where an automobile is insured against "theft" and the said automobile was taken by the employee of the garage in such a way as to make taker guilty of "vehicle taking," under Burns' 1926, section 2460, then it may be said that the vehicle has been stolen within the terms of the policy.

12821 FILIPOBISH, ET AL. V. ILLINOIS STEEL COMPANY. Industrial Board. *Affirmed. Per Curiam.* March 11, 1927.

Per Curiam.

12835 GARDEN CITY SAND CO., ET AL. V. ABNEY, ET AL Industrial Board. *Affirmed.* March 10, 1927.

It is irregular for a single member of the Industrial Board to give a second hearing when insufficient evidence that all liability was produced at

the first hearing; but where the other party appealed in the second hearing and at the hearing before, he cannot complain.

12597 JULIAN GOLDMAN STORES, INC. v. LAVEN. Morgan County. *Affirmed. Per Curiam.* March 11, 1927.
Per Curiam.

12823 INLAND STEEL COMPANY v. URHOVAC, ET AL. Industrial Board. *Affirmed. Per Curiam.* March 18, 1927.
Per Curiam.

12680 JONES v. JONES. Wayne County. *Affirmed.* Remy, J. March 18, 1927.
Although the court may say that it will not grant a divorce, this does not amount to a rendition of judgment so that at a later time the court may not dismiss the action after it has heard further evidence.

12671 JULIAN, ADMR. v. MCADAMS, TRUSTEE, ET AL. Warren County. *Reversed.* March 9, 1927.
Where money is left in trust for certain beneficiaries to be used for certain purposes and it appears from the general provisions that an intention to benefit the beneficiaries in any case obtain, then the beneficiaries take a vested interest in the trust property although the particular provisions can no longer be fulfilled.

12650 KANDIS, ET AL. v. PUSCH, ET AL. LaPorte County. *Affirmed.* Nichols, J. March 18, 1927.
Where there has been a complete assignment of a lease by the lessee with the consent of the lessor and with the understanding that the lessee was to be subject to no further liability on the lease after the assignment, then the lessee has no right to re-entry in case the assignee fails in his agreement.

12703 KOERNER v. SCHWARTZ, ET AL. Marion County. *Affirmed. Per Curiam.* March 30, 1927.
Per Curiam.

12788 LAHR v. BROYLES, ET AL. Huntington County. *Affirmed.* Nichols, J. March 31, 1927.
Where a breach of condition in a lease has been waived it cannot be asserted later.

12946 LANICH, ET AL. v. JOSS, ET AL. Marion County. *Affirmed. Per Curiam.* March 9, 1927.
Per Curiam.

12664 LOVETT v. LOVETT. St. Joseph County. *Reversed.* Nichols, J. March 11, 1927.
Where one makes a contract to will all his property to another person including property that may be received by will, it is not a violation of that contract if the said person wills property under this contract in keeping with the limitations on its use, imposed by the will under which it was received.

12555 MCADAMS, TRUSTEE v. JULIAN. Warren County. *Reversed.* Remy, J. March 9, 1927.
Reversed on authority.

12637 MEYER v. THE FIRST NAT'L BANK, ET AL. Daviess County. *Affirmed.* McMahan, C. J. March 17, 1927.

It is incumbent on parties in the appellate court to set out the evidence in support of their allegations of error in the trial court. The appellate court will not serve the records merely upon the chance of finding error at the trial.

12694 MILLER v. MILLER. Greene County. *Affirmed.* Nichols, J. March 31, 1927.

Where a daughter passes from minority to majority in an invalid condition, it is the duty of the parent to support the child even after she has become of age. In case of divorce, however, if one of the divorced parties takes a child from the one to whom its custody is committed, the one so taking the child cannot recover for its support.

12675 MOCK v. MOCK. Marion County. *Affirmed. Per Curiam.* March 30, 1927.

Per Curiam.

12693 NEAL v. PAYNE. Vanderburgh County. *Affirmed. Per Curiam.* March 18, 1927.

Per Curiam.

12961 THE N. Y. CENTRAL RY. CO. v. SAVORY, CONSTRUCTION COMMISSIONER, ET AL. Starke County. *Affirmed.* Nichols, J. March 31, 1927.

A volunteer cannot recover for work done where there is no express contract and no basis for quasi-contractual liability.

12955 OBERLING, ET AL. v. SWAIN-ROACH LUMBER CO. Jackson County. *Affirmed.* Remy, J. March 30, 1927.

Infancy is a purely personal defense; where an infant and an adult enter into a contract jointly, the adult is liable regardless of the defenses which the infant may have.

12216 CITY OF PERU, INDIANA, ET AL. v. KREUTZER, ET AL. Miami County. *Petition for rehearing denied.* Nichols, J. March 11, 1927.

Where no appeal is taken from the decision of a city council in compliance with Burns' 1926, section 10569, the appellate court has no jurisdiction to review the case.

12653 PETRUCELLE v. TRIPOLI. Allen County. *Affirmed. Per Curiam.* March 18, 1927.

Per Curiam.

12633 PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. HOFFMAN. Delaware County. Affirmed. March 16, 1927.

Under Burns' 1926, sec. 13006 and sec. 13088, it is required in Indiana that a locomotive sound a whistle or bell whenever it approaches a public crossing. When appellee alleges in her complaint that the locomotive had negligently failed to do this and had shown that injury resulted, there was ample evidence to support the verdict.

12583 PORTLAND BODY WORKS v. MCCULLOUGH MOTOR SUPPLY CO. Henry County. *Affirmed.* Enloe, J. March 30, 1927.

Where the court gives instructions in the alternative, and the reference for each instruction is clear, there is no error if the instructions themselves are correct under the facts.

12965 RICHARDSON, ADM'R, ET AL. v. SCHRAMM, ET AL. Henry County. *Affirmed. Per Curiam.* March 18, 1927.
Per Curiam.

12731 RICHMIRE, ADMR. v. BOARDUFF. Newton County. *Affirmed.* Remy. J. March 31, 1927.
Where a person who is not a member of a house-hold of another, performs services for him, the presumption is that these services are not gratuitous.

12836 RILEY v. HUNT, ET AL. Industrial Board. *Affirmed.* Enloe, J. March 9, 1927.
Where there is no contract between a branch of the state Government and an employee covering his employment, there is no basis for giving compensation to a plaintiff who occupied no better position than that of a volunteer in working for the state.

12833 ROBERTSON BROS. CO. v. WHALEY, ET AL. Industrial Board. *Affirmed. Per Curiam.* March 11, 1927.
Per Curiam.

12581 THE SCHAFER CO., ET AL. v. HOFFMAN. Jay County. *Affirmed.* McMahon, C. J. March 29, 1927.
Where the evidence shows that appellee was entitled to further commissions if he were still working under a previous written contract and there was some evidence that this contract was still in force, then there is sufficient evidence to sustain the verdict of the jury awarding damages in the amount of such commissions.

12651 SEAFROSS, ET AL. v. GRISSOM, ET AL. Kosciusko County. *Reversed.* Nichols, J. March 11, 1927.
It is reversible error for the court to re-read instructions to the jury at their request after they have retired, unless counsel for both parties are informed of that and have an opportunity to be present. (See section 593, Burns' (1926).)

12959 SHOBE, ET AL. v. NEWKIRK, TRUSTEE. Montgomery County. *Affirmed.* Nichols, J. March 18, 1927.
Affirmed on authority of *Wilkins v. Newkirk*, 155 N. E. 516.

12686 SMALLWOOD v. DILLMAN, ET AL. Monroe County. *Affirmed. Per Curiam.* March 15, 1927.
Per Curiam.

12763 SMITH, TRUSTEE, ET AL. v. WAY. Marion County. *Affirmed. Per Curiam.* March 30, 1927.
Per Curiam.

12630 SMITH, ADM'R v. DEEP VEIN COAL CO. Gibson County. *Reversed.* Nichols, J. March 18, 1927.
Where there is a valid judgment requiring appellee to pay a certain sum of money in weekly installments under the Workmen's Compensation Act, appellee is not authorized to discontinue payments because the beneficiary remarries unless such action is authorized upon due proceedings before the Industrial Board.

12684 STATE LIFE INSURANCE COMPANY v. JAMES. Marion County. *Affirmed. Per Curiam.* March 11, 1927.
Per Curiam.

12784 STEINBRENNER RUBBER CO., ET AL. v. DUNCAN, RECEIVER. Marion County. *Reversed.* March 16, 1927.
Under Burns' 1926, sec. 1300, there must have been a cause of equitable cognizance in order for the court to appoint a receiver under the 7th provision of that section which is in fact merely a confirmance of the equitable jurisdiction of the court.

12608 UNION TRACTION CO. OF INDIANA v. RAY. Delaware County. *Reversed.* Enloe, J. March 9, 1927.
Where there is no evidence that a certain passage was a public way, it was error for the court to instruct the jury that it was for the jury to decide whether that particular passage was a public or private way.

12726 THE U. S. FIDELITY & GUARANTY COMPANY, ET AL. v. HOOSIER DESK COMPANY. Pike County. *Affirmed. Per Curiam.* March 31, 1927.
Judgment affirmed upon remittance by the appellee of $64.85 in accordance with the order of the court.

12699 WAFFLE, ET AL. v. IRELAND. Elkhart County. *Affirmed.* Thompson, J. March 11, 1927.
Where a lease provides that the landlord must show due diligence in reletting in case the tenant abandons the premises, then the burden is on the landlord to prove that he did show due diligence.

12655 WILKINS, ET AL. v. NEWKIRK, TRUSTEE, ET AL. Montgomery County. *Affirmed.* March 11, 1927.
Although the advisory board of the school township and the township trustee are given no express authority to review their decision about a school building, this authority is implied if they give proper notice and proceed in the same way as they did in their original recommendations.

12623 ZELLER v. MESKER, ET AL. Vanderburgh County. *Affirmed. Per Curiam.* March 10, 1927.
Where an employee has received full compensation under the compensation law, there is no cause of action against the employer because the employer had an improper motive indirectly causing the employee to apply for compensation in a less favorable way.