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Indiana Docket

INDIANA DOCKET*

SUPREME COURT

25339. ABSHIRE V. STATE. Vanderburgh County. *Affirmed.* Gemmill, J. October 6, 1927.

In the case of prosecution for the crime of rape, no corroborating evidence is required.

25340. ABSHIRE V. STATE. Vanderburgh County. *Reversed.* Gemmill, J. October 6, 1927.

Where one is charged with the commission of a felony, a conviction on this charge will not be sustained unless there is evidence that the defendant intended to commit the particular felony charged.

25246. BEYER V. STATE. Decatur County. *Affirmed.* Gemmill, J. October 28, 1927.

An affidavit charging the defendant with practicing medicine without a license might not negative the exception that is set out in a proviso to the statute which defines the practice of medicine. Such exception constitutes a defense.

25204. BOND V. STATE. Marion County. *Affirmed.* Gemmill, J. October 14, 1927.

An illegal sale of liquor by an agent is not sufficient to convict the principal, but if it appears that the sale was made in such a manner as to imply approval or consent by the principal, then there may be criminal liability in the principal.

24908. BRUCE V. STATE. Porter County. *Affirmed.* Travis, C. J. October 26, 1927.

Where the newly discovered evidence is purely cumulative in character and is not calculated to be so convincing as to change the attitude of the jury in regard to the facts to which it relates, then such newly discovered evidence is not ground for a new trial.

24810. CROOP, ET AL. V. WALTON, ET AL. Kosciusko County. *Affirmed.* Martin, J. June 10, 1927.

Intangible personal property has no situs of its own and hence is assessible for taxation only at the domicile of the owner. Domicile is largely a matter of intent; thus one's domicile is the place of his intended permanent residence.

25047. HUNNICUTT V. FRAUHIGER, ET AL. Wells County. *Affirmed.* Willoughby, J. October 28, 1927.

Where upon the terms of a statute the court has authority to assess a certain fine and imprisonment, it is beyond the jurisdiction of the court to assess a totally different fine and imprisonment unprovided for by the statute; and in such a judgment involved, such a sentence will be void for lack of jurisdiction and may be attacked collaterally. (See section 1200, Burns' 1926.)

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*We had planned to digest all decisions from the first of June to the last of October, 1927, for this issue. Unfortunately the Supreme Court Clerk's office failed to send us some of the decisions. The omitted decisions will all appear in the December issue.—Editor.

25307. LEHR V. STATE. Marshall County. *Reversed.* Willoughby, J. June 17, 1927.

In a criminal case the burden is never on the defendant to prove his innocence; where the defendant tries to establish an alibi the burden is on the plaintiff to prove beyond a reasonable doubt that the defendant was where a crime was committed at the time alleged.

25224. MCCUTCHEON V. STATE. Marion County. *Affirmed.* Martin, J. June 9, 1927.

Where one commits murder in the course of committing a felony, no intent to commit murder need be proved. Mental deficiency or moral weakness of the defendant is not ground for reversal unless it appeared that he was actually insane.

24792. RHODEHAMEL V. STATE. Grant County. *Affirmed.* Willoughby, J. June 10, 1927.

Where an offense is named in a criminal statute and an exception is also provided, it is not incumbent upon the state to prove that the offense committed did not come within the exception.

25155. SANCHEZ V. STATE. Porter County. *Reversed.* Gemmill, J. June 8, 1927.

In a criminal case where the newly discovered evidence is not merely cumulative or impeaching, there may be ground for giving a new trial if it is material to the verdict on the facts.

24568-24569. STATE V. MABREY. Monroe County. *Reversed.* Travis, C. J. June 14, 1927.

If the defendant files a motion in a case within the term he is not entitled to discharge under the statute, section 2252 Burns' 1926, which provides for discharge of all defendants for want of prosecution where there has been no prosecution for more than three terms of court.

25383. STEPHENSON V. DALY. Laporte County. *Affirmed.* Martin, J. October 25, 1927.

Jurisdiction over a defendant is not conferred upon the court to which a change of venue is taken by the signature on the certificate to the transcript of the clerk of the court in which the case was pending before the change. But is is conferred by the order of the court which grants the change and directs where the case is sent for trial.

25276. VAN TORNHAUT ET AL V. STATE. St. Joseph County. *Affirmed.* Gemmill, J. June 17, 1927.

Where the defendants were properly held guilty on two counts there is no ground for a new trial as to those counts merely because evidence was improperly admitted as to a third count.

APPELLATE COURT

12841. ALLIED COAL AND MATERIAL CO. V. MOORE. Boone County. *Affirmed.* Nichols, J. June 10, 1927.

Where a city ordinance prohibits a hole in the sidewalk from being left open more than a limited time incidental to the delivery of coal, it is negligence per se for one to leave the coal hole open in violation of statute.

12728. ARMSTRONG v. HALLECK, ADMR. Jasper County. *Affirmed.* Thompson, C. J. June 8, 1927.

The extent to which cross examination shall be carried is largely in the discretion of the trial court and this discretion will not be interfered with on appeal unless it clearly appears that this right of cross examination has been abused to the injury of the complaining parties.

12944. ATZ v. CITY OF INDIANAPOLIS ET AL. Marion County. *Affirmed.* McMahan, J. October 28, 1927.

In connection with sections 108, 9 and 11 of the Municipal Code Acts 1905, p. 236, as amended in 1909, 21 (see sec. 10445 Burns' 1926), it must be interpreted that later amendments are intended to be read as far as possible as if they were integral parts of the original act and no repugnancy is to be presumed.

12735. AULT v. MILLER, ET AL. Tipton County. *Affirmed.* McMahan, J. June 7, 1927.

Where there is a contract to make a will of real estate and in accordance with this contract one of the parties goes upon the land and improves it in accordance with the contract itself, then the contract for the transfer of the land will be specifically enforced.

12735. AULT v. MILLER, ET AL. Tipton County. *Affirmed.* McMahan, J. October 13, 1927.

Where one claims title on equitable grounds in property that has been devised by will, he may proceed to have title quieted in him on the basis of these equities without contesting the will.

13027. BARTHOLOMEW ET AL. v. NORTHWESTERN INDIANA TELEPHONE CO. ET AL. Industrial Board. *Affirmed.* Enloe, J. October 5, 1927.

Where there is evidence that an employee was not working in the course of his employment at the time of the injury and the Industrial Board so finds, this finding will not be disturbed on appeal.

12615. BASSETT, ET AL. v. SOUTH. Howard County. *Petition for rehearing denied.* McMahan, J. October 7, 1927.

In a court of general jurisdiction, it is presumed that proper notice was given to all the parties of each order and proceeding that occurred unless evidence to the contrary appeared in the record.

12529. BEARSE v. CORBETT ET AL. Grant County. *Affirmed.* McMahan, C. J. October 11, 1927.

In general a judgment is binding on all the parties to the action who have been duly served but especially in the settlement of titles. Afterborn persons may be said to be represented by persons who were parties to the action and through whom the afterborn persons must trace their claim. (Nichols, J., dissents on the ground that the alleged representative in this case who would properly be bound to the judgment had adverse interests to the claimant.)

12842. BUSINESS MEN'S INDEMNITY ASS'N v. WASHBURN. Marion County. *Rehearing denied.* McMahan, J. October 26, 1927.

On rehearing this case was distinguished from *Dunn* v. *Physician, etc.*, 103 Neb. 557, on the ground that the policy in the latter case did not cover injuries and death.

12842. BUSINESS MEN'S INDEMNITY ASS'N v. WASHBURN. Marion County. *Affirmed.* McMahan, J. June 16, 1927.

In an insurance policy which covers insurance against injury or death with a special clause excepting injury through intentional assault unless committed in the course of robbery, the beneficiary may recover if the insured is killed by such intentional assault, since the exception does not specifically cover death.

12760. CAMPBELL v. STRIEBEL. Porter County. *Reversed.* Per Curiam, October 27, 1927.

Case reversed on confession of error by the appellee.

12602. THE CENTRAL DREDGING CO. v. PROUDFOOT CO. Lake County. *Affirmed.* Nichols, J. October 5, 1927.

Where one sues in *quantum meruit* for the value of his services, it is for the defendant to prove any set-offs that should be allowed.

12889. CITY OF HUNTINGTON v. THOMAS. Allen County. *Rehearing denied.* McMahan, J. October 11, 1927.

Rehearing denied on the ground that the evidence was ample to support the former finding.

12466. CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO., ET AL. v. SHROYES, ET AL. Delaware County. *Affirmed.* McMahan, J. June 17, 1927.

Where a railroad company has no right of way across another's land of definite width and various owners of the land have purchased without notice of any right of way at all, the railroad is guilty of trespass and may be subjected to exemplary damages at least for the wilful use of land beyond its actual need.

12867. COMSA, ET AL v. INLAND STEEL CO. Industrial Board. *Affirmed.* Per Curiam. June 10, 1927.

Per Curiam.

12896. CRAWFORDSVILLE TRUST CO., ADMRS. v. BURKE ET AL. Montgomery County. *Rehearing denied.* McMahan, J. October 25, 1927.

Where appellant's brief is insufficient under the rule of the court to present a question for the determination of the appellate court, the petition for rehearing will be denied.

12896. CRAWFORDSVILLE TRUST CO., ADMR. v. BURKE ET AL. Montgomery County. *Affirmed.* McMahan, J. June 9, 1927.

The burden is on the appellant to show reversible error and he must sustain this burden by presenting adequate evidence of error in his brief.

12877. DARMODY CO. v. MOSS. St. Joseph County. *Affirmed.* Remy, J. October 25, 1927.

Where there is an implied warranty that goods are fit for the purpose for which they were purchased, the purchaser may sue on the implied warranty and recover damages. Although he does not offer to return the goods, there is liability on the warranty in any case.

12916. E. I. DUPONT DE NEMOURS & CO. v. FERGUSON. Park County. *Affirmed.* Remy, J. October 27, 1927.

Where a contract of indemnity is entered into on behalf of certain stockholders of a corporation, the parties for whose benefit this contract was

made cannot sue upon it where the indebtedness alleged is the indebtedness of the corporation.

12701. EQUITABLE FIRE AND MARINE INS. CO. v. PHARES, ET AL. Vanderburgh County. *Affirmed.* Per Curiam. June 7, 1927.
Per Curiam.

12636. THE FIDELITY AND CASUALTY CO. ET AL v. SINCLAIR REFINING CO. Porter County. *Petition for rehearing denied.* Nichols, J. June 10, 1927.
Authorities from other states which have been considered in the original opinion and are not conflicting with the Indiana rule are not grounds for a re-hearing before the appellate court.

12866. FIEBER & REILLY v. ESTWISTLE. Industrial Board. *Affirmed.* Nichols, J. June 17, 1927.
Where a carpenter does work on a house under orders of a real estate agent who has charge of the house, the carpenter may be an employee of the real estate firm and not an independent contractor.

12900. FLACK v. BIG CEDAR GROVE CEMETERY ASS'N. Franklin County. *Affirmed.* Nichols, J. June 10, 1927.
Affirmed on authorities.

12976. FLAGG v. RUSSELL. Jasper County. *Affirmed.* Nichols, J. October 28, 1927.
Where the allegation in the complaint objected to by counsel in the trial court is merely surplusage, there is no reversible error if the court refuses to strike it out.

12758. FRAYER ET AL v. HOLMES. Porter County. *Affirmed.* Remy, J. June 15, 1927.
Per Curiam.

12919. GUARANTY DISCOUNT CORP. v. BOWERS. Clinton County. *Affirmed.* Remy, J. October 7, 1927.
Where the assignee of a vendor's rights under a condition sale allows the vendor to retain possession of the chattel and does not require him to comply with the sales of chattels act (section 124 Burns' 1926) and under these actions the vendor fraudulently resells the chattel to a bona fide purchaser, then the assignee of the vendor's rights under the first sale must lose and the second purchaser will be protected.

12886. HAMILTON ET AL. v. PATTISON, ET AL. Marion County. *Affirmed.* Nichols, J. June 10, 1927.
On the question of reversal because a juror was acquainted with one of the parties to the action, the decision of the trial court will not be reversed where there is conflicting evidence of such relationship.

13051. HAWKINS ET AL v. MEYER-KISER CORP. Grant County. *Reversed.* Nichols, J. October 25, 1927.
Where the form of the contract is that of an original and absolute undertaking to pay the debt of another, the liability of the promisor is that of a surety; but where the agreement is that another shall pay in the first instance, and the promisor becomes liable only for the default of the other the contract is one of strict guaranty.

13000. HAYS V. BOARD OF TRUSTEES OF CLINTON SCHOOL CITY. Industrial Board. *Affirmed.* Thompson, C. J. October 6, 1927.

Where one's employment is casual, he may not recover for injury under the Workman's Compensation Act in Indiana.

12771. HELDT V. THOMPSON. Pike County. *Reversed.* Remy, J. June 10, 1927.

In an action for injury to personalty under the Indiana law, the burden is upon the plaintiff to prove his own freedom from contributory negligence.

12893. HENSLER ET AL V. ALBERDING ET AL. Jasper County. *Affirmed.* McMahan, J. October 6, 1927.

Where partners sign an agreement with commissioners for the partition of land and the commissioners divide the land into several parts in accordance with this agreement, the parties are bound by their subsequent drawing of lots for the part if they knew in a general way what the particular lots contained and that they involved differences in money value which would have to be equalized by money payments.

12822. HUNSMAKER V. HUNSMAKER. Grant County. *Affirmed.* Remy, J. June 8, 1927.

Under the Indiana statute a minor over fourteen years of age must be consulted in the matter of appointing a guardian for him.

12918. HURST V. REEDER. Posey County. *Affirmed.* Thompson, C. J. June 17, 1927.

While the question of the effect of medical practice is a matter for expert testimony, the jury is still under a duty to pass on the facts when interpreted by expert testimony in a malpractice case, and where under these facts there is evidence of negligence a verdict and judgment for the plaintiff will be sustained.

12812. INCORPORATED TOWN OF MUNSTER V. TUBBS. Industrial Board. *Affirmed.* Nichols, J. June 10, 1927.

Where an award for accidental death has been made by the Industrial Board, there is no ground for contesting this on appeal on the condition that no bona fide effort to settle the claim was made. If the appellant denies any liability at all, the right of the Industrial Board to dispose of the claim where no bona fide effort of the settlement has occurred is a question in jurisdiction which the appellant waives when it contests the claim on the merits.

12969. INDIANA PORTLAND CEMENT CO. V. FRAZIER INDUSTRIAL BOARD. *Affirmed.* McMahan, J. October 13, 1927.

On appeal all inferences in support of the finding of the court on a jury at the trial will be presumed in favor of the decision of the trial court.

12553. JEWETT, ET AL. V. FARLOW, ET AL. Decatur County. *Rehearing denied.* McMahan, J. October 28, 1927.

Where there was no evidence that the absent witness was equally available to either of the parties, it was not error to refuse an instruction saying that no inference should be drawn by the jury upon the failure of one of the parties to call this witness.

12805. JULIEN ET AL. V. LANE. Jasper County. *Affirmed.* Remy, J. June 14, 1927.

Where a judgment has been rendered on default, there has been no trial within section 423 Burns' 1926 so as to make it possible to secure relief through the instrumentality of a new trial.

12806. JULIEN, ET AL. V. LANE. Jasper County *Affirmed.* Enloe, J. June 14, 1927.

Where cattle are wrongfully placed in quarantine by the State veterinarian and the owner of the cattle recovers damages in the proper court for such action, there is no ground for a new trial if the defendant officer fails to appear at the trial and a judgment was given against them by default upon presentation of sufficient evidence.

12366. KAISER V. ANDREWS. Monroe County. *Appeal dismissed.* Enloe, J. June 16, 1927.

Where an appeal is given in the trial court below, the appeal may be dismissed unless all the parties to the original trial are duly notified in accordance with law.

12698. KEATON V. KEATON. Hancock County. *Affirmed.* Remy, J. October 11, 1927.

Where there was sufficient evidence to grant a husband a divorce from his wife, it was not improper for the trial court to grant the husband half of the real estate which had been purchased mainly with his money, where the understanding was that the land should be held by them jointly.

12757. LAFAYETTE SCHOOL TOWNSHIP V. SCHOOL CITY OF ANDERSON. Madison County. *Affirmed.* McMahan, C. J. June 15, 1927.

Where there has been an annexation of a part of an adjoining township, and this part includes the school that served the whole township, the basis for money payment by the balance of the township for the education of the children residing there in the school that is now next to the city shall be in proportion to the assessed valuation of the property rather than in proportion to the number of children of school age.

12483. LEASURE V. LEASURE. Park County. *Reversed.* Dausman, J. June 9, 1927.

A conveyance of realty with intent to defraud creditors is not void but voidable. The questions of fraud and of injury are questions of fact in each case.

12664. LOVETT V. LOVETT. St. Joseph County. *Petition denied.* Nichols, J. June 17, 1927.

Where a will has been made in compliance with a contract, an action to enjoin the revocation of that will, so far as such revocation would violate the contract, may be maintained.

12950. MCDORMAN, ET AL. V. CITY OF TERRE HAUTE, INDIANA. Vigo County. *Reversed.* Nichols, J. October 13, 1927.

Where a party contests the assessment made by a board of public works, there is an appeal to the circuit court from this decision under section 1353-4-5-6 Burns' 1926.

12888. MENTONE LUMBER CO. v. NEW YORK, CHICAGO & ST. LOUIS RY. CO. Kosciusko County. *Affirmed.* Per Curiam. October 13, 1927.

Per Curiam.

12804. NATIONAL LIFE & ACCIDENT INS. CO. OF TENNESSEE v. RITCHIE. Marion County. *Reversed.* Remy, J. June 17, 1927.

Where there is no evidence to sustain the verdict in an action on an insurance policy, judgment for the plaintiff must be reversed.

12876. NATIONAL SURETY CO. ET AL. v. STATE, EX REL. Bartholomew County. *Reversed.* Enloe, J.

Where a surety company is liable for the default of an absconding trustee, the surety company is entitled to an allowance for the charges that the trustee could have made in the administration of his trust.

12883. NATIONAL UNION FIRE INS. CO. v. MINAS FURN. CO. Lake County. *Affirmed.* Remy, J. October 4, 1927.

Where there is a motion for judgment on the evidence, the court must presume a reference from the evidence submitted most favorable to the parties submitting the evidence. If even then, the evidence is insufficient to sustain a cause of action, the judgment may be for the defendant.

12751. NEW YORK, CHICAGO AND ST. LOUIS RY. CO. v. PEELE. Howard County. *Affirmed.* Nichols, J. June 17, 1927.

Where under the general doctrine of common law assumption of risk an employee assumes all the risk incidental to his employment, he does not assume those risks which he could not reasonably anticipate would be incidental to the employment and which are not incidental to the employment when properly conducted and which are due to the negligence of the employer.

12807. PATTISON ET AL. v. HOGSTON, ET AL. Grant County. *Rehearing denied.* McMahan, J. October 26, 1927.

Where it appeared on the record that the proper appraisement of real estate had been filed as a basis for an order of court for a sale of decedent's real estate, then the court will presume that this appraisement was filed before the order for the sale in the absence of proof to the contrary.

12434. PENN. RY. CO. v. WILLIAMSON. Randolph County. *Affirmed.* McMahan, J. June 10, 1927.

Where the answers to interrogatories put to a jury do not cover every phase of liability in the case, then a general verdict of the jury which does not seem to conform to the special findings will be upheld if there was some evidence of liability on the matters not covered by the special findings. Where one has assumed the burden of caring for an injured person, he is under a duty to continue to care for him in a manner that is reasonable under the circumstances.

12538. PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. STEPHENS. Cass County. *Reversed.* McMahan, J. June 8, 1927.

No degrees of care are recognized in estimating the duty of due care in this jurisdiction. A railroad company as well as others is bound only to exercise reasonable care under the circumstances. It is sufficient if contributory negligence is proved by a preponderance of all the evidence offered at th trial in a personal injury suit.

12789. PRIDE ET AL. v. VONDERSCHER. Vanderburgh County. *Affirmed.* McMahan, J. October 5, 1927.

Where there is evidence of negligence sufficient to sustain the verdict, it will not be disturbed on this ground of appeal. Where it appears that the appeal may be prosecuted for purposes of vexation or delay, the court may add a ten per cent penalty as it did here.

12958. SCOTT ET AL. v. PETERS ET AL. White County. *Affirmed.* Nichols, J. October 26, 1927.

There is nothing in the statute, section 9017 Burns' 1926, which prevents a person from adopting another person of mature age, with the understanding that the adopted person shall retain his own name.

12719. SCOTT v. BROWN. Laporte County. *Affirmed.* Nichols, J. June 7, 1927.

Where two partners are under contract as to their respective interests in a corporation and a re-organization of that corporation is affected through fraudulent representations of one of the partners then the other partner has suffered damage and has a cause of action on the basis of fraud even though the only interests which he relinquished because of this fraud is his stock and position of relative control in the old corporation.

12949. SHACKELFORD v. SEITZ, ET AL. Vanderburg County. *Affirmed.* Per Curiam. October 14, 1927.

Per Curiam.

12890. SHERMAN v. MILLER CONSTRUCTION CO., ET AL. St. Joseph County. *Affirmed.* Enloe, J. October 11, 1927.

A township trustee is not liable for injuries that occur as a result of defective provisions for safety in a school building if the acceptance of the plans was at most an error in judgment and would not amount to negligence or fraud.

12997. SIPPLE, ET AL. v. HELTOM. Industrial Board. *Affirmed.* McMahan, J. October 28, 1927.

Where several parties unite in a joint assignment of errors, the assignment will be unavailing unless it is good as to all joining.

12742. SMITH ET AL. v. FARR, ET AL. Grant County. *Petition denied.* Nichols, J. October 26, 1927.

This case on rehearing was distinguished by the court from *Branstrator v. Crow,* 162 Ind. 364, on the ground that it appeared in this case that the testator was so permanently afflicted with paralysis that his brain was affected and he was no longer able to understand the extent of his property or the natural objects of his bounty.

12739. SHORTAL v. STANDERFORD ET AL. Howard County. *Affirmed.* Nichols, J. June 17, 1927.

When a mortgagee gets possession of the mortgaged property and converts it to his own use, then this constitutes payment of the accompanying note at least to the extent of the value of the mortgaged property converted.

12742. SMITH ET AL v. FARR ET AL. Grant County. *Affirmed.* Nichols, J. June 17, 1927.

In a case involving contest of a will as in other cases where a plaintiff has the burden of proof, the defendant may be obliged to set up other mat-

ters affirmatively; but if at the conclusion of the trial the plaintiff has not sustained his case by a preponderance of the evidence, then he must fail.

13001. SWITOW THEATRICAL CO. v. FISHER, ET AL. Industrial Board. *Affirmed.* Remy, J. October 14, 1927.

Where an employee has broken a telephone wire in the course of his employment and then is killed while rolling the wire up after the completion of his day's work, it is held that he was killed in the course of his employment within the terms of the Workman's Compensation Act.

12857. TRAVIS v. PORTER. St. Joseph County. *Affirmed.* Thompson, J. J. October 5, 1927.

An insolvent corporation may prefer creditors before it is placed under the control of court and this continue to be true in spite of section 4844 Burns' 1926 except where some director of a corporation has been a surety or otherwise interested in the debt that is preferred.

13058. UFFELMAN v. TEMPLETON COAL CO. Industrial Board. *Affirmed.* Per Curiam. October 25, 1927.

Per Curiam.

12726. THE U. S. FIDELITY AND GUARANTY CO. ET AL v. HOOSIER DESK CO. Pike County. *Petition for rehearing denied.* Nichols, J. June 10, 1927.

Per Curiam.

12808. WEIL BROS. LOESER CO. v. BUNZ. Union County. *Affirmed.* Per Curiam. June 9, 1927.

Per Curiam.

12540. WOLF HOTEL CO. v. PARKER. St. Joseph County. *Affirmed.* McMahan, J. October 14, 1927.

Under section 689 and 690 Burns' 1926, where a bill of exceptions contains only part of the evidence and this evidence does not show that the error complained of was not immaterial or later cured, then it must be presumed that the exception was material and will be ground for reversal.