Indiana Law Journal

Volume 3 | Issue 3 Article 12

12-1927

Indiana Docket

INDIANA DOCKET*

SUPREME COURT

24811. BIDDLE v. STATE. Marion County. *Affirmed.* Willoughy, J. June 28, 1927.

A defendant in the trial court may not plead in abatement if he has pleaded in bar. Action by the court on motions made before the beginning of the trial cannot be assigned as error in a motion for a new trial.

25217. CADWELL, ET AL. v. TEANY, ET AL. Dearborn County. *Affirmed.* Travis, C. J. June 7, 1927.

City officers elected for a definite term and until their successors are elected are qualified for such an interest in their offices that they are proper persons to bring a *quo warranto* proceeding to determine the validity of election of succeeding officers.

25238. CITIZENS TRUST COMPANY v. WHEELING CAN CO. Dubois County. *Affirmed.* Gemmill, J. June 30, 1927.

Where it appears on the record of a court's bench docket that some of the figures in a court order were incorrect, it is proper for the court on its own motion by a *nunc pro tunc* entry to correct the error without hearing evidence on the matter or the argument of counsel.

25418. CONTINENTAL NATIONAL BANK OF INDIANAPOLIS v. DISCOUNT & DEPOSIT STATE BANK OF KENTLAND, INDIANA, ET AL. Jasper County. *Reversed.* Per Curiam. June 30, 1927.

It is error for the trial court to overrule a demurrer to an insufficient answer, primarily harmful, and this will be regarded as reversible error where the record does not affirmatively show that the ruling on the demurrer was harmless.

25213. DYAR, ET AL. v. THE ALBRIGHT CEMETERY ASS'N. Miami County. *Affirmed.* Martin, J. July 20, 1927.

Where parties are incorrectly served with the required notice, and they voluntarily submit to the jurisdiction of the court, they waive this defect. In the case of condemnation proceedings for a cemetery where certain parties have acted as appraisors in the matter and have not objected on the ground that land owned by them would be injured, they cannot later appear as defendants to contest the condemnation proceedings themselves on the ground that they misunderstood the procedure in the trial court and thought the plaintiffs were proceeding under a different statute.

25291. GUETLING v. STATE. Vanderburgh County. *Affimed.* Gemmill, J. November 16, 1927.

In a criminal proceeding if it is contended that the statute under which the prosecution is brought is unconstitutional, the required procedure is to raise this question by motion to quash or motion in arrest of judgment.

24831. KESSLER v. CITY OF INDIANAPOLIS, ET AL. Marion County. *Reversed.* Martin, J. July 19, 1927.

In condemnation proceedings for the securing of land for highway or park purposes, the general purposes of the park may be considered

* The brief digests given here are intended merely to identify the cases.

rather than the express general interest in the particular land secured; and the fact that a private interest is also advantaged by the taking of land for a proper public interest does not render the condemnation void. If, however, the taking of the land for roadways is in fact not by a public interest even as part of the general plan at the time the proceedings are brought, then such condemnation is illegal.

25219. RIGGS v. STATE. Vanderburgh County. *Affirmed.* Gemmill, J. November 1, 1927.

It is sufficient to prove the furnishing of liquor in order to secure conviction under the Indiana statute; it is not necessary to prove a sale to the party who receives it.

25136. SCHELL v. SCHELL. Madison County. *Affirmed.* Willoughby, J. November 17, 1927.

Where there is filed an amended brief for a writ of certiorari, it is necessary that this brief contain a concise statement covering so much of the record as shall show the errors which are relied upon for reversal; and if a brief with this content is not filed, there is no ground for reversal.

25353. STATE EX TEL NEJDL v. BOWMAN. Marion County. *Petition for rehearing denied.* Martin, J. August 5, 1927.

Where the legislature votes a ten dollar a day salary to its members, this is so far reasonable and necessary where it applies only to the period that they were in session that it cannot be said that it is "against the public opinion" or "for personal enrichment."

25147. STATE v. SHUMAKER, ET AL. Original Action. Myers, J. August 6, 1927.

Where one has made a statement not in the presence of the court during a trial which is in criticism of a decision of the court, and that statement is calculated to interfere with the administration of justice, whether its content involves statements that are true or false, and when these statements are made about a case that, though already decided, is similar to cases that are then pending or are likely to be pending, such statement constitutes criminal contempt of court. Martin, J., and Gemmill, J., dissent.

25177. WALLACE v. STATE. Henry County. *Reversed.* Travis, C. J. June 30, 1927.

The burden of proof is upon the state to establish the validity and legality of the search warrant rather than upon the defendant to establish its invalidity and its illegality. Section 2746 Burns' 1926, which provides that a search warrant in liquor cases may be secured by an affidavit before a mayor, justice of the peace, or judge is not sufficient in its terms to make a search warrant legal unless it appear affirmatively that it was issued upon probable cause. Martin, J., and Gemmill, J., dissent.

25366. WARD v. BOARD OF COMMISSIONERS OF LAKE COUNTY. Lake County. *Affirmed.* Per Curiam. August 5, 1927.

Where the records of an inferior court or tribunal show affirmatively or by necessary implication that such court or tribunal had jurisdiction of the subject matter and of the persons, thereafter the same presumptions are indulged as to the regularity of the proceedings as in the case of courts of general jurisdiction.

APPELLATE COURT

12938. ALLSTOTT v. BARNETT. Warwick County. *Affirmed.* Per Curiam. November 17, 1927.

Per Curiam.

12617. AMES, ADMR., v. CONRY, ADMX. Laporte County. *Affirmed.* November 22, 1927. Remy, J.

A devise of the land and profits that come for life is equivalent to a devise of a life estate in the property. Where the testator refers to "my legal heirs then in being" he must be taken to mean his legal heirs at the time of his death rather than at the time of his making the will, in the absence of expressions indicating a contrary intent.

12605. AMSBURY, ET AL. v. HARPER. Boone County. *Affirmed.* McMahan, J. June 29, 1927.

Where the directors of a corporation have made false statements about their stock, knowing them to be false, and intending thereby to cause other individuals to purchase their stock in reliance upon those false statements, and these persons do purchase the stock in reasonable reliance on these statements to their damage, then there is a cause of action and there may be recovery to the extent of the damage suffered.

12872. ANDERSON v. CROOP, ET AL. Elkhart County. *Affirmed.* McMahan, J. June 30, 1927.

Section 5966 Burns' 1926 expressly gives a taxpayer a right to question the employment of any county employee at the time he applies for payment of his salary. This complete remedy for the taxpayer precludes his bringing a separate action to enjoin the employment or the payment of employees that are covered by the statute.

13065. AUBERRY ET AL. v. KNOX CONSOLIDATED COAL CO. Industrial Board. *Affirmed.* Per Curiam. November 2, 1927.

Per Curiam.

12820. BAKER v. ZEISGRABER. Vanderburgh County. *Reversed.* Remy, J. June 30, 1927.

Where there was no evidence that plaintiff had been permanently injured or her earning capacity reduced, then an instruction that the jury might give damages for her permanent injury and her impaired earning capacity was not responsive to any evidence and constituted reversible error.

13050. BATTEN v. MCCARTY. Wells County. *Reversed.* McMahan, J. November 4, 1927.

Malicious prosecution involves the malicious prosecution of some legal proceeding. Thus if the imprisonment is under legal process, but the action has been commenced and carried on maliciously without probable cause, it is malicious prosecution. If it has been extra-judicial, without legal process, it is false imprisonment, providing there are the necessary elements of restraint.

12862. BERNSTEIN v. RHOADES. Marion County. *Affirmed.* Thompson, C. J. June 30, 1927.

Section 1725 Burns' 1926 provides that the municipal court of Marion County shall have jurisdiction in possessory actions involving landlord and

tenant. Thus the court has jurisdiction where there is a lease with an option of sale, but it does not have jurisdiction where the contract amounts to a sale of the property itself.

13011. BIRO v. INLAND STEEL CO. Industrial Board. *Affirmed.* Per Curiam. November 2, 1927.

Per Curiam.

13010. BUCUR v. INLAND STEEL CO. Industrial Board. *Affirmed.* Remy, J. November 2, 1927.

Proceedings before the industrial Board must be brought by the real party in interest, and where one does not allege that he is the trustee, he will not come within the exception that a trustee of an express trust may bring an action for the beneficiary.

12901. BUCHER, ADMR., v. YOUNG. Wabash County. *Reversed.* Remy, J. November 3, 1927.

Where a husband and wife make a contract for the sale of real estate upon a condition and place the abstracted title in escrow, then title will pass to the vendee on performance of the condition even though the husband dies before the condition is performed and the contract did not expressly bind the heirs and assignees of the parties.

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

Where an appellant fails to make the necessary recital of evidence in his brief on appeal he could not object if the appellee merely refers to the place in the record where this missing evidence is found. Appellee under such facts is not required to prove that the errors were not committed.

12889. CITY OF HUNTINGTON v. THOMAS. Allen County. *Reversed.* McMahan, J. June 28, 1927.

Where a city undertakes to grade or improve a highway that is beyond its corporate limits, and such grading or improving is beyond its authority, then it cannot be made liable for injuries that occur on such improved highway due to any defect in the improvement.

13043. DUSTMAN ET AL. v. RATLIFF. Wells County. *Affirmed.* Nichols, J. November 18, 1927.

Where one contracts to purchase land for another "free from incumbrances" and in reading the abstract fails to note certain incumbrances, the other party to the contract may recover damages caused him because of such incumbrances.

12960. FOSTER ET AL. v. MALSBARY. Warren County. *Affirmed.* Nichols, J. July 1, 1927.

Where one has illegally built a dam across a navigable stream and this dam interferes with the flow of the water, then any lower riparian owner has a right to nominal damages and injunction for the removal of the dam even though he has not suffered actual damages.

12721. GRIEGER, GUARDIAN, v. CARLSON, TREAS., ET AL. Starke County. *Affirmed.* McMahan, J. July 1, 1927.

A judgment given in an action in which certain named defendants and "all the world and all interested" are made defendants is good against the

defendants named and served or those served by publication in accordance with the statute, but is not good against others.

12720. HARMON, EXECUTOR, v. SMITCH. Johnson County. *Motion denied.* Remy, J. November 25, 1927.

Where one is under contract for continuous employment and not for definite periods, then the statute of limitations does not begin to run for the recovery of the amount due for the employment until the employment has ceased.

12928. HARRIS, ADMX., v. CHICAGO & EASTERN ILL. RY. CO. Green County. *Reversed.* Nichols, J. November 17, 1927.

Where there is evidence that a defendant employee might have prevented the injury by giving reasonable warning of the danger to his fellow employee, there is evidence which should have gone to the jury in an action on account of death under the Workmen's Compensation Act.

13000. HAYS V. BOARD OF TRUSTEES OF CLINTON SCHOOL CITY. Industrial Board. *Affirmed.* Thompson, C. J. November 3, 1927.

Where one contracts to do repair work on a building and employs others to help him, there may be sufficient evidence to hold that such contractor is an independent contractor and not the employee of the employer.

12993. HEWITT V. WESTOVER ET AL. Shelby County. *Affirmed.* Nichols, J. November 23, 1927.

Statements made in public advertisements which are statements of fact and are known to be erroneous and are significant may be the foundation of an action of fraud by one who purchases on reliance on them.

12785. HITCH ET AL. V. CURRY. Vanderburgh County. *Affirmed.* Per Curiam. November 16, 1927.

Per Curiam.

12802. HORRALL V. CHICAGO & EASTERN ILL. RY. CO. Gibson County. *Affirmed.* Per Curiam. November 1, 1927.

Per Curiam.

12856. INDIANA SERVICE CORPORATION V. KRASENKO. Dekalb County. *Affirmed.* Thompson, C. J. November 3, 1927.

Testimony by witnesses that thoroughly concerns the incident involved is admissible where it is part of the *res gestae.*

12553. JEWETT ET AL. V. FARLOW ET AL. Decatur County. *Affirmed.* McMahan, J. June 30, 1927.

Where there is sufficient evidence for reasonable men to find that the testator did not have testimentary capacity when he made his will, then a verdict so finding will be upheld on appeal. Instructions that may be confusing or erroneous separately but are not objectionable when considered all together, are not cause for reversal.

12917. KIRKHAM V. BAILEY ET AL. Vigo County. *Affirmed.* Remy, J. November 16, 1927.

Before one can maintain an action for malicious prosecution, he must first prove that the suits which he alleged constituted the malicious prosecution, were decided in his favor.

12754. LANG v. DAVIS ET AL. Lake County. *Affirmed.* Per Curiam. July 1, 1927.

Per Curiam.

12483. LEASURE v. LEASURE. Parke County. *Affirmed.* McMahan, J. November 23, 1927.

A decision of the Appellate Court saying that the case is reversed and that the appellant is entitled to a decree quieting her title does not amount to a mandate on the trial court. It means that a new trial as ordered must be given and that the proceedings thereafter must not be inconsistent with the Appellate Court's decision.

12769. MATHEWS v. REX HEALTH & ACCIDENT INSURANCE CO. Marion County. *Reversed.* McMahan, J. July 1, 1927.

Where the evidence secured by a physician in his professional service to a patient is privileged, then if the physician who attended the deceased during life makes an autopsy upon his body after death, the results of this examination is also privileged; and it is nevertheless privileged where under the rules of the hospital the body of certain patients may be subjected to autopsy without the consent of the patient or the attending physician.

13068. MCCOY v. STATE. Floyd County. *Affirmed.* Per Curiam. November 3, 1927.

Per Curiam.

12736. MCCOY v. BUCK. Knox County. *Reversed.* Nichols, J. July 1, 1927.

Where there is no expert evidence that defendant physician has proceeded in an unskilled or improper way and where the matter for proof may be established by expert evidence only, then it is reversible error if damages are given to the plaintiff when there is no competent evidence in support of it.

12706. METROPOLITAN LIFE INS. CO. v. HEAD. Howard County. *Reversed.* Nichols, J. July 1, 1927.

Where the insured has made a false representation regarding the condition of his health in order to secure a life insurance policy and this representation is material to the liability of the company, then such representation will preclude recovery of the policy unless the company has waived this defect.

12676. MOREHOUSE v. THE MILLIGAN FINANCE CO. ET AL. Wells County. *Affirmed.* Enloe, J. June 28, 1927.

Where there is more than one defendant in an action at law a motion for a new trial on the ground that there was not sufficient evidence to support the finding of the court on questions of fact will not be questioned on appeal if the finding of the court could have supported a judgment against some of the defendants. If the facts were insufficient for a finding against certain ones only, this would be grounds for a motion in arrest of judgment or perhaps a new trial as to that particular defendant; but if the motion for the new trial is made general respecting all the parties, the trial judge had right to overrule it regardless of the evidence with respect to certain defendants only.

12933. NATIONAL CITY BANK v. PARR ET AL. Hancock County. *Reversed.* Remy, J. November 23, 1927.

Fraud and total failure of consideration will be a good defense in suit on a contract, but the burden is on the defendant to show fraud or failure of consideration.

12843. C. M. OBERLIN CO. v. WOOLVERTON. St. Joseph County. *Affirmed.* McMahan, J. July 1, 1927.

Where a question asked a witness is not pertinent to any issue before the jury and is not asked for the purpose of qualifying the witness, it is proper for the court to exclude it.

12948. OWEN ET AL. v. SHIELDS ET AL. Jackson County. *Affirmed.* Nichols, J. November 1, 1927.

Where a widow with children by a previous marriage remarries and has children by the second marriage; and where said widower later dies and his widow in turn remarries and has children by this later marriage and dies; then under our statute, section 3337 and section 3342 Burns' 1926, the widow is the "ancestor" and upon her death during the subsequent marriage, the land will descend to her children who were born of the marriage by virtue of which she secured the land and not those of her children of her husband through whom she secured the land.

12807. PATTISON ET AL. v. HOGSTON ET AL. Grant County. *Affirmed.* McMahan, J. July 1, 1927.

Where an order of sale has been made by the court and the property sold under that order, then in a collateral attack the sale must stand unless the court was without jurisdiction to make the order. Dissenting opinion by Nichols, J., based on the question of jurisdiction.

12824. PIERSON & BRO. CO. v. DOWNEY. Vigo County. *Affirmed.* Per Curiam. November 1, 1927.

Per Curiam.

12897. PULLIN v. FIRST NATIONAL BANK OF RENSSELAER, INDIANA. Lake County. *Affirmed.* Nichols, J. November 4, 1927.

Even though the admissions of defendant at the trial were sufficient to establish one paragraph of plaintiff's complaint, still if it was insufficient evidence to sustain the complaint as a whole, the court on appeal has no basis for reversing the case where the judge directed a verdict for defendant.

13183. REDACRE ET AL. v. WITWER ET AL. St. Joseph County. *Affirmed.* Per Curiam. November 17, 1927.

12737. REPOSYNSKI ET AL. v. MIKULAK. St. Joseph County. *Affirmed.* Remy, J. July 1, 1927.

Section 10125 Burns' 1926 provides that it shall be a criminal offense for anyone under 17 years of age to operate an automobile. If a child less than 17 years old with the consent of his parents operates an automobile and operating such an automobile injures anyone, then he is guilty of negligence regardless of how he operated the automobile and damages may be recovered for the injuries which he caused.

12789. ROBERTSON v. SERTELL. Johnson County. *Affirmed.* Per Curiam. November 23, 1927.
Per Curiam.

12845. RUBIN & CHERRY SHOWS, INC., v. WAGNER. Marion County. *Affirmed.* McMahan, J. November 22, 1927.
Where there is a contract to render professional services for a fixed sum if that sum is paid at once, and the services are rendered although the sum is not paid as agreed, then there may be recovery for the reasonable value of the services although this be in excess of the agreed price.

12927. RUCHALA v. KRACY. Vigo County. *Affirmed.* Per Curiam. July 1, 1927.
Per Curiam.

12874. RUSHVILLE SCHOOL TOWNSHIP v. MOCK ET AL. Industrial Board. *Affirmed.* Dausman, J. June 29, 1927.
A chauffeur who drives school children to the township school may be the employee of the school trustee for purposes of recovering under the Workman's Compensation Act if he is accidentally killed by a train while driving a truck after having deposited the children in the school.

12811. SCHULTE v. KOETTER. Franklin County. *Reversed.* Per Curiam. November 2, 1927.
Where the relatrix gives no evidence by which she could determine which of several persons was the father of her child, then it is error to give an instruction by which the evidence of the relatrix in determining the father could be accepted by the jury.

12887. SMITH v. ZABEL ET AL. Carroll County. *Affirmed.* McMahan, J. June 30, 1927.
Where a negotiable note is made in Illinois, the law of Illinois will govern the note itself; but if the indorsement is an Indiana contract, this must be considered distinct from the note and to be governed by the laws of Indiana.

12730. SPROW v. WICKER ET AL. Montgomery County. *Affirmed.* Nichols, J. July 1, 1927.
Whether personalty has been properly attached and if so held whether it has been appraised with the assistance of a disinterested householder of the proper county, are questions for the decision of the court in determining whether an ordinary judgment should be rendered for the plaintiff, or whether the attached property should be sold.

12911. STATE v. HULLIHAN ET AL. Wabash County. *Affirmed.* Thompson, C. J. June 29, 1927.
Where a negotiable note is given in payment of a deed, the presumption is that the acceptance of the negotiable note constitutes a payment of the deed involved; while if the note is non-negotiable the burden rests upon the maker to prove the said note was given as the payment of the deed. Usually only money is payment. The law is also however that if the presumption of payment deprives the party accepting the note of a collateral security or some other substantial benefit, such circumstances rebut the presumption.

12899. SUGAR CREEK CREAMERY CO v. EADS. Montgomery County. *Reversed.* Nichols, J. November 1, 1927.

Where an infant enters a room without invitation and this room is not one that is open to the public generally; and such infant is accidentally injured by acid kept there, this is insufficient to show negligence on the part of the proprietor or to result in his liability for the injury.

12947. SWAIN ET AL. v. BOWERS ET AL. Grant County. *Affirmed.* McMahan, J. November 15, 1927.

If there is an absolute gift of the income, the gift is not void if it rests within the statutory requirement although there be a postponement of the enjoyment of this gift. (Burns' secs. 12171 and 12172.)

12815. TERRE HAUTE, INDIANAPOLIS & EASTERN TRACTION CO. v. PUCKETT. Sullivan County. *Reversed.* Enloe, J. November 23, 1927.

If on the theory of the action which the plaintiff has adopted in his complaint he has not proven his case and if by his own admissions he has refuted the allegation of his complaint, there is no ground for reversal.

12932. THE THOMPSON NORRIS CO. v. GRIMME ET AL. Industrial Board. *Affirmed,* Remy, J. June 30, 1927.

Per Curiam.

13127. WALTER ET AL. v. SWANK. Allen County. *Appeal dismissed.* Nichols, J. November 3, 1927.

Where one attempts to make a term time appeal the security on the bond must be approved during that term and the transcript of record for the appeal must be filed within 60 days after the time for filing the bond.

12779. TICHENOR ET AL. v. WITHERSPOON. Pike County. *Affirmed.* McMahan, J. November 2, 1927.

As a general rule an upper land owner has no right to discharge water on a lower land owner in ways or in quantities other than the natural flow of such water.

12936. WOODSMALL v. JENEKES. Morgan County. *Affirmed.* Enloe, J. November 22, 1927.

Where the record itself does not affirmatively show that the case was tried upon a wrong theory, it is not competent on appeal to introduce matters that are not part of the record in order to show this.

12967. WOODSMALL v. MEYERS. Johnson County. *Affirmed.* Nichols, J. November 17, 1927.

A purchaser of a negotiable instrument which is fair upon its face will maintain good title and can recover on it even though the maker was induced to give it by fraud; but the circumstances under which the note was given and the purchaser failed to make inquiry about its inception may be considered by the jury in deciding whether the purchaser would take in good faith without notice of defenses in the original transaction.

12801. WRIGHT v. STATE EX REL. Shoemaker. Marion County. *Affirmed.* Thompson, C. J. November 23, 1927.

Where there is a stipulation of agreed facts filed in a case and there is also other evidence at the trial in regard to the interpretation of these facts, then if there is any evidence in the record at all which would sustain the verdict, it will not be reversed on appeal.