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SUPREME COURT

25179. DURHAM v. STATE. Kosciusko County. *Reversed.* Martin, J. December 23, 1927.

An instruction is erroneous which indicates that the defendant is liable for assault and battery where he strikes another but does not state that such assault and battery must be "unlawful." Thus an officer may injure another without liability if he does so in the pursuit of his lawful duties and in keeping with his right under the law.

24606. HUNT v. STATE. Vanderburg County. *Reversed.* Travis, J. December 7, 1927.

Where a date is set for an indictment both in words and in figures and the words and figures differ in giving the date, then the words will prevail according to the rule of the common law and in spite of sec. 2225, Burns' 1926, which relates to the validity of affidavits that involve errors in dates and numbers represented by figures. Dissent by Martin, J., and Gemmill, J.

25216. KOSCIELSKI v. STATE. St. Joseph County. *Reversed.* Gemmill, J. December 7, 1927.

In a criminal case it is reversible error to try a defendant where he has entered no plea even though from the evidence later it appears what his plea might have been.

25363. MOORE v. STATE. Elkhart County. *Affirmed.* Travis, J. December 23, 1927.

In order to present a case for the consideration of the Supreme Court on appeal, it is necessary that the alleged errors in the trial court be set forth with reference to such errors as were preserved at the trial including a presentation of that part of the record that contains them.

25315. SMITH v. STATE. Clark County. *Affirmed.* Travis, J. December 8, 1927.

A brief in the Supreme Court must set forth the errors from the record from which the appellant bases his application for reversal.

12882. ABBOTT, ET AL v. APPLETON, ADMR. Appellate Court. Franklin County. *Reversed.* McMahan, J. December 14, 1927.

It is provided that where an executor fails to qualify, an administrator may be appointed from among the legatees named in the will or from among other competent persons. It is error to appoint one not a legatee under the will where there were competent legatees who were willing to serve.

12905. BLACK ET AL v. SMITH ET AL. Marion County. *Reversed.* Nichols, J. December 16, 1927.

In an action for breach of covenants to a deed, the parties in that action are bound by a judgment of competent court reforming this deed if the said parties trace their interest in the deed through the parties who were bound by the decree for reformation.

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

12884. BRANNUM-KEENE LUMBER CO. v. STALNAKER ET AL. Marion County. *Affirmed.* Per Curiam. December 13, 1927.

Per Curiam.

12765. BURWELL ET AL v. FIRST NATIONAL BANK OF COLUMBIA CITY. Noble County. *Reversed.* McMahan, J. December 8, 1927.

Where a surety is sued on a note along with the co-makers of the note, he cannot escape liability on the ground that another surety executed the note on Sunday, when that surety did not give this as a defense in the action, but gives his discharge in bankruptcy as his only defense. This is in keeping with the general rule that a defense which is personal to one defendant is not available to his co-defendants. A surety can make no defense which the principal can and does waive.

13099. CRAWFORDSVILLE WIRE & NAIL CO. v. TITUS INDUSTRIAL BOARD. *Affirmed.* Per Curiam. December 20, 1927.

Per Curiam.

12859. DETROIT FIDELITY & SURETY CO. v. FREY ET AL. Marion County. *Affirmed.* Nichols, J. December 8, 1927.

Where a surety bond provides an indemnity in case mechanic's liens are filed against the property and also provides that all claims under the bond must be filed within three months after the last payment to the contractor before the completion of the building, then if the contractor defaults and the building is never completed, there is immediate liability on account of the mechanic's liens that were allowed for material supplied on the word of the contractor in the construction of the building.

13064. EBB W. VALE COAL CO. v. QUACKENBUSH. Industrial Board. *Reversed.* Remy, C. J. December, 1927.

It is error for the Industrial Board to find the vision of appellee's eye with the use of glasses was impaired 90% when the only evidence was that it was considerably impaired without the use of glasses.

12930. ERIE RAILROAD CO. v. THE C. CALLAHAN CO. Wabash County. *Reversed.* Enloe, J. December 14, 1927.

Where a shipper sues in damages because of loss caused through delay in a shipment of his carload of products, it is incumbent upon him to show that this delay and consequent loss were due to the negligence of the defendant.

12924. GIVEN, ET AL v. EBERWEIN, EXTR. Hamilton County. *Reversed.* Remy, C. J. December 15, 1927.

In construing a clause in a will, which is ambiguous, the construction should give some effect to each provision in the clause if this can be done by way of reasonable construction and in spite of the ambiguity.

12989. GLICK v. GLICK. Marion County. *Reversed.* Remy, C. J. December 9, 1927.

Where a trial court has granted the wife a divorce because of cruel and inhuman treatment and it appears that the husband has about $3,000 in property and an income of $122 a month while the wife has practically no property, it is an abuse of the discretion for the trial court to deny all alimony to the wife.

12461. HARTFORD ACCIDENT & INDEMNITY CO. v. STATE EX REL MARTIN. Jasper County. *Reversed.* Nichols, J. December 8, 1927.

Where the principal obligor on a contract is permitted to change the terms of the contract materially without the knowledge or permission of his surety, then the surety is not liable on its bond for a later default.

12780. ILES ET AL v. JORDAN ET AL. Hendricks County. *Affirmed.* McMahan, J. December 9, 1927.

Where a party on appeal objects to the findings of fact made by a court on the ground that they are insufficient for use in rendering a judgment, this insufficiency must be set forth from the record. In the dissolution of a partnership the expense for auditing and winding up the partnership should be borne by all the partners and the proportionate shares of this expense may be recovered if the partner has the audit made when the others refuse to join with him.

13003. JACKSON, ET AL v. WILSON, ET AL. Porter County. *Affirmed.* Nichols, J. December 16, 1927.

Under section 651, Burns' 1926, a defendant served by publication, except in case of divorce, may reopen a case within five years if he did not appear to defend it; one who was not made a defendant in the original action is not affected by this provision.

12926. KELTNER v. PATTON. Wells County. *Affirmed.* Nichols, J. December 21, 1927.

Where the defendant at trial does not make a motion to have the allegations made more certain and where the complaint is sufficient to show a cause of action, there is no basis for reversible error in these facts on appeal.

12963. KENNEDY v. SOUTHERN FIRE BRICK AND CLAY CO., INC. Vigo County. *Affirmed.* Enloe, J. December 16, 1927.

Where one is injured by the servants of another and he does not bring his action under the Workmen's Compensation Act, it is incumbent upon him to show negligence in the defendant in order to recover.

12996. LOWISH v. ROWLAND. Vigo County. *Reversed.* Thompson, C. J. December 9, 1927.

As a general rule share-holders in a corporation do not bind the corporation by what they do as individuals, but where they are composed of all the share-holders at the time and enter into a proposed agreement for the corporation to do certain things, and the corporation receives the benefit of this agreement the corporation will be bound in equity.

12934. LUCE SCHOOL TOWNSHIP ET AL. v. SCHOOL CITY OF ROCKPORT, ET AL. Spencer County. *Affirmed.* McMahan, J. December 21, 1927.

On appeal the parties cannot object to the admissibility in evidence on certain exhibits in the trial court unless those exhibits with proper exceptions are presented in their briefs.

12894. LUTEN *v.* ILLSLEY. Marion County. *Appeal dismissed.* McMahan, J. December 15, 1927.

Where the amount involved in the case of appeal is less than $50 there is no right of appeal to the Supreme or Appellate Courts. (Sec. 1353, Burns' 1926.)

13006. MARTZ ET AL v. GRASSELLI CHEMICAL CO. Industrial Board. *Affirmed.* Per Curiam. December 15, 1927.

Affirmed on authority of *In Re Moore*, 79 Ind. App. 470; 138 N. E. 783.

12999. MATTES v. BRUGGNER. Elkhart County. *Affirmed.* McMahan, J. December 22, 1927.

Under the Indiana decisions contributory negligence must be affirmatively proved by the one who alleges it.

12984. MODERN FOURTH VEIN COAL CO. v. JOHNSON. Industrial Board. *Affirmed.* Per Curiam. December 16, 1927.

Per Curiam.

12846. NEGDEMAN ET AL v. CAWLEY ET AL. Lake County. *Reversed.* Enloe, J. December 7, 1927.

A written contract may not be varied by subsequent parole agreements so long as the contract itself remains in force. Where one party under a contract has a right to rescind it for certain causes stated, he may not later rescind it in keeping with an oral agreement if he has failed to rescind for the reasons permitted in the written contract.

12792. PALMER ET AL v. ANDREWS ET AL. Rush County. *Affirmed.* McMahan, J. December 20, 1927.

In briefs filed before the Appellate Court when a case is taken there on appeal, the parties should make their points of law and their citation of authorities responsive to particular allegations of error that have been duly excepted to at the trial. The decision of the trial court is not subject to review in the Appellate Court except upon express allegations of error.

12844. PRINE v. WHITTEN, ADMX. Decatur County. *Affirmed.* McMahan, J. December 7, 1927.

A beneficiary may recover money wrongfully retained by a fraudulent trustee but in the absence of special circumstances he may not recover damages for his expenses or inconvenience in bringing action against the fraudulent trustee.

12496. RENFROW v. CITIZENS STATE BANK OF STILESVILLE, IND. Hendricks County. *Affirmed.* Remy, C. J. December 8, 1927.

Where one is not liable as an acceptor of a bill of exchange, he may still be liable as a matter of separate contract apart from the negotiable instruments law but in such separate contract there would be no liability if the consideration for the contract had failed.

12787. SOUTHERN SURETY CO. v. MECHTS. & FARMERS BANK OF AVILLA, IND. ET AL. Noble County. *Reversed.* McMahan, J. December 7, 1927.

The surety's right of subrogation when it becomes capable of enforcement is a right to resort to the funds, securities, and remedies which the creditor is capable of asserting against its debtor.

13200. STATE EX REL FLOCKEN v. KEENE. Sullivan County. *Affirmed.* Per Curiam. December 9, 1927.

Per Curiam.

12898. TROWBRIDGE v. KNOX CONSOLIDATED COAL CO. Knox County. *Affirmed.* Per Curiam. December 14, 1927.

Per Curiam.

12954. UNION INDEMNITY CO. v. STORM. Allen County. *Affirmed.* Thompson, C. J. December 6, 1927.

One who stops an automobile to repair the damage to a tire in order to proceed on his journey is engaged in the operation of the automobile at that time, within the meaning of an automobile insurance policy that provides for compensation where one is injured "while operating, driving, riding in * * * an automobile."

12915. WATTS v. HART ET AL. Vanderburgh County. *Affirmed.* Thompson, J. December 13, 1927.

A drainage commissioner is entitled to reasonable compensation for his services rendered in a professional capacity and apart from his official duties. (Section 6173, Burns' 1926; also *Buckman v. State*, 59 Ind. 1.)

12914. WEBB v. CLARK COUNTY, INDIANA, ET AL. Clark County. *Reversed.* McMahan, J. December 13, 1927.

Where one has purchased chattels from the Federal government and has made only the first payment with a requirement that the balance be paid at a certain time, title does not pass to the purchaser until the balance is paid.