

2-1928

Indiana Docket

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Recommended Citation

(1928) "Indiana Docket," *Indiana Law Journal*: Vol. 3: Iss. 5, Article 12.
Available at: <http://www.repository.law.indiana.edu/ilj/vol3/iss5/12>

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INDIANA DOCKET*

SUPREME COURT

25254. BAUGH v. STATE. Monroe County. *Reversed*. Martin, J. January 10, 1928.

The mere fact that a still and mash and some illegal whiskey were found on the farm of the defendant is not sufficient circumstantial evidence to sustain a verdict of the jury that the defendant was guilty of keeping a still, under the Indiana statute.

25358. DARST v. FORNEY. Porter County. *Affirmed*. Gemmill, J. January 24, 1928.

Under Section 4141 Burns' 1926, one is not entitled to a writ of habeas corpus and a new hearing to determine his sanity, when he has been adjudged insane but has not yet been committed to an institution for the insane. An officer who under a valid writ arrests one who has been adjudged insane for the purpose of committing him to an insane institution is acting within his authority.

25536. EDMONDSON, ET AL. v. FRIEDEL. Grant County. *Affirmed*. Travis, J. January 5, 1928.

In an action in replevin the right to possession must be shown affirmatively to lie in plaintiff; it is not necessary for the defendant to prove that he has right to possession.

25237. HALL v. STATE. Elkhart County. *Affirmed*. Martin, J. January 6, 1928.

Under Section 65, Burns' 1926, and under Blackstone, 4 Com. 332, a prisoner at trial must not be placed in irons or in any other way bound unless it appears that there was danger of an escape. The court holds that evidence of such danger may be taken from acts that occurred before the trial.

25551. HOAG ET AL. v. JEFFERS. Marion County. *Affirmed*. Travis, J. January 26, 1928.

In order to set aside a judgment entered by default, it must appear that the judgment was entered against the defendant through a mistake, inadvertance, surprise, or excusable neglect and that it had a meritorious defense to the action. (Section 423, Burns' 1926.)

25149. WOLFE v. STATE. Delaware County. *Affirmed*. Gemmill, J. January 12, 1928.

It is not error to admit the dying declaration of one of two murdered persons when this declaration includes matter as to motive if it was not

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

necessary for the prosecution to prove motive in any case and the element of motive was not significant in the statement itself.

25334. WRIGHT v. STATE. Delaware County. *Affirmed*. Martin, J. January 12, 1928.

Even though a defendant might have objected to the admission of certain evidence, this does not affect the case on appeal if the evidence tended to substantiate the findings of the jury.

APPELLATE COURT.

12906. THE AMERICAN NATIONAL RED CROSS v. FELZNER POST, INC. Park County. *Reversed*. Nichols, J. January 27, 1928.

Where money is given in trust for a charitable organization, another organization that is not considered as a beneficiary or that has no interest in the express trust is without authority to question the disposition of the trust funds.

12935. ATLAS SECURITIES CO. v. DERRINGER, ET AL. Vigo County. *Affirmed*. Dausman, J. January 6, 1928.

Memorandum opinion.

12909. BROWN ET AL. v. PASKO, TRUSTEE. Whitley County. *Reversed*. Thompson, J. January 13, 1928.

A contract of sale as differentiated from a completed sale causes the title to remain in the vendor until the terms of the contract are complied with.

12977. CARRICO v. TEMPLETON COAL CO. Industrial Board. *Affirmed*. McMahan, J. January 27, 1928.

An application for an original award for disability not covered by any agreement before the parties must be filed within two years from the date of the injury in order to secure compensation under the Workmen's Compensation Act.

12972. CIRTIN v. CIRTIN. Vigo County. *Affirmed*. Per Curiam. January 6, 1928.

Per Curiam.

13083. CITY OF GARY v. PROTT, ET AL. Lake County. *Motion overruled*. Enloe, J. January 10, 1928.

Where an appeal for one court can be had only to a single other court, the Indiana statutes do not require notice to the other party of such appeal. The saving of a bill of exceptions at the trial was sufficient notice.

12839. DAVIS CONSTRUCTION CO., ET AL. v. GRANITE SAND & GRAVEL CO. Marion County. *Reversed*. Thompson, J. January 6, 1928.

The evidence introduced at the trial by an agent which is of a self-serving character which was not generally established, should have been excluded.

13053. ESCH v. ESCH. Grant County. *Affirmed*. Nichols, J. January 11, 1928.

A motion for a new trial was properly denied when the only reason given was that a continuance to secure an absent witness was denied al-

though the affidavits did not show that the testimony of this witness would have been material.

12966. GEISEN v. KAROL, ET AL. LaPorte County. *Affirmed*. McMahan, J. January 3, 1928.

Under the Indiana law an action is not considered to have commenced until the summons is delivered to the proper officer for service. Where a summons is not delivered until after return day, it is of no effect. A bona fide purchaser takes free of any mortgages or liens of which he did not have actual or constructive notice.

13225. HOLMES v. NEGLEY. Marion County. *Appeal Dismissed*. Per Curiam. January 27, 1928.

Where a question has become moot the court will not pass upon it especially where the relief asked is injunctive and the occasion for such relief has passed. Jurisdiction will not be retained merely to determine payment of costs.

13054. HUGHES-CURRY PACKING CO. v. SPRAGUE. Madison County. *Reversed*. Nichols, J. January 5, 1928.

It is a violation of the Bulk Sales Law to sell the merchandise in bulk to one purchaser and the fixtures to another where the formalities of the statute have not been complied with. (Sec. 8052, Burns' 1926).

13098. W. N. JOHNSON AUTO SHEET METAL CO. v. DAVIS. Industrial Board. *Affirmed*. Per Curiam. January 4, 1928.

Per Curiam.

13037. KURATNIK v. ILLINOIS STEEL CO. Industrial Board. *Reversed*. Remy, C. J. January 25, 1928.

Where the appellant before an Industrial Board is a foreigner who does not speak English, it is proper for the court to require reasonable proof of an attorney's authority to represent him.

13181. LUKE, ET AL. v. INDIANA TRUST CO., Spec. Admr. Marion County. *Reversed*. Remy, C. J. January 27, 1928.

An administrator appointed by a probate court pending a suit to resist probate of a will does not have a right to possession of the decedent's property under the Indiana statute. (Sec. 3073, Burns' 1926).

12852. MILLER v. STATE EX REL. Boone County. *Affirmed*. Remy, C. J. January 13, 1928.

In an action on a bond that is required by statute (Section 8393, Burns' 1926), the suit does not involve an action to charge the surety company upon any special promise to answer for the debt, default, or miscarriage of another so as to bring it within the terms of the statute of frauds.

13037. MURDICK v. CITY OF MUNCIE. Delaware County. *Affirmed*. Nichols, J. January 5, 1928.

An appeal to the Board of Public Works can be taken only under Section 10569, Burns' 1926; and that body has no general jurisdiction of appellate review under Section 10344, Burns' 1926.

13038. QUICK ET AL. V. SMITH ET AL. Carroll County. *Affirmed.* Nichols, J. January 13, 1928.

Where the subject matter of a former statute is completely covered by the subject matter of a later statute and the two are inconsistent, the latter statute must be taken to have repealed the former.

12910. SCOTT CONSTRUCTION CO. ET AL. V. COBB. Martin County. *Affirmed.* McMahan, J. January 26, 1928.

Where a contractor employs a sub-contractor to do work and is not generally liable for the sub-contractor's negligence in performing this work, nevertheless he will be liable if he has actual notice that the contractor in the performance of the work required must necessarily do acts which will cause wrongful damage to others.

13193. STATE EX REL. V. EACRET. Warren County. *Affirmed.* Remy, C. J. January 5, 1928.

Where an action is commenced by the issuance of a writ to the proper officer for service, this action must be kept alive by plures writs until service is obtained; otherwise the action is discontinued.

13055. STRAUS ET AL. V. HETTLER. Wabash County. *Affirmed.* Per Curiam. January 4, 1928.

Per Curiam.

12768. WASMUTH-ENDICOTT CO. V. RICHMOND CABINET Co. Wayne County. *Affirmed.* Thompson, J. January 25, 1928.

In an action based on unfair competition, it is for the court to determine whether the competent concern has used a trade name or device in such a way as to unfairly encroach upon the trade representation of another. In such litigation the general rule prevails that the appellate court will not attempt to weigh the evidence upon which the trial court based its decision.

13104. WRIGHT ET AL. V. KELTNER. Industrial Board. *Affirmed.* McMahan, J. January 4, 1928.

Where the defense in an action under the Workmen's Compensation Act is that of willful misconduct or intoxication, such defense must be pleaded at least five days prior to the original hearing.

12880. WRIGHT ET AL. V. THE J. R. WATKINS Co. ET AL. Henry County. *Affirmed.* Nichols, J. January 26, 1928.

If a complaint does not give facts sufficient to state a cause of action, objection to it is waived unless the defendant demurs.

12733. ZAHAREK ET AL. V. GORCZYCA. St. Joseph County. *Affirmed.* Enloe, J. January 25, 1928.

Where it appears that the grantor of a deed signed it through inadvertance or fraud without intending to sign a deed and when it appears that there was no binding contract under which he was bound to sign such deed anyway, then the deed is not enforceable against him.