

1928

## Indiana Docket

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the Courts Commons

---

### Recommended Citation

(1928) "Indiana Docket," *Indiana Law Journal*: Vol. 3 : Iss. 7 , Article 12.  
Available at: <https://www.repository.law.indiana.edu/ilj/vol3/iss7/12>

This Special Feature is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# INDIANA DOCKET.\*

## SUPREME COURT

25368. *BERNSTEIN v. STATE.* Marion County. *Reversed.* Martin, J. March 7, 1928.

Where malt extract may reasonably be used as a medicine as well as a beverage there can be no conviction under the prohibition law for its sale as a beverage unless it appears that the defendant reasonably expected it to be used as a beverage and intended such sale.

25441. *CUSTER v. STATE.* Grant County. *Affirmed.* Per Curiam. March 15, 1928.

*Per Curiam.*

25308. *HANGER v. STATE.* Parke County. *Affirmed.* Martin, J. March 15, 1928.

Where the driver of an automobile jumps from his car leaving the car running, upon seeing a sheriff; the sheriff has reasonable and probable cause to infer that the defendant has been committing a felony. The evidence thus obtained is sufficient to sustain a conviction where defendant was in fact transporting liquor in his car.

24549. *HANGER v. STATE.* Crawford County. *Reversed.* Willoughby, C. J. March 9, 1928.

Under the statute as it obtained in 1923 (Acts of 1921, p. 736) a defendant was not liable for having liquor in his possession but liable only if he had in his possession for purposes of sale, etc. Thus if defendant had a half pint of liquor on his person and no liquor on his premises when searched, there is no presumption that the liquor on his person was for sale.

25152. *HETHERINGTON v. HETHERINGTON.* Cass County. *Affirmed.* Myers, J. March 16, 1928.

Where the court has jurisdiction of the parties it may decree a payment by one party to the other for expenses in divorce litigation, and the allowance for such expenses will not be questioned upon appeal unless it is clearly unreasonable.

25576. *HOBBS v. LUDLOW, ET AL.* Rush County. *Reversed.* Martin, J. March 13, 1928.

Where a promissory note is made outside of Indiana and, properly interpreted, its place of payment is outside of Indiana; then in a suit on that note the maker is not liable on the note if his liability has been barred by the statute of limitations that obtained in the jurisdiction where the note was payable.

25431. *MCQUEARY v. STATE.* Marion County. *Affirmed.* Willoughby, C. J. March 6, 1928.

If there is evidence that the defendant has maintained a place where persons may resort "for the purpose of drinking intoxicating liquor as

---

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

a beverage" then there may be a conviction under sec. 2740 Burns' 1926, on the indictment against the defendant for maintaining a common nuisance.

25319. STATE BOARD OF TAX COMMISSIONERS, ET AL. V. MCDANIEL, ET AL. Shelby County. *Affirmed.* Travis, J. March 7, 1928.

Where an equalization tax is levied under authority of the State Board of Tax Commissioners and the amount of this tax is actually found without the giving of due notice and hearing, the tax itself is void.

25420. THOMPSON V. STATE. Marion County. *Affirmed.* Gemmill, J. March 6, 1928.

Under prosecution for rape there can be no reversal because the time of the commission of the crime alleged in the indictment is not the same as that proven on trial.

25129. WINTERS V. STATE. Henry County. *Affirmed.* Martin, J. March 6, 1928.

A prosecuting attorney may file a new action in a different court having jurisdiction after arranging for the dismissal of a former action, even though the former action involved the same facts as the later one and there is no double jeopardy here.

#### APPELLATE COURT

13020. ARMSTRONG V. THE PEOPLES BANK OF WINDFALL, IND., ET AL. Howard County. *Affirmed.* Nichols, J. March 30, 1928.

While an embarrassed or insolvent debtor may prefer certain ones among his valid creditors, he may not make a conveyance to one whose claim is largely fictitious for the express purpose of defeating other creditors.

13018. BARKER V. WOOD. Marion County. *Affirmed.* Nichols, J. March 15, 1928.

One may secure good title from a vendor in case the real owner of the chattel is estopped to deny title in the vendee because he has clothed the vendor with the necessary indicia of ownership.

13012. BARNETT V. SMITH, ADMR., ET AL. Lake County. *Affirmed.* Nichols, J. March 15, 1928.

It was held in this case that there was sufficient evidence to sustain the judgment of the trial court.

13024. BODNER V. LAFLEUR. Marion County. *Affirmed.* Nichols, J. March 30, 1928.

Unless it appears from a preponderance of evidence that the plaintiff was not guilty of contributory negligence, the verdict of the jury must be for the defendant.

13026. BOWEN ET AL. V. KOKOMO OMNIBUS CO. ET AL. Howard County. *Affirmed.* Remy, C. J. March 14, 1928.

Where it is not alleged that the repairs were made on the motor omnibuses of the owner who is made a party to the suit, and where it does not appear that the owner or the owners of interests in these buses consented

to these repairs; there can be no recovery under a lien in preference to prior claimants under the provisions of sec. 9844-9849 Burns' 1926.

13090. COLE V. BAILEY. Gibson County. *Dismissed on authority.* Remy, C. J. March 6, 1928.

Dismissed on authority of *Plotnicki v. Nowicki* (1920), 73 Ind. App. 383, 127 N. E. 564.

13021. CONTINENTAL LIFE INS. CO. V. ARCHIBALD. Vigo County. *Affirmed.* Nichols, J. March 30, 1928.

Even though the lower court should have sustained a demurrer, this will not be ground for reversal on appeal where the case was actually tried on the merits and the party demurring was not injured thereby. Dissenting opinion by Enloe, J.

12678. DIDDEL ET AL. V. AMERICAN SECURITY CO. ET AL. Montgomery County. *Affirmed.* Per Curiam. March 29, 1928.

Where parties to a transaction enter into a written contract, all prior negotiations, in the absence of fraud or mistake, are conclusively supposed to be merged in the written contract.

12942. EARL PARK STATE BANK, ET AL. V. LOWMON. Warren County. *Affirmed.* McMahan, J. March 27, 1928.

The Appellate Court finds that the answers of the jury to particular interrogatories do not overcome the allegations in the complaint of lack of good faith and the allegations of trust relations in the complaint; hence the verdict of the jury is sustained. There was ample evidence to support the findings of the jury.

12885. ELLIOTT V. KERN, ET AL. Marion County. *Affirmed.* Nichols, J. March 15, 1928.

A sale of stock does not transfer a right of action for damages caused by false representation made to the vendor by the party from whom the vendor purchased.

12976. FLAGG V. RUSSELL. Jasper County. *Affirmed.* Nichols, J. February 23, 1928.

Where the complaint is based on a common law cause of action the constitutionality of a statute that is incidentally involved in the case will not be before the court. If one does not act in the best manner when he is in imminent danger of accident because of the negligence of the defendant, he may still recover for the resulting injury.

13199. FT. WAYNE CORRUGATED PAPER CO. ET AL. V. FORD. Industrial Board. *Affirmed.* Per Curiam, March 13, 1928.

*Per Curiam.*

13089. GENERAL AMERICAN TANK CAR CORP. V. McLAUGHLIN. Industrial Board. *Affirmed.* Thompson, J. February 24, 1928.

In cases where there is an appearance and a contest for compensation before the Industrial Board, it is not necessary for the Board to find specifically that there was, prior to the filing of said application, a "dispute" between the parties.

13007. **HATFIELD v. THURSTON ET AL.** Marion County. *Reversed.* Nichols, J. March 30, 1928.

Where a real estate salesman has secured a purchaser for the vendor and a written contract has been entered into by the vendor and the vendee indicating the amount to be paid to the salesman for his services; the salesman may recover the stipulated amount under section 8048 Burns' 1926, even though the sale is later carried out under a different agreement.

13003. **JACKSON, ET AL. v. WILSON, ET AL.** Porter County. *Rehearing denied.* Nichols, J. March 30, 1928.

Rehearing denied.

13177. **JOHNSON v. COLE.** Industrial Board. *Affirmed.* Remy, C. J. March 28, 1928.

It is legal under a statute for the Industrial Board to award compensation for a temporary partial disability after the compensation for total disability has ceased.

13013. **JOHNSON, ADMRX. v. WABASH VALLEY TRUST CO., ADMR.** Miami County. *Affirmed.* Nichols, J. March 30, 1928.

Where a claim against an estate is filed more than a year after notice of administration, it must be filed at least thirty days after the making of the final report or it is absolutely void. (Sec. 3152 Burns' 1926.)

12803. **KANSAS CITY FLOUR MILLS Co. v. BRICKLEY, ET AL.** Jay County. *Reversed.* McMahan, J. March 29, 1928.

Where a contract provides that merchandise shall be packed and shipped within sixty days upon order of the buyer and the buyer refused to order shipment of part of the merchandise, the seller may recover for breach of contract where there is no ambiguity in the contract to excuse the buyer.

13044. **KUHN v. STEPHENSON.** Hamilton County. *Affirmed.* Remy, C. J. March 7, 1928.

Where a complaint alleged that the defendant alone was guilty of negligence and that an intervening third party was not guilty of negligence, it will be incumbent upon the plaintiff at the trial to prove that the defendant's negligence was the cause of the injury; assuming that third party was not in any way negligent so as to cause the injury.

12991. **LUKEN, ET AL. v. ECKHOFF, ET AL.** Vigo County. *Affirmed.* McMahan, J. March 28, 1928.

Where there is a gift to one for life, remainder to her children, with later provisions for the grand-children to share the estate of the deceased children; the children take vested remainders, not contingent remainders.

12999. **MATTES v. BRUGGNER.** Elkhart County. *Affirmed.* McMahan, J. March 13, 1928.

In the absence of a legal ordinance to the contrary, section 10154 Burns' 1926 requires that every motor vehicle on a public highway must give the right of way to another motor vehicle approaching along an intersecting highway from the right.

13008. MATTHEWS v. THE NEW YORK, C. & ST. L. RAILROAD Co. Allen County. *Reversed*. Nichols, J. March 15, 1928.

Where private detectives are employed by a private corporation in keeping with the Indiana statute for purposes of apprehending a supposed criminal, and these detectives arrest and maltreat an innocent person, without authority from the state officers, the private corporation may be liable for the tortious conduct.

12837. NATIONAL HAME & CHAIN Co. v. ROBERTSON. Jefferson County. *Affirmed*. McMahan, J. March 15, 1928.

The purchaser will be bound to pay for goods "at the price ruling the date of shipment" if it appears that by this expression both vendor and vendee understood that it meant the price which was regularly received by the manufacturer at the time of shipment.

12813. NATIONAL SURETY CO. v. STATE EX REL. RATHBURN. Newton County. *Affirmed*. McMahan, J. March 30, 1928.

When used in a contract of suretyship on an official bond of a bank officer, "honesty" means financial integrity; hence if the bank officer has made loans in violation of the state statutes and in violation of the bank's own directions, and the bank suffers loss thereby, the bank can recover from the surety company on the bond given by the dishonest officer.

12830. NATIONAL SURETY CO. v. STATE EX REL. RATHBURN. Newton County. *Affirmed*. Thompson, J. March 29, 1928.

A president of a bank may not lay aside his duties and obligations as such president and deal with the bank at arm's length in the same way as an individual might do who had no official connection with the bank.

12825. THE PENNSYLVANIA R. Co. v. HOUGH. Clark County. *Affirmed*. Nichols, J. Enloe, J., dissents. March 15, 1928.

Since the Federal Safety Appliance Act, 8 Fed. Stat. Ann. (2d ed.) 1190, sec. 2, expressly requires that "all cars must be equipped with secure sill steps and efficient hand brakes," it is a sufficient allegation of negligence if it is alleged in the complaint that the defendant did not comply with this ruling. Enloe, J., dissents.

13019. PHELPS v. STUTZ MOTOR CAR Co. OF AMERICA. Marion County. *Reversed*. McMahan, J. March 7, 1928.

Where a contract is based upon letters, the terms of the contract must be found from construing the letters together in case they are interdependent.

12985. PHENIS v. STATE EX REL. SHULL. Union County. *Reversed*. McMahan, J. February 24, 1928.

There can be no appeal to the circuit court on a charge of bastardy before the justice of the peace where no judgment at the trial was entered.

12683. RICE v. CALDWELL ET AL. Hancock County. *Affirmed*. Per Curiam. March 8, 1928.

Where there is evidence that is sufficient to sustain the judgment of the trial court and there is no reversible error, the judgment of the trial court will be sustained, even though there was also sufficient evidence to sustain a different judgment, if the jury had so interpreted the facts.

12689. ROBERTSON V. SERTELL. Johnson County. *Affirmed*. Nichols, J. March 9, 1928.

Under Burns' 1926, sec. 9833, a notice of a mechanic's lien may be filed "at any time within sixty days after performing his labor or furnishing such material." If a mechanic's lien is filed against the defendant's interest in the property, this is sufficient.

12940. SCHLENSKER V. STATE. Marion County. *Affirmed*. Thompson, J. March 29, 1928.

Where a vendor who supplies material to the state is charged with irregularities in point of exorbitant prices charged the state and the lack of delivery of certain goods that were ordered, and when it appears that defendant vendor indicated that he felt he was liable for some of these irregularities and joined with the state in agreeing upon a fixed amount to pay in satisfaction of these irregularities; such payment is entirely valid and there can be no recovery because of alleged duress through fear of criminal prosecution. The compromised amount agreed upon was the necessary result of defendant's own failure to keep adequate and accurate books of his dealings.

12908. SEYMOUR IMPROVEMENT CO. V. VIKING SPRINKLER COMPANY. Bartholomew County. *Affirmed*. McMahan, J. March 9, 1928.

Where the defendant is under duty to speak and in fact stands by while he sees the plaintiff injured because of representations made on behalf of or with regard to the defendant, the defendant may be estopped to deny his liability for such injury.

12819. UNION SCHOOL TOWNSHIP OF ST. JOSEPH COUNTY, INDIANA, V. MOON. LaPorte County. *Reversed*. Nichols, J. March 15, 1928.

There can be no recovery on a contract by a board of school trustees providing for attorney's fees unless the contract is duly signed and authorized by the Board.

13127. WALTER ET AL. V. SWANK. Allen County. *Affirmed*. Per Curiam. February 24, 1928.  
*Per Curiam*.

12625. WEITZMANN, EXEC. V. BECKSTEIN, ET AL. Allen County. *Reversed*. Thompson, J. March 14, 1928.  
*Reversed on the authority of Weitzmann v. Weitzmann (12572).*

12572. WEITZMANN V. WEITZMANN, ET AL. Allen County. *Reversed*. Thompson, J. March 14, 1928.

Where a testator uses words that would normally indicate a fee, it may still be held that he created a life interest, if this appears from other parts of the will. The provision granting the power to a legatee to buy a certain property at a fixed price from the beneficiaries under the will is valid, if it does not violate the rule against perpetuities.

13022. WELLS ET AL. V. THE INDIANAPOLIS CO. Marion County. *Reversed*. Nichols, J. March 9, 1928.

Where a loan is made in violation of the petty loan act, sec. 977-9 Burns' 1926, there can be no recovery at all.