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24411. CAPPS V. STATE. Marion County. *Affirmed.* Willoughby, C. J. April 19, 1928.

Whether a defendant may withdraw a plea of guilty and enter a plea of not guilty is a question for the sound judicial discretion of the trial court which will not be considered on appeal in the absence of evidence that this discretion was abused.

24840. COOPER V. FERGUSON WILLIS OIL COMPANY, ET AL. Marion County. *Appeal Dismissed.* Willoughby, C. J. April 17, 1928.

The appointment of a receiver rests in the discretion of the trial court; and he need not appoint a receiver in an improper case even with the consent of all the parties involved.

25341. DAVIS V. STATE. Delaware County. *Reversed.* Martin, J. April 17, 1928.

Section 2751 Burns 1926 is construed to mean that empty vessels which have the odor of liquor about them can be used as evidence of the possession of intoxicating liquor where it appears that there was liquor on the premises apart from that due to the odor only. Thus there must be evidence of possession of intoxicating liquor rather than possession of vessels that have contained intoxicating liquor.

25168. DEIG V. STATE. Vanderburg County. *Affirmed.* Gemmill, J. April 3, 1928.

A bill of exceptions must be duly signed by the judge of the trial court in order to be before the Supreme Court for consideration on appeal.

25503. DUDLEY V. STATE. Sullivan County. *Appeal dismissed.* Willoughby, C. J. April 24, 1928.

It is competent for the legislature to prescribe the time within which appeal must be taken on the decision of the trial court and if the proper notice and completion of the requirements of appeal are not had within the terms of the statute, the appeal is lost (section 2382, Burns' 1926, as amended by Sec. 16, ch. 123, p. 421 of the Acts of 1927).

25161. FEHLMAN ET AL. V. STATE. Newton County. *Reversed.* Myers, J. April 17, 1928.

In a trial for burglary it is not competent for the trial court to admit evidence of a collateral crime merely because it had the collateral effect of proving the crime charged.

24734. HARROD V. STATE. Marion County. *Affirmed.* Myers, J. April 20, 1928.

Where it appears that the complainant has relied upon representations of the defendant to his injury, the defendant may be guilty under the statutory charge of false pretences. (Sec. 2947, Burns' 1926.)

25576. HOBBS V. LUDLOW, ET AL. Rush County. *Reversed.* Martin, J. April 5, 1928.

Where a cause of action arises in a different state this cause of action is subject to the statute of limitations in that state.

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

25159. KENSINGER v. SCHAAL. Vigo County. *Remanded.* Martin, J. April 19, 1928.

A *quo warranto* proceeding to secure possession of a public office does not lie where there is no demand for the office itself apart from its salary or other elements of damage.

25419. ORR v. STATE. Bartholomew County. *Affirmed.* Myers, J. April 24, 1928.

It is for the trial court to grant or deny a petition of defendant to withdraw his plea of guilty and enter a plea of not guilty. Unless it appear that the trial court has abused its discretion in the matter, the question will not be considered on appeal.

24883. SCHULTZ v. STATE. Lake County. *Affirmed.* Myers, J. April 18, 1928.

Upon conviction of keeping a house of ill fame, evidence given by the occupants is competent.

25265. WILST v. STATE. St. Joseph County. *Affirmed.* Martin, J. April 26, 1928.

It is constitutional for the State to fix one-half of one per cent alcoholic content as constitutional in intoxicating liquor and to prohibit the same.

APPELLATE COURT

13157. BERRY-MAY LUMBER CO. v. KING, ET AL. St. Joseph County. *Appeal dismissed.* Remy, C. J. April 26, 1928.

Appeal dismissed on authority of *Court of Honor v. Bankert* (1903), 31 Ind. App. 689, 68 N. E. 1039.

13095. BIGHAM v. NATIONAL BROOKVILLE BANK, Admr. Franklin County. *Affirmed.* McMahan, J. April 19, 1928.

It is not reversible error for the trial court to overrule a motion to strike out the plea. Exceptions to the rulings of the trial court must be served at the time those rulings are made if they are to be available on appeal.

13039. BRUNER v. CHICAGO & EASTERN ILLINOIS RY. CO. Gibson County. *Affirmed.* Nichols, J. April 20, 1928.

In order to recover under U. S. Comp. Stats. 1925, Cumulative Suppl., Sec. 8604a, the complainant must prove that he was the owner of the bill of lading at the time of the injury to the goods complained of.

12980. THE CHAPMAN-STEIN CO. v. LIPPINCOTT GLASS CO. ET AL. Madison County. *Affirmed.* Nichols, J. April 27, 1928.

Where the work done at a factory was not done as part of the actual construction thereof, but was done purely for the purpose of acquiring rights under the mechanic's lien statute, no mechanic's lien attaches.

12669. THE CHESAPEAKE & OHIO RY. CO. v. FULTZ, Admx. Grant County. *Affirmed.* Enloe, J. April 4, 1928.

In order to recover damages for injury received in a railway wreck it is competent evidence to sustain the judgment of the lower court if it appear that the wheels of the train were so "flat" or worn as to make it likely that the train would jump the track.

13052. CITY OF ANDERSON v. REED. Madison County. *Affirmed.* McMahan, J. April 20, 1928.

Whether the complainant at the trial has been guilty of contributory negligence is a question for the jury.

12988. THE CITY OF NEW CASTLE, IND. v. SMITH-JACKSON COMPANY. Rush County. *Affirmed.* Nichols, J. April 27, 1928.

In an action against a city for damage done to goods because of the city water pipes, there may be evidence of negligence in the fact that the water pipes were not constructed as required.

12870. DEUTSCH ET AL. v. SCHMIDT. Lake County. *Affirmed.* Nichols, J. April 27, 1928.

A complaint cannot be challenged for want of sufficient facts to state a cause of action, if this challenge occurs for the first time in the Appellate court.

13236. EVERS ET AL. v. MID-CONTINENT COAL CO. Industrial Board. *Affirmed.* Remy, C. J. April 20, 1928.

Affirmed on authority of *Buckley v. Inland Steel Co.*, (1921) 75 Ind. App. 84, 129 N. E. 860.

13073. MARSHALL FIELD & CO. v. ANDERSON TRUST COMPANY. Madison County. *Affirmed.* Per Curiam. April 19, 1928.

Per Curiam.

13040. FREAS v. CUSTER. Marion County. *Affirmed.* Nichols, J. April 20, 1928.

Under Sec. 418 et seq. Burns' 1926, it must be presumed that the pleadings conform to the evidence that was introduced at the trial and made available before the Appellate court. Hence there can be no ground for objection because of variance between the evidence and the original complaint. Sec. 8045 Burns' 1926 applies only to contracts that are not to be performed within one year from the time of agreement, and does not apply to contracts that may or may not be performed within a year.

13188. GILBERT v. H. C. BAY CO. Industrial Board. *Affirmed.* Remy, C. J. April 3, 1928.

Affirmed on authority of *Johnson v. Cole* (1928), 87 Ind. App. ——, 159 N. E. ——.

12759. HUTTON, ET AL. v. MCGUIRE, ET AL. Lake County. *Affirmed.* Thompson, J. April 20, 1928.

Sec. 9831 Burns' 1926 provides that unless a contract providing against the filing of mechanic's liens shall be duly recorded, such contract shall not prevent the filing of mechanic's liens. It follows that if the parties knew of such an agreement by contract but that this agreement was not duly recorded, it is still ineffective to prevent the filing of mechanic's lien.

12929. KING, ADMR. v. ARNOT. Marion County. *Affirmed.* Remy, C. J. April 19, 1928.

Where a child goes to live with her uncle and aunt under an oral agreement that she shall receive half of their property on their death, it is competent to introduce in evidence as proof of this agreement a letter from the aunt that her family acknowledges the agreement.

13067. MARMON MOTOR CAR CO. v. SPARKS. Industrial Board. *Affirmed.* McMahan, J. April 4, 1928.

A question of constitutionality of any part of the Workmen's Compensation Act can not be decided by the Industrial Board or by the Appellate court; it cannot be raised in a case properly brought before the Industrial Board. The constitutionality of such a statute must be determined by the Supreme court in a case that can be brought before the Supreme court.

13073. MARSHALL FIELD & COMPANY v. ANDERSON TRUST CO. Madison County. *Affirmed. Per Curiam.* April 19, 1928.

Per Curiam.

13009. METZGER ET AL. v. DUNN, ET AL. Hamilton County. *Reversed.* Enloe, J. April 26, 1928.

Under Sec. 1045 et seq. Burns' 1926, the Board of County Commissioners and the city officials are not authorized to issue bonds for the paving of two streets where these streets are authorized under separate resolutions and serve separate purposes.

12951. MONTGOMERY ET AL. v. SOUTHERN SURETY COMPANY OF IOWA, ET AL. Marion County. *Affirmed.* April 20, 1928.

Lumber used for appliances and not as a part of the original contract cannot be made a basis for an action on the original surety's bond covering the construction of a highway.

13087. MURDICK v. CITY OF MUNCIE. Delaware County. *Rehearing denied.* Nichols, J. April 20, 1928.

Usually a later statute, general in its terms, will not repeal an earlier specific statute; but such a later statute may repeal a previous statute if it expressly appear that such universal effect was the intent of the legislature. Thus the court holds that Sec. 10569 Burns' 1926 is controlling in the matter of relief if the appeal has been taken rather than Sec. 10344 Burns' 1926.

12952. NORTHERN INDIANA PUBLIC SERVICE CO. v. BAKER. Industrial Board. *Affirmed. Per Curiam.* April 5, 1928.

Affirmed on authority of *Northern Indiana Gas Co.*, 77 Ind. App. 247, 133 N. E. 393.

13030. NORTON v. FORSHAN. Marion County. *Reversed.* Nichols, J. April 6, 1928.

There can be no objection to the assignment of a conditional sales contract where the complaining party knew of this intention at the time the contract was made.

13242. PIVOT CITY REALTY COMPANY ET AL. v. STATE SAVINGS & TRUST COMPANY, ET AL. Marion County. *Affirmed.* Thompson, J. April 24, 1928.

The substitution of a new note for an old note, where the new note does not involve any valuable consideration under the law, is ineffective to discharge liability on the old one.

13036. PRIEST v. AMOS. Rush County. *Appeal dismissed.* Nichols, J. April 27, 1928.

Appeal dismissed on authority of *Herrick v. Miller et al.*, 123 Ind. 304, 2 Cyc. 641; *Stoner v. Gloystein*, 193 Ind. 614, 140 N. E. 435.

13049. RASCHKA v. CITY OF HOBART, INDIANA. Lake County. *Reversed.* Nichols, J. April 6, 1928.

Where a city of the fifth class has no Board of Public Works citizens may still appeal directly to the courts on matters of special taxes.

12787. SOUTHERN SURETY CO. v. MERCHANTS & FARMERS BANK, ET AL. Noble County. *Rehearing denied.* McMahan, J. April 20, 1928.

The creditor may not without the surety's assent surrender, release, waste, or render unavailable to the surety any securities held by the creditor without affecting the creditor's remedy against the surety; but the surety is discharged on such ground only to the extent to which the creditor has parted with such securities.

12865. TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION CO. v. EVANS. Vermillion County. *Reversed.* Remy, C. J. April 5, 1928.

A street railway conductor is not under duty to warn descending passengers of the normal perils of crossing the street. Unlike a railway company a street car company does not have control of a general right of way where a car runs on the public street.

13032. WALL ET AL. v. ENGSTROM, ET AL. Porter County. *Affirmed.* Enloe, J. April 25, 1928.

It is competent to prove by oral evidence that the deceased made a voluntary deed of land when she was of unsound mind. Under such circumstances, the deed may be set aside and title quieted in the heirs at law.

12982. WASMUTH-ENDICOTT CO. v. RICHARDS. Marion County. McMahan J. *Reversed.* April 5, 1928.

Where there is a sale to a company and an agreement on behalf of the vendor not to bring suit on the claim in consideration of the vendor's agreeing to pay, this claim is collectible if it is not covered by the vendor's bankruptcy action.

12733. ZAHAREK ET AL. v. GORCZYCA ET AL. St. Joseph County. *Petition denied.* Enloe, J. April 4, 1928.

Where the parties fail to set forth verdict of a jury in the abstract of record of appeal, the Appellate court will not consider a motion for a *venire de novo* on the ground that the verdict was "uncertain and indefinite."