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INDIANA DOCKET*

SUPREME COURT

25423. BUSER V. STATE EX REL. RODGERS. Marion County. *Affirmed.* Martin, J. May 29, 1928.

Where counsel do not comply with rule 22 in the preparation of their briefs filed in the Supreme Court and in addition, the briefs are clearly insufficient to present a question for the determination of the court, such briefs will not be considered.

24878. DAVIS V. STATE. Blackford County. *Reversed.* Martin, J. May 18, 1928.

A new trial must be granted where it appears that one of the main witnesses, whose testimony was probably an essential link in the chain of evidence that caused conviction; later swears under oath, giving substantial evidence therefor, that the evidence at the trial was false and that such false testimony was intentionally obtained and used by the prosecuting officer.

24406. FOUST ET AL. v. STATE. Huntington County. *Affirmed.* Willoughby, C. J. May 18, 1928.

Under Sec. 2225, Burns' 1926, a criminal indictment of appellants is not to be held void if the allegations are set forth with sufficient detail and clarity to indicate the crime and the person charged and generally advise the defendant of the nature of the charge made. The rule as to particularity in setting forth an offense is no more in criminal cases than in civil cases.

24884. MATTHEWS V. STATE. Lake County. *Affirmed.* Myers, J. May 11, 1928.

Where there is evidence that a house of ill fame was in operation and that the defendant was connected with its management, then a conviction under the statute of Sec. 2562, Burns' 1926 will be sustained and the court on appeal will not weigh conflicting evidence given at the trial.

25258. NEUENSCHWANDER V. STATE. Wells County. *Affirmed.* Gemmill, J. May 16, 1928.

Although there be an appeal pending it is possible on sufficient evidence to bring such a correction of a record from the trial court which will indicate the defect in the record complained of by appellant.

25180. NEWBAUER 1. STATE. Dekalb County. *Reversed.* Martin, J. May 29, 1928.

Where two acts are passed at the same session of the legislature dealing with the same subject, there is a strong presumption that the act later enacted does not repeal in whole or in part the act first enacted but that both of them are to be given effect. If on the other hand, any parts of such acts are clearly contradictory and irreconcilable then the later act must prevail and be held to repeal the contradictory part of the former

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

act. In keeping with this the majority of the court held that there was an irreconcilable conflict between Sec. 9, ch. 48, Acts 1925, and Sec. 40, ch. 213, Acts 1925; and that the latter, in so far as there was conflict, repeals the former. Martin, J., dissents with an opinion.

24332. ONSTOTT v. STATE. Starke County. *Affirmed.* Willoughby, C. J. May 9, 1928.

Where the appellant contends that the evidence upon which he was convicted at trial was obtained under an illegal warrant, no question is presented for the consideration of the Supreme Court if appellant does not point out wherein the warrant was illegal.

25398. RUEDE v. STATE. Delaware County. *Reversed.* Gemmill, J. May 29, 1928.

Where defendant has been convicted of maintaining a common nuisance under Sec. 2740, Burns' 1926, this conviction will not be sustained if there is no evidence that intoxicating liquor was sold, manufactured or bartered or given away on the premises, and if there is no evidence that persons resorted there to buy or drink intoxicating liquor, and if there is no evidence that intoxicating liquor was kept there for sale, barter, or gift in violation of the statute.

24624. SULLIVAN v. STATE. Delaware County. *Reversed. Per Curiam.* May 9, 1928.

Where appellant was charged with keeping a house of ill fame under the Indiana statute, there cannot be a case unless it appear that appellant managed or rented the house when he knew that it was used for such purpose.

25330. TORPHY v. STATE. Lawrence County. *Affirmed.* Gemmill, J. May 9, 1928.

If a corrected affidavit later secured from the trial court is sufficient to sustain the conviction, the judgment of the trial court will not be disturbed.

25361. ZIMMERMAN v. STATE. Pulaski County. *Affirmed.* Martin, J. May 16, 1928.

An instruction which refers to "home brew" as an intoxicating liquor is unfortunate, but it will not involve reversible error where the evidence established that the liquor known as "home brew" was in fact intoxicating, since it had more than 4.41% of alcoholic content.

APPELLATE COURT

13241. BORYCZKA ET AL. v. BORYCZKA ET AL. Industrial Board. *Affirmed.* Nichols, J. May 11, 1928.

Under Sec. 9483, Burns' 1926, it is provided that "if there is more than one person wholly dependent, the death benefit shall be divided equally among them, and persons partially dependent shall receive no part thereof." This provision covers the instant case even though it may work a harsh result.

13245. BREWER v. CULP. Industrial Board. *Affirmed.* Remy, C. J. May 15, 1928.

Under Sec. 9485, Burns' 1926, it must be held that under no theory is the Industrial Board allowed to exceed the sum in excess of $5,000 on account of injury to an employee; but if the payments fixed by the Board in fact reach a greater sum than this, it is to be regarded as a clerical error which the Board is authorized to correct at any time on its own motion.

12913. BUSINESS MEN'S FINANCE ASSN. v. ROLSIN ET AL. Henry County. *Affirmed.* Thompson, J. May 15, 1928.

"A transferor by delivery of a bill or note payable to bearer or endorsed in blank, being a mere conduit for the transfer of its legal title, incurs no liability on the instrument, and is not responsible if, at maturity it is dishonored."

13094. CHICAGO & ERIE RD. v. RANS. Fulton County. *Reversed.* McMahan, J. May 17, 1928.

Where the defendant is guilty of negligence or not is always a question of fact for the jury; it is error for the court to instruct the jury that the defendant is guilty of negligence as a matter of law in case the jury finds that certain facts alleged in the complaint are true.

13308. CIRTIN v. CIRTAN. Vigo County. *Affirmed.* Nichols, J. May 18, 1928.

The trial court has authority to grant an allowance for attorney's fees and expenses pending an appeal, where it has granted a divorce to the wife and the husband has appealed the decree.

13258. DARK v. GRANT PRODUCE CO. Industrial Board. *Affirmed.* McMahan, J. May 18, 1928.

The findings of the Industrial Board on questions of fact will not be disturbed where there is sufficient evidence in support of them.

13079. INTERSTATE PUB. SERVICE CO. v. MOORE, ADMX. Johnson County. *Affirmed.* Nichols, J. May 18, 1928.

Even though there be contributory negligence in an automobile driver who attempts to cross a railroad track when he sees a train approaching, and even though there be negligence in the railroad company in maintaining a defective crossing, these matters do not bear upon liability if it appears further that the engineer of the train saw the automobile in a helpless condition on the railroad track in time to stop and avoid the accident but did not do so.

13041. MANUFACTURERS DISCOUNT COMPANY v. AMER CAN SECURITY COMPANY ET AL. Fayette County. *Affirmed.* McMahan, J. May 16, 1928.

Where one sells an automobile on a conditional sale contract in the knowledge that the vendor plans to resell the automobile as his own, the original vendor is not protected against a later mortgagee of the automobile who lends his money in good faith and has the mortgage recorded.

13244. THE MAJESTIC COMPANY v. KREIG. Industrial Board. *Affirmed.* Thompson, J. May 10, 1928.

Affirmed on authority of *Republic Iron and Steel Co. v. Markiowica, et al.*, 75 Ind. App. 57, 129 N. E. 810; *Pike County Collieries Co. v. Richeson*, 160 N. E. 54.

13238. MERCER v. BAILEY ET AL. Industrial Board. *Affirmed.* McMahan, J. May 10, 1928.

Whether one is an employee or not within the terms of the Workmen's Compensation Act may be a question of fact for the determination of the Industrial Board. If there is evidence sufficient to sustain the conclusion of the Board on such a question of fact, their finding will not be disturbed by the court.

13071. NESKIRK v. WATSON ET AL. Henry County. *Affirmed.* McMahan, J. May 31, 1928.

A demurrer for defect of parties must designate the proper parties. If the decree of the court does not follow the findings of the court, the proper remedy is a motion to modify the decree and not a motion for a new trial.

13249. ORDEAN, ET AL. v. INLAND STEEL CO. Industrial Board. *Affirmed.* Enloe, J. May 10, 1928.

Where a litigant petitions for the dismissal of a case before the Industrial Board and hence terminates the jurisdiction of the Board in that matter, the same litigant may not later appeal to the courts to have the case reviewed.

12672. PERRINE-ARMSTRONG CO. v. BOLDT. Huntington County. *Affirmed.* Enloe, J. May 12, 1928.

The jury should consider only the evidence that is pertinent to the allegations in the complaint in its determination of liability, but if the instruction of the court allows the jury to consider all the evidence submitted, and all the evidence actually submitted, was directed to the allegations in the complaint, there is no reversible error.

12860. SALVATION ARMY, INC., v. ELLERBUSH, ET AL. Gibson County. *Affirmed.* McMahan, J. May 15, 1928.

If the goods of the tenant are injured through the negligence of the landlord there may be recovery even though a later agreement made by an alleged agent of the landlord with respect to the rights of the tenant was not binding on the landlord.

13254. SCHOOL CITY OF RUSHVILLE v. GREGG. Industrial Board. *Affirmed.* *Per Curiam.* May 11, 1928.

Per Curiam.

12986. SECURITIES UNDERWRITERS, INC., v. ROUSCH MOTOR COMPANY. Vigo County. *Affirmed.* McMahan, J. May 11, 1928.

An insurance company is liable under a policy of automobile assurance, even though the injury involved occurred through the violation of a criminal statute, unless it clearly appears that such violation was expressly or impliedly a defense to liability under the terms of the policy itself.

13056. STERNE ET AL. v. FLETCHER AMERICAN COMPANY PEOPLES STATE BANK. Marion County. *Affirmed.* Nichols, J. Remy, J., dissents. May 11, 1928.

Under Sec. 4822 et seq., Burns' 1926, a corporation which has completed the filing of its papers with the Secretary of the State in accordance with the statute is a corporation *in esse* and is capable of entering into contracts and incurring corporate liabilities, even though it has not yet complied with Sec. 4842, Burns' 1926, in the matter of filing papers in the local county and even though it has not complied with the requirements that are essential to its existence as a corporation *de jure*.