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INDIANA DOCKET*

SUPREME COURT

25369. ABEL v. STATE. Monroe County. *Affirmed.* Gemmill, J. Willoughby, J., concurs in conclusion. October 4, 1928.

In prosecution for possessing and manufacturing intoxicating liquor, search warrant is held not invalid where it was not claimed that description did not cover real estate of which defendant had possession, but defendant claimed that owner of land named in affidavit owned two farms two or three miles apart and that evidence did not show which of two farms was searched. In prosecution for manufacturing liquor under Acts 1925, c. 48, sec. 4 (Burns' Ann. St. 1926, sec. 2717), word "manufacture" means not only to produce or create, but covers active efforts and means employed to make liquor.

25452. ANDERSON v. STATE. Elkhart County. *Affirmed.* Martin, J. June 7, 1928.

No error in overruling appellant's motion for a new trial based on "accident or surprise which ordinary prudence could not have guarded against" and "newly discovered evidence." The surprise was not such as "ordinary prudence could not have guarded against," and granting a new trial on ground of newly discovered evidence is within the ordinary discretion of the trial court.

25226. BAKER v. STATE. Noble County. *Reversed.* Martin, J. October 24, 1928.

To support a conviction on a charge of theft of property other than money, the money value must be proved.

25346. THE BALTIMORE, ETC., R. CO. v. CARROLL, ADMX. Jennings County. *Affirmed.* Martin, J. October 2, 1928.

In a personal injury case Federal Employers' Liability Act (45 U. S. C. A., sec. 5159) eliminates entirely defense of contributory negligence in cases where violation by carrier of any federal statute enacted for safety of employees proximately contributed to injury, and whether deceased assumed risk of being injured, in view of all circumstances of case, is question for jury under proper instructions.

25217. CADWELL ET AL. v. TEANEY, ET AL. *Petition denied. Per Curiam.* June 21, 1928.

On petition for writ of certiorari to the Supreme Court of United States.

25555. COGER v. STATE. Marion County. *Affirmed.* Gemmill, J. October 24, 1928.

The appellant having been convicted of unlawfully selling intoxicating liquor on the uncorroborated testimony of a seventeen year old prosecuting witness, case being tried by the court without a jury, the credibility of the witness was a matter to be determined by the trial court.

25591. DENNY ET AL. v. BRADY. (The Muncie Bus Case.) Delaware County. *Reversed.* Martin, J. October 25, 1928.

Sec. 1, ch. 122, Acts 1925, sec. 10175 Burns' 1926, (sec. 5, ch. 46, Acts 1925, 10168 Burns' 1926) extending the corporate power of street, inter-

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

urban and steam railroad corporations to include the power to acquire, own and operate motor vehicles for the transportation for hire of passengers and freight not merely grants this privilege to the class of companies named but actually construes the power already granted to all such companies to include such privilege. Muncie is within that class of cities from which the grant of power to the Public Service Commission over local busses as common carriers was excluded and consequently the city ordinance is not invalid because it regulates service, fixes rates and controls competition.

25270. FLEENOR v. STATE. Grant County. *Reversed.* Travis, J. June 26, 1928.

It is a well settled rule that one who seeks to degrade a witness or to impair his credibility as such, by answers to questions which are collateral to the issue on trial, is bound by the answers made to his questions and may not contradict such answers by propounding the same questions to other witnesses who will, by their answers, deny the answers gained upon such cross-examination. It is not necessary for the bill to contain all of the evidence given in the cause or proceeding, unless the decision of the court or verdict of the jury shall be called in question as being contrary to law or not sustained by sufficient evidence.

25458. GARGAS v. STATE. Lake County. *Reversed.* Travis, J. June 1, 1928.

The evidence was not sufficient to sustain the finding of guilty for having unlawfully maintained a house, etc., where intoxicating liquors were manufactured, etc., in violation of the law.

25397. HALL v. STATE. Marion County. *Affirmed.* Martin, J. June 19, 1928. Myers, C. J., and Willoughby, J., concur in conclusion.

There was no error in admitting a conversation of appellants' co-defendant in view of the record which shows that it was admitted only as against the other defendant; the same being true as to alleged conversations with such other defendant. The court will take judicial notice that alcohol is a spirituous liquor and intoxicating; whether defendant comes within the class of persons authorized to possess or transport alcohol for a lawful purpose is a matter of defense.

25126. HAMER v. STATE. Gibson County. *Affirmed.* Martin, J. October 5, 1928.

An indictment is not invalid which is signed by a duly appointed deputy or assistant prosecutor and an information may be signed by a deputy or assistant prosecutor.

25594. HAMMOND v. STATE. Rush County. *Affirmed.* Gemmill, J. October 25, 1928.

The fact that a witness' testimony differs from that given on a former trial does not change the rule that credibility of a witness is for the jury and the trial court. That "the judgment is not fairly supported by the evidence" is not a statutory cause for a new trial.

25634. HITT ET AL. v. CARR ET AL. Laporte County. *Affirmed. Per Curiam.* July 13, 1928.

Suit to restrain and enjoin the assertion of any right of title, interest, or claim to certain land and to obtain relief from a judgment quieting title.

The case turned on questions of competency and admissibility of evidence and the opinion must be read in full to understand the questions involved.

25673. JONES V. STATE EX REL. SMOCK ET AL. Vigo County. *Affirmed. Per Curiam.* October 22, 1928.

When the Board of County Commissioners sits as a tribunal to try an election contest, the statute fixes the life of this tribunal as 20 days, and no longer, and the tribunal itself expires at the end of that period of time, and with it the cause of action before it.

25278. KLYSZ V. STATE. St. Joseph County. *Reversed.* Martin, J. June 1, 1928.

Conviction on a count for maintaining a common nuisance was not sustained by evidence; there can not be a conviction on mere suspicion. And while it was competent to prove the general reputation of a place alleged to be a common nuisance, the statute does not provide and the court could not hold that evidence of bad reputation alone is sufficient to establish the existence of a common nuisance.

24527. RANDOLPH V. STATE. Delaware County. *Affirmed.* Willoughby, J. Travis, J., concurs in conclusion. July 20, 1928.

Specifications of plea in abatement that grand jury was not qualified to serve as such and return indictment charging public offense, nor legally authorized to investigate alleged commission thereof, and was not organized as required by law, held insufficient as stating mere conclusions and opinions of pleader as to validity of law under which grand jurors were drawn, and specifications of plea in abatement that petit jury was improperly drawn and that it was drawn by clerk need not be considered; such jury having nothing to do with indictment.

24695. SPROUT V. CITY OF SOUTH BEND, INDIANA. St. Joseph County. *Reversed. Per Curiam.* June 20, 1928.

An order in judgment of Supreme Court of Indiana affirming judgment of the St. Joseph Circuit Court (153 N. E. 504, 154 N. E. 369) is set aside and annulled on order of the Supreme Court of the United States.

24632. STATE V. BLYSTONE. Clinton County. *Affirmed.* Myers, C. J. June 28, 1928. Martin and Gemmell, JJ., dissent with opinion.

The issue presented on appeal was whether the search warrant was issued on probable cause on the authority of *Wallace v. State*, 157 N. E. 657. The Supreme Court holds that the affidavit of the police officer did not show probable cause for issuing the search warrant.

25147. STATE V. SHUMAKER. Original Action. *Rehearing denied.* Myers, C. J. Martin and Gemmill, JJ., concur in part. October 18, 1928.

Supplemental opinion denying rehearing. For former opinion, see 157 N. E. 769. Separate opinion by Martin in which Gemmill concurs.

25520. STATE EX REL. HOGUE V. SLACK. Marion County. *Affirmed.* Willoughby, J. Myers, C. J., concurs in result, Travis, J., dissents. July 27, 1928.

When new city comptroller was appointed by newly elected mayor and former comptroller relinquished as city comptroller, and city council appointed mayor on disqualification of elected mayor, former city comptrol-

ler could not maintain *quo warranto* proceedings under Burns' Ann. St. 1926, secs. 1208, 1209, 1212, against council's appointee, on ground that elected mayor was incompetent to appoint city comptroller and that former comptroller continued to hold office.

25584. STATE EX REL. HOLMES V .SLACK ET AL. Marion County. *Affirmed.* Travis, J. July 20, 1928.

Under Acts 1905, c. 129, sec. 45, as amended by Acts 1909, c. 188 (Burns' Ann. St. 1926, sec. 10276), provision that city comptroller "shall act as mayor" in case of vacancy and shall appoint another "to act as comptroller" contains words of limitation, and provision that, in event of death, resignation, etc., of comptroller, council shall designate one of its members to "act as mayor pro tempore," refers to comptroller "acting as mayor," and hence on death, resignation, or disability of comptroller while acting as mayor council may fill vacancy. And such section also provides the term of office of city comptroller, appointed by one who had succeeded to office of mayor by virtue of being city comptroller when elected mayor resigned, expired with resignation of comptroller who appointed him.

25547. STATE EX REL. LADD V. WALTERS. Adams County. *Reversed.* Martin, J. July 20, 1928.

Under Acts 1905, c. 169, secs. 81, 83 (Burns' Ann. St. 1926, secs. 2111, 2113), as amended by Acts 1927, c. 132, secs. 1, 3, it is incumbent on justice's court to prepare and certify transcript on appeal from conviction for misdemeanor and to transmit it together with all necessary papers and documents to criminal or circuit court as requested by appellant.

25246. STATE EX REL. ZINK V. HOGGATT. Washington County. *Affirmed.* Gemmill, J. October 24, 1928.

A demurrer to a complaint in a *quo warranto* proceeding was properly sustained when the complaint alleges that in an election the appellant received 156 votes and that W received 174 votes and that W was ineligible for the office because of the fact that he was insane and had been legally declared insane by the circuit court; and further alleged that the appellee, the prior elected trustee and incumbent of the office, refused to surrender the office to appellant who had duly qualified for the same.

24431. STROUP ET AL. V. FERGUSON, TRUSTEE, ET AL. Tipton County. *Affirmed.* Travis, J. June 7, 1928.

Affirms judgment in a proceeding to repair a public drain.

25227 (See 25230). STUCK ET AL. V. TOWN OF BEECH GROVE ET AL. Shelby County. *Reversed.* Martin, J. October 25, 1928.

The trial court erred in deciding that the cause was *res judicata* by reason of the prior suit by the same parties in the Marion Superior Court. See No. 25230. The trial court erred in not permitting appellants to introduce evidence on the issue of the reasonableness of the ordinances. See opinion for full discussion of the merits of the case.

25230 (See 25227). STUCK ET AL. V. TOWN OF BEECH GROVE ET AL. Marion County. *Affirmed.* Martin, J. October 25, 1928.

The appellants sought to enjoin appellees from enforcing ordinances, not upon the ground that the ordinances were unreasonable, but on the

alleged ground that they encroached on the jurisdiction of the Public Service Commission. The points and authorities cited by appellants go only to unreasonableness of the ordinances which was not an issue under the pleadings. The failure of the appellee to file his brief does not require a reversal, and the discretionary power of the courts to reverse the judgment in such a case should not be exercised unless the appellant's brief makes an apparent or *prima facie* showing of reversible error.

24506. TOSSER v. STATE. Vigo County. *Affirmed.* Willoughby, J. June 19, 1928.

An affidavit charging grand larceny and filed in Vigo County and alleging that the property was stolen in Knox County and brought into Vigo County is good against a motion to quash as each removal of the property to a new county operates as a new taking under the law to make it a larceny in the county to which it is taken, and appellant could be prosecuted in Vigo County.

25331. WALKER v. STATE. Vanderburgh County. *Affirmed.* Martin, J. October 9, 1928.

In the trial the defendant, to sustain his objection to the testimony of searching officers, introduced evidence which proved that there was not a showing of probable cause for the issuance of the search warrant, but made no attack upon the search warrant by motion to quash or other pleading. But since it appears from the record (1) that the defendant at the trial disclaimed ownership or control of the premises, and (2) that other evidence in the record independent of that obtained by the search is sufficient to sustain defendant's conviction, it is unnecessary to consider the question of whether, without a formal attack upon the search warrant, its validity may be determined upon objection to testimony obtained by aid thereof.

24920. WEBER v. REDDING ET AL. Wells County. *Affirmed.* Travis, J. October 23, 1928.

A decree awarding the custody of a child in a divorce proceeding where the defendant is a non-resident and does not appear, and there is substituted service only, and the child is not within the jurisdiction of the court when decree is rendered, is void. And even if the decree of custody were valid the court of this state in which the child is domiciled has the judicial power, on a change of circumstances, to make a new disposition of the child; the welfare of the child being of first consideration and the whole matter resting rather upon sound judicial discretion than upon hard and fast rules of law.

24972. WIERNASICIWICZ v. STATE. Porter County. *Affirmed. Per Curiam.* June 20, 1928.

The record is not in compliance with rules 3 and 22 of the Supreme and Appellate courts. Failure to comply with the fifth clause of Rule 22, in that there are no propositions, points, or authorities to support either of the assignments of error, is held to be a waiver of questions not thus supported.

APPELLATE COURT

13096. ANSPACH v. BEYER. Howard County. *Affirmed.* Nichols, C. J. July 20, 1928.

When record failed to show that any exception was taken to court's ruling overruling objection to admission of evidence, but assignment merely asserted court erred in permitting witness to testify to profits, nothing was presented for consideration by Appellate Court.

13164. ARMSTRONG v. REMINGTON. Marion County. *Affirmed.* Nichols, C. J. October 5, 1928.

The care and custody of children is generally left to the sound discretion of the court. The trial court having heard the evidence, and having seen the party, and having had an opportunity to know the surroundings, the reviewing court cannot say that there has been any abuse of discretion.

13114. THE BALTIMORE AND OHIO SOUTHWESTERN RD. CO. v. DICKEY. Lawrence County. *Affirmed.* Nichols, J. October 25, 1928.

The only question presented was alleged error in the instructions. The jury was well instructed as to the law of the case.

13270. BISHOP v. INTERNATIONAL SUGAR FEED COMPANY. Industrial Board. *Affirmed.* Remy, J. June 20, 1928.

A general appearance by a foreign corporation before the Industrial Board does not confer judgment to award compensation.

13360. BITTROLFF v. PEARSON PIANO COMPANY, Marion County. *Affirmed.* Enloe, P. J. June 7, 1928.

Motion for new trial was overruled and 90 days given within which to present and file bill of exceptions on the evidence. The record disclosed that the bill of exceptions was presented to the trial judge, signed by him and filed with the clerk as a bill of exceptions on the 91st day after the motion for the new trial was overruled. There was no extension of time and the bill is not, therefore, a part of the record in this case and cannot be considered.

13077. BOOKER v. DEANE ET AL. Knox County. *Affirmed.* Thompson, J. October 24, 1928.

Will construed to give the widow the power to convey the real estate only for her own use and benefit.

13136. CHANEY v. CAVINS, ADMR. Greene County. *Affirmed.* McMahan, J. October 5, 1928.

Where bill of exceptions was not filed within time granted therefor, and application for extension of time was granted without notice to opposite party of presentation or hearing of application, evidence incorporated in bill of exceptions filed within period provided for by extension was not properly in the record.

13282. CHAVEZ v. UNIVERSAL PORTLAND CEMENT COMPANY. Industrial Board. *Affirmed.* Remy, J. August 30, 1928.

Affirmed on authority of *Radanovic v. Vermillion Coal Co.* (1925), 83 Ind. App. 555, 149 N. E. 182.

13097. THE CHESAPEAKE AND OHIO RY. CO. v. RUSSO, ADMR., ETC. Grant County. *Affirmed.* Enloe, P. J. October 24, 1928.

One working as water boy for a section and repair gang engaged in repairing steel rails upon the main line of a railroad which is a part of an interstate railroad, is engaged in interstate commerce work.

13075. CHICAGO AND EASTERN ILLINOIS RY. CO. v. WELLS. Vanderburgh County. *Affirmed.* McMahan, J. July 19, 1928.

Where record on appeal shows that time beyond the term, for presenting bill of exceptions, which was not filed at term of court at which motion for new trial was overruled, was not given until day subsequent to day on which motion for new trial was overruled, the evidence was not in the record, since extension of time was granted too late.

12956. THE CLEVELAND, CINCINNATI, ETC. RY. CO. v. CROSS, ET AL. Boone County. *Reversed.* McMahan, J. June 26, 1928.

Suit to quiet title. Where a railroad company surveyed and took possession of a right of way across land of C and constructed a railroad thereon and operated it for 70 years, there being no deed of conveyance, the railroad company's interest was a right of way in the nature of an easement acquired only for the purpose of the railroad. And when the railroad was abandoned and removed from the strip of land subject to the right of way the land was discharged of that burden.

When the deed conveying land to a railroad company provided that "said conveyance is upon the express condition that said railroad company shall keep and maintain," etc.; and further provided "that said railroad company shall not themselves use said ground permanently nor suffer persons permanently to use it for any other purpose not connected with the railroad," such tract of land was conveyed to the railroad upon a condition subsequent. But, on the authority of *Sheets v. Vandalia Rd. Co.*, 74 Ind. App. 610, keeping the land and maintaining the same for the uses set forth in the deed for a period of 70 years constitute substantial compliance with such condition subsequent.

13092. COLLINS v. CALE. Blackford County. *Affirmed.* Thompson, J. July 19, 1928.

The only question presented was sufficiency of the evidence to sustain the decision of the court. It seems there was evidence in the record to sustain the decision. Judgment affirmed.

13103. CONKLIN v. BEDEL MFG. CORP. Grant County. *Reversed.* Nichols, C. J. July 20, 1928.

Where contract for sale of car load of lumber of "No. 2 common and better" did not specify that it should contain any firsts and seconds or particular percentage of Nos. 1 and 2 common, which seller's agent said it probably would contain, and seller expressly declined to guarantee any percentage of each grade, buyer was not justified in relying on seller's statements as to probable contents.

13151. COX ET AL. v. HARWOOD AUTOMOTIVE COMPANY. Grant County. *Affirmed.* McMahan, J. October 24, 1928.

Affirmed on authority of *McKee v. Harwood Automobile Co.*, — Ind. App. —, 162 N. E. 62.

13072. DEMPSEY v. CHICAGO COLISEUM CLUB. Marion County. *Appeal Dismissed. Per Curiam.* June 29, 1928.

Since it appeared from the record that the injunction in question expired by its own limitations with the passing of the month of September, 1926, it had become a mere moot question whether the facts justified the issuance of the order, and the appeal was dismissed.

12816. DIAMOND v. CLEARY. Lake County. *Affirmed.* Enloe, P. J. June 19, 1928.

It was not error for the trial court to overrule a demurrer the basis of which was that the averment of the complaint restricted the remedy of the appellee to an application to the Industrial Board for an adjustment of compensation, since the complaint directly averred that the appellant had not done either of the things expressly required by section 68 of the Workmen's Compensation Act; and by reason of such failure the appellee had the election given him by section 69 of said act to ask for compensation or to bring an action at law. Under the averment of the complaint the court had jurisdiction of the subject matter of the case.

13165. ECKART v. ECKART, EX'R. Allen County. *Affirmed.* McMahan, J. October 23, 1928.

The birth of an illegitimate child, recognized by testator as his child, did not affect the testator's will made before the birth of the child, as it is only the birth of a legitimate child that invalidates a will under the statute.

13048. FIDELITY LIFE AND ACCIDENT INS. CO., ETC., v. VANDEVER. Marion County. *Affirmed. Per Curiam.* June 29, 1928.

Per Curiam.

13131. FORRESTER v. SOMERLOTT ET AL. Steuben County. *Affirmed.* Nichols, C. J. October 11, 1928.

In action for injuries to pupil received by the overturning of school hack in which she was passenger, demurrer of school township properly sustained and evidence sufficient to sustain jury's verdict for other defendants.

13057. CITY OF FRANKFORT, INDIANA, v. SLIPHER. Tipton County. *Affirmed.* McMahan, J. June 19, 1928.

This is an action by appellee, owner of a farm, against the city of Frankfort to recover damages due to pollution of a stream with sewage. The court denies the contention of the city that, conceding that an individual did not have such a right to pollute the stream, it is exempt, and that the law provides for special remedy as against a city.

13083. CITY OF GARY v. PROTT ET AL. Lake County. *Affirmed.* Nichols, C. J. June 7, 1928.

Affirmed on authority of *City of Gary v. Roper* (decided at this term), — Ind. App. —, — N. E. —.

13084. CITY OF GARY v. ROPER. Lake County. *Affirmed.* Nichols, C. J. June, 1928.

An action for the purpose of reducing an assessment for the construction of a sewer is controlled by sections 10344 *et seq.* Burns' 1926 as to methods of taking an appeal and as to procedure on appeal. Where the

only defect in the original complaint was a request for an improper method of obtaining proper relief there was no need of filing an amended complaint; amended complaint correcting this defect does not state a new cause of action and relates back to the time of the signing of the original complaint.

12902. GENERAL PARTS CORPORATION v. FIRST TRUST & SAVINGS BANK ET AL. Howard County. *Affirmed.* Remy, J. June 6, 1928.

A mortgage on real estate "together with all buildings, machinery, tools and apparatus (the same being hereby declared to be fixtures) now located or hereafter located or erected thereon," covers not only machinery, tools and patterns, but also tool steel, polishing brushes, and pattern lumber, "apparatus" being sufficiently comprehensive to include all the foregoing items. The tool steel, brushes and pattern lumber were made fixtures by agreement of the parties to the mortgage; but the agreement between the parties as to what should be regarded as fixtures had no application to polishing brushes acquired after the manufacturing plans had passed out of the hands of the mortgagor.

12987. GLOBE MINING COMPANY v. OAK RIDGE COAL COMPANY. Boone County. *Affirmed.* McMahan, J. June 28, 1928.

In a former appeal from the Marion appellate (79 Ind. App. 76) appellant secured a reversal of trial court's refusal to set aside a judgment; the purpose of setting aside the judgment being to enable appellant to file motion for a new trial. The court says there was no evidence to show that the judgment was in fact erroneous on the evidence at the original trial and holds that if there is no showing of error in the first trial there is a presumption that the first judgment was correct. "And in accordance with the universal rule that a court of equity will not grant relief from judgments entered in a court of law without some showing of grounds for equitable relief, we are compelled to hold there was no error in overruling appellant's motion for a new trial."

13296. HILL v. STARCO COAL CO. Industrial Board. *Affirmed.* Thompson, J. October 3, 1928.

Where there is some evidence to support the finding, award will not be disturbed on appeal from the Industrial Board.

12891. HORNER ET AL. v. BOOMERSHINE. Elkhart County. *Affirmed.* Enloe, P. J. June 5, 1928.

Where it is stipulated in the trial that decedent left no legitimate children or their descendants, nor parents surviving, the appellee had burden of showing that she was the illegitimate daughter of decedent and that he had recognized her as such. There was no error in permitting the surviving husband of appellee's deceased mother to testify that she had often told him that appellee was the daughter of the decedent. There was no error in excluding a signed statement by a third person, delivered to the decedent, stating that such third person was the father of appellee.

13192. HUNTER v. HARRELL ET AL. Shelby County. *Affirmed.* Remy, J. October 24, 1928.

The law is settled in this state that relief from a domestic judgment obtained through the unauthorized appearance of an attorney must be

sought in the original cause by an application therein for a stay of proceedings and a hearing upon the merits.

12970. CITY OF HUNTINGBURG v. MORGEN. Spencer County. *Affirmed.* McMahan, J. June 29, 1928.

Distinguishes between the liability of a city for default or negligence of the city's employees in supplying water for the purpose of fire protection and supplying water for daily consumption. There is nothing in the Public Utility Act that destroys the common law liability of a municipality in an action of this character.

13287. INDIANA LIMESTONE CO. v. STOCKTON. Industrial Board. *Affirmed.* Enloe, P. J. October 3, 1928.

Where appellee had suffered an injury which necessitated the removal of his right eye the Industrial Board did not err in awarding 50 weeks compensation on the distinct ground that it was a disfigurement of such a character that his opportunity for future usefulness and earning capacity were thereby impaired, in addition to the award for the specific injury caused by the loss of the sight of his right eye.

13325. INLAND STEEL CO. v. LARA ET AL. Industrial Board. *Affirmed.* Remy, J. October 2, 1928.

Affirmed on authority of *Buckley v. Inland Steel Co.* (1921), 75 Ind. App. 84, 129 N. E. 860; *Indiana Portland Cement Co. v. Frasier* (1927), 86 Ind. App. 406, 158 N. E. 249.

13295. JOHNSON ET AL. v. LEWIS. Industrial Board. *Affirmed.* Remy, J. October 5, 1928.

The Industrial Board was correct in limiting an award to the children of the deceased to the amount fixed by divorce decree, by the terms of which the deceased had been ordered to pay a specified sum weekly for their support.

13134. KENDALLVILLE LUMBER CO. v. BURGER ET AL. Noble County. *Affirmed.* Remy, J. August 29, 1928.

Where defendant building contractor had two accounts with plaintiff for materials furnished him in building houses, and where a payment was made with no direction as to which account it should be applied and plaintiff applied it to one only, and so notified the party for whose home the materials were furnished, and later by agreement between the contractor and plaintiff, it was transferred to the other account, and subsequently plaintiff transferred it back, without knowledge or consent of contractor, it was held that by mutual consent of debtor and creditor, it being right of debtor to direct application of payment, the first transfer was proper, and precluded plaintiff from again transferring it without debtor's consent.

13004. KRITZ v. MOON. St. Joseph County. *Reversed.* McMahan, J. October 3, 1928.

Where option to purchase contained provision for allowance for improvements made by lessee, assignee of option, on lessor's refusal to accept offer of assignee, was not entitled to allowance for improvements made by lessee, since the measure of damages would be difference between value of land as fixed by option and value at time of refusal to perform, and where option

to purchase contained in lease provided for allowance of credit for improvements made by lessee, it was held that painting and papering house, etc., constituted "repairs" as distinguished from "improvements" and credit could not be claimed for them on acceptance of option.

12981. LEIKAUF ET AL. V. GROSJEAN. Allen County. *Affirmed.* McMahan, J. June 29, 1928.

The word "decision" as used in the statute designating the grounds upon which a new trial can be had refers to the findings of a court and not to the judgment or decree. If the judgment does not follow the findings the remedy is by a motion to modify the judgment so that it will correspond with and follow the findings, and not by motion for a new trial.

13080. LEVERING ET AL. V. LEVERING. Benton County. *Affirmed.* Remy, C. J. July 20, 1928.

Although a will gave testamentary trustee power to sell and convey real estate devised in trust, it did not necessarily imply that the entire fee-simple estate in realty was vested in trustee absolutely, notwithstanding use of words "in fee simple," since devisee of life estate in lands, coupled with power to sell and convey, may convey the fee.

13046. CITY OF LOGANSPORT V. GOTHER. Cass County. *Reversed.* Nichols, C. J. October 25, 1928.

Where a city contracted for a tile drainage ditch on the petition of the property owners whose lands would be affected, and assessed the lands for its construction, the same not being used as a city sewer, the city has no duty of supervision or repair and is not liable for damages resulting because of the subsequent condition and operation of the drain.

13125. MARMON MOTOR CAR COMPANY V. MAYER. Marion County. *Affirmed.* Nichols, C. J. October 5, 1928.

There was no question as to the sufficiency of the evidence, no contention that the damages were excessive and the court says that the objections to instructions were captious rather than meritorious.

13116. MCNAIR V. PUBLIC SAVINGS INS. CO. OF AMERICA ET AL. Jackson County. *Reversed.* McMahan, J. October 25, 1928.

Where the evidence shows that the appellant was informed it would be necessary for her to sign a mortgage as the wife of the mortgagor, and that she signed as such in order to release her inchoate interest and not otherwise, and when the only possible inference is that an insertion of a provision to the effect that the appellant should pay the debt was by mistake or by fraud on the part of the appellee, equity will grant relief.

13298. MILLER V. ELGIN, JOLIET & EASTERN RD. CO. Industrial Board. *Affirmed. Per Curiam.* July 18, 1928.
Per Curiam.

13318. MOORE ET AL. V. COPELAND. Industrial Board. *Affirmed.* Remy, J. October 10, 1928.

Award of Industrial Board affirmed against the employer of the injured workman and also against the owner of the building, who contracted with the employer for the performance of work without having exacted from him an employer's certificate as provided for by the Compensation Act.

13319. MOORE ET AL. V. SMILEY. Industrial Board. *Affirmed.* Thompson, J. October 10, 1928.

Affirmed on authority of *Moore et al. v. Copeland,* decided October 10, 1928.

13087. MURDICK V. CITY OF MUNCIE, INDIANA. Delaware County. *Affirmed.* Nichols, C. J. June 7, 1928.

Assessment levied by a board of public works against real estate for the construction of a general sewer. Chapter 143, Acts 1919, p. 635 (sec. 10344 *et seq.* Burns' 1926), while not affecting relief or procedure in the proceedings before boards or councils, or such relief on appeal, does provide an exclusive method of appeal and procedure thereafter in the circuit and superior courts of the state, supplanting all other methods of appeal and procedure, except as was then allowed under chap. 140, acts 1919. Court corrects erroneous statement made in the *City of Peru v. Kreutzer,* 86 Ind. App. 16, 153 N. E. 420, 155 N. E. 515.

13047. NEW YORK CENTRAL RD. CO. V. SOLOMON, ADMX. St. Joseph County. *Reversed.* Nichols, C. J. June 7, 1928.

In ruling upon a motion for judgment on answers to interrogatories notwithstanding a general verdict, the court will look only to the pleadings to justify sustaining the motion; but the conflict between such answers and the general verdict must be such that it could not be overcome by any evidence admissible under the pleadings. In view of the answers to the interrogatories it could not be said that the railroad company was guilty of negligence in operating their train, or that there was negligence in failing to make proper warning of the approach of the train.

13118. THE NOBLE COUNTY BANK ET AL. V. WATERHOUSE. Noble County. *Reversed.* Nichols, C. J. October 11, 1928.

Where mortgage executed by husband and wife recited that mortgagors expressly agreed to pay mortgage debt, held that, even if wife merely became surety for husband who was principal debtor, judgment for deficiency on foreclosure of mortgage constituted lien on realty owned by mortgagors by entireties, under Acts 1923, c. 63, (Burns' Ann. St. 1926, sec. 8738 *et seq.*), and wife could not thereafter maintain suit in equity to enjoin sale of tracts owned by entireties to satisfy foreclosure judgments.

12709. PHILBIN ET AL. V. CARR ET AL. Laporte County. *Reversed.* Nichols, C. J. June 29, 1928.

On a former appeal of this case (*Philbin v. Carr,* 75 Ind. App. 560, 129 N. E. 19), the appellate court determined from the evidence in the record that the appellants were the holders of the legal title to the land. It was error for the trial court during the second trial, without change in the evidence, to allow the jury to consider the question of title since the previous decision of the appellate court respecting the appellant's title became the law of the case and "as such was binding upon the court in the trial upon which this appeal is now prosecuted as well as upon us in our present consideration of the case."

12633. PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RD. CO V. HOFFMAN. Delaware County. *Petition denied.* Willoughby, J. July 12, 1928.

Under section 1, art. 7 of the Constitution of Indiana, as amended March 14, 1881, the legislature was given power to create the Appellate court,

and the act approved March 12, 1901, concerning appeals, increasing the number of judges of the Appellate court, as amended by subsequent acts, except the act of 1911 and the act of 1913, each of which was held to be unconstitutional by this court except sec. 3 of the act of 1911, is a valid act and in full force and effect at this time; and under sec. 4, art. 8, of the Constitution of Indiana, the legislature has abolished writ of error and provided that the only method by which the proceedings of a trial court can be reviewed is by appeal as provided by statute.

12920. POWELL ET AL. v. TOTTEN ET AL. Decatur County. *Affirmed.* Enloe, P. J. July 20, 1928.

Chattel mortgagees, not acknowledging and recording mortgages, as required by Burns' Ann. St. 1926, sec. 8055, cannot assert their lien as against creditors giving something of value for execution of assignment by mortgagor, in absence of showing that the creditors had notice or knowledge of mortgage lien.

13059. RAILROAD SCHOOL TOWNSHIP, STARKE COUNTY, INDIANA, ET AL. v. CHRISTENSEN. Starke County. *Affirmed.* Nichols, C. J. October 25, 1928.

Where there is an appointment of a judge *pro tem* for a definite term of court the term of the *pro tem* judge ends at the expiration of that term of court just as it would have expired had he been elected to serve for a definite period or term, but if the judge *pro tem* at a subsequent term assumes further jurisdiction of an undetermined cause without objection by the parties to his authority, they thereby waive any objection to his continuing jurisdiction.

13102. SABAUGH *v.* SCHRIEBER ET AL. Fulton County. *Reversed. Per Curiam.* June 27, 1928.

When one who has contracted to convey land has put it out of his power to perform he is not in a position to ask that a court of equity come to his aid and declare forfeiture or cancellation of the contract which he himself has breached. The other party is entitled to recover back all money paid on account of said purchase and all money spent for permanent improvement placed thereon while in actual possession.

13115. SCHAMAHORN ET AL. v. GEHLHAUSEN. Dubois County. *Affirmed.* Nichols, C. J. October 24, 1928.

Evidence sufficient to sustain the judgment of $950 damages caused to the appellee's house by blasting done by appellants for highway construction at a distance of 180 yards from house.

12979. SHARTS ET AL. v. DOUGLASS. Miami County. *Affirmed.* Remy, J. October 5, 1928.

Exemplary damages held recoverable in action by receiver of *cestui que* trust against trustee for cheating and defrauding *cestui que* trust out of trust property, and against third party who participated in wrongdoing.

12585. SHEA ET AL. v. PEOPLES COAL AND CEMENT CO. ET AL. Marion County. *Affirmed.* Enloe, J. June 6, 1928.

Action to foreclose a lien against certain real estate on account of materials furnished; sufficient evidence to support various findings of fact. Where the owner of the building makes various payments to the con-

tractors during the progress of the work, and during the progress of the work the contractors, without any directions as to how the same should be applied, send the check to a material man who credits it on their general account, the owner of the building cannot require the material man to apply this payment on the account of materials furnished for use in the construction of his building.

13106. SOUTHERN INDIANA GAS & ELECTRIC CO. v. VAUGHN. Warrick County. *Affirmed.* Nichols, C. J. October 5, 1928.

Relation of physician and patient, no matter what the supposed ailment, should be protected as strictly confidential, subject only to right of patient to waive such restriction. (Sec. 550, Burns' 1926.)

13161. STATE v. FEICLE. Marion County. *Affirmed.* Nichols, C. J. June 22, 1928.

Because of the failure of the State Highway Commission to procure right-of-way over which appellee, a road contractor, could construct the highway which he had contracted to construct and further, because of mistakes during the progress of the work by the engineer of the State Highway Commission, the appellee was delayed in the performance of his contract and damaged thereby; the fact that the damages to the appellee was caused by failure of the officers of the state to perform their duty does not prevent the appellee from recovering; the provision in the contract for extension of time to the contractor for delays in which he was not at fault was to protect the appellee and not to place a limit upon his right of recovery for damages sustained by reason of the default of the state, acting through the Highway Commission.

12978. STATE v. WRIGHT ET AL. Marion County. *Rehearing Denied.* Remy, J. August 30, 1928.

The Appellate Court has jurisdiction of appeals from the Superior Court of Marion County sitting as a court of claims although the act originally creating the Superior Court of Marion County as a court of claims provides that appeals shall be to the Supreme Court, the Appellate Court not being in existence at that time. After the creation of the Appellate Court its jurisdiction was definitely fixed by statute.

12978. STATE v. WRIGHT ET AL. Marion County. *Reversed.* Remy, C. J. June 1, 1928.

Section 394 of the Code of Civil Procedure providing that, upon request of one of the parties to a suit, the court shall make a finding of facts specially and state its conclusions of law thereon is mandatory and is applicable to the Superior Court of Marion County composed of five judges sitting together as a court of claims.

12964. STATE EX REL. J. B. SPEED AND CO. v. TRAYLOR ET AL. Gibson County. *Affirmed.* Nichols, C. J. June 22, 1928.

An answer that the contract in question was a part of relator's doing business in Indiana without complying with the Indiana corporation laws, and that relator was a Kentucky corporation which had in no way complied with the Indiana corporation laws was a proper plea in bar and not matter in abatement.

13091. TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION CO. v. SWALLS, ADMR. Clay County. *Affirmed.* Thompson, J. July 20, 1928.

Complaint in action for death of truck driver in collision with interurban car, alleging that decedent was injured by negligence of defendant and without any fault or negligence on decedent's part is held to state a cause of action, as against demurrer. Verdict supported by some evidence and it is only where but one reasonable inference can be drawn that the reviewing court will interfere or invade province of jury.

13280. ESTATE OF JOHN N. TODD v. TODD. Vanderburgh County. *Appeal Dismissed.* Nichols, C. J. August 29.

Appeal dismissed on authority of *Ansel v. Kyger*, 60 Ind. App. 259, 110 N. E. 559.

13215. C. F. TURNER COAL CO., INC. v. COLLINS ET AL. Industrial Board. *Reversed.* Thompson, J. July 19, 1928.

No evidence to support the award. Hearsay evidence must be supported by other competent evidence to sustain an award by the Industrial Board.

12819. UNION SCHOOL TOWNSHIP OF ST. JOSEPH COUNTY, INDIANA, v. MOON. Laporte County. *Petition for rehearing denied.* Nichols, C. J. June 21, 1928.

(For previous opinion see 161 N. E. 714.)

12995. WILLISTON CONSTRUCTION CO. v. HUGHES. Elkhart County. *Affirmed.* Remy, J. June 26, 1928.

Tax sales certificates for delinquent street-and-sewer assessments do not constitute liens or incumbrances in favor of the state within the meaning of section 283 of the Tax Act of 1919 (Acts 1919, p. 198, sec. 14325 Burns' 1926) which provides that a conveyance by the auditor of a county to the holder of a tax sale certificate "shall vest in the grantee an absolute estate in fee simple, subject, however, to all the claims which the state may have therein for taxes, or liens, or incumbrances."

13163. WISCONSIN LUMBER & COAL CO. v. WALL ET AL. Lake County. *Appeal Dismissed.* Enloe, P. J. June 20, 1928.

On a former appeal of this same cause it was dismissed for want of jurisdiction, it appearing that the cause had not been fully disposed of (84 Ind. App. 642, 151 N. E. 830). This was remedied and final judgment rendered March 31, 1927. There was a motion for new trial on April 11, 1927, which was stricken from the files June 16, 1927, and thereupon an appeal prayed to the Appellate court, transcript being filed October 14, 1927. Under the facts of this case the filing of the so-called motion for a new trial and the rule thereon did not extend the time for filing the record which should have been within 180 days from March 31, 1927.