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SUPREME COURT

25616. CHANDSIE V. STATE. Marion County. *Affirmed.* Martin, J. October 26, 1928.

Evidence showed appellant transported liquor "by carrying and conveying it from one place to another." Requirement of allegation and proof that a liquid is "reasonably likely or intended to be used as a beverage" does not apply to alcohol, but to those liquors referred to in the second and third divisions of the definition of "intoxicating liquor" in sec. 2715 Burns' 1926.

25671. EDMONDSON, ET AL. V. FRIEDELL. Grant County. *Affirmed.* Travis, J. (Transferred from the Appellate Court under No. 1557, cl. 2 Burns 1926, Acts 1901, p. 565.) October 5, 1928.

Suit in equity to have trust declared. The evidence sustained findings of the trial court and the court did not err in its rulings on exclusion and admission of evidence, nor in its conclusions of law.

24318. HOWELL V. STATE. Marion County. *Reversed.* Travis, J. October 30, 1928.

The appellant was convicted on the charge of involuntary manslaughter and for having caused the death of a nine year old girl, who was run down by his automobile. In view of the fact that the evidence showed that the deceased "very suddenly placed herself in front of the automobile when it was approaching her, and at a time when appellant was within less than 10 feet from her (half the length of the desk)" and that "the accident could not have been averted had the automobile been operated in the most careful manner by appellant," the court says that the act of the deceased was the proximate cause of her death.

24651. ISTRATE V. STATE. DeKalb County. *Reversed.* Willoughby, J. November 14, 1928.

The evidence was not sufficient to support the conviction of the appellant for keeping a liquor nuisance, the conviction being under the 1923 Act, at which time it was not an offense to have liquor in one's possession.

24834. JALBERT, ET AL. V. STATE. Clay County. *Reversed.* Travis, J. November 23, 1928.

The appellants convicted of transporting liquor in an automobile. The trial court's refusal to give requested instruction of the presumption of innocence and reasonable doubt was reversible error. Under the 1923 Transportation Act the state is not required to prove that the liquor was not transported for a lawful use, the exception not being in the enacting part of the statute. It was not error to tell the jury that, although they were the judges of the law, they should weigh the instructions as they did the evidence.

25326. KLEOPFER V. STATE. Ripley County. *Affirmed.* Gemmill, J. October 5, 1928.

Jury found appellant guilty of assault and battery on a count charging involuntary manslaughter. The commission of assault and battery was

necessarily included in the offense of manslaughter, as charged. The jury could discharge defendant of the higher offense and convict him of the minor offense if the evidence warranted.

25573. LAIRD v. STATE, EX REL. RICHEY. Spencer County. *Affirmed. Per Curiam.* October 18, 1928.

Mandamus proceeding to compel county auditor to accept and approve bond tendered as township trustee-elect. Validity of appellee's claim to office depended on whether the county commissioners were "doing business in term time" (sec. 12020 Burns 1926) when they selected appellee to fill a trusteeship vacancy. That is question of fact for the trial court and there was evidence to support trial court's finding.

24952. MCALEER v. STATE. Jasper County. *Affirmed.* Travis, J. November 13, 1928.

Evidence was sufficient to support the conviction of the appellant. It was a question of fact whether the appellant was too drunk to be able to have an intent.

25516. MCGREGOR v. STATE. Vanderburg County. *Affirmed.* Gemmill, J. November 14, 1928.

Where officers entered a house on a legitimate errand, and, while there for a legitimate purpose, saw and smelled intoxicating liquor, they did not need a search warrant.

24999. NELSON v. STATE. Lake County. *Affirmed.* Willoughby, J. October 5, 1928.

Appellant convicted of maintaining common nuisance, and the appeal turns on legality of search and seizure. Court reviews and distinguishes several former opinions on question of illegal search and seizure.

25681. PULSE, ET AL. v. BOARD OF COMMISSIONERS, OF THE COUNTY OF DECATUR, IND., ET AL. Decatur County. *Reversed.* (Transferred from the Appellate Court under sec. 1357, cl. 2, Burns 1926) *Per Curiam.*

The fact that a contract under which the appellants were laying a sewer limited the payment to a special fund, and the further fact that this special fund was exhausted did not render the claim of appellants invalid; and the exhaustion of a special fund was no ground for denial of the claims.

24608. STATE, ET AL. v. NAGEL. Clark County. *Appeal Dismissed.* Willoughby, J. October 2, 1928.

Appeal from judgment in a habeas corpus proceeding, the appeal purporting to be by the State of Indiana. The State was not a party to the proceedings in the lower court, and no question raised on appeal was decided or presented to lower court for decision.

24791. THOMAS v. STATE. Hamilton County. *Reversed.* Travis, J. November 15, 1928.

Reversed on the ground that the evidence was not sufficient to support court's finding that defendant transported intoxicating liquors.

25533. THOMPSON v. STATE. Delaware County. *Affirmed.* Willoughby, J. November 16, 1928.

The defendant was convicted for violation of an act concerning intoxicating liquors. The court says the verdict was sustained by sufficient evidence and was not contrary to law. Where appellant assigned as error "that the court erred in giving of its own motion to the jury instructions numbered one to eleven, inclusive," this assignment can only be maintained by showing that all the instructions are incorrect. The appellant, by failing to point out any objections to any of the instructions except No. 5, admits that no legal objection exists as to any of the remaining instructions, therefore his contention fails.

25151. VARISH v. STATE. Lake County. *Affirmed.* Martin, J. November 2, 1928.

Where there was an entry on June 11, 1924, showing a finding of guilty and the judgment imposing sentence was not entered until March 6, 1925, the delay in imposing the sentence was not such as to deprive the lower court of jurisdiction over the defendant, under the rule of *State v. Smith* (188 Ind. 64), since it appears that a justifiable reason existed for the court's delay in entering the judgment of March 6, 1925. The contention that under the rule of *Rode v. Baird* (196 Ind. 335) the defendant had completed the term of the minimum sentence on June 11, 1925, and that the court thereby had no power or authority over him, is unavailing for the reason that the entry of June 11, 1924, was a *finding* and not a *judgment* and the sentence did not begin to run on that date.

APPELLATE COURT

13143. ARCHBOLD, ET AL. v. THE W. T. RAWLEIGH CO., ET AL. Wells County. *Affirmed.* Nichols, C. J. November 1, 1928.

In an action to recover on a contract of guaranty, demurrers to paragraphs of answer were properly sustained, when such answers were based on the theory that the principal was the agent of the plaintiff-creditors in procuring the signatures of the guarantors.

13130. BALTIMORE & OHIO SOUTHWESTERN RD. CO. v. BEACH. Jennings County. *Reversed.* Nichols, C. J. November 23, 1928.

It was not reversible error to overrule a motion to make complaint more specific when the evidence disclosed that the appellant was fully informed of the facts. In a suit to recover for injuries caused by defendant's alleged negligence, it was error to overrule demurrer to the complaint when the allegations disclosed that the plaintiff assumed the risk.

13129. BECKER, ET AL. v. REICHERS, ET AL. Porter County. *Affirmed.* Thompson, J. McMahan, J. not participating. November 1, 1928.

Testator gave his widow a farm for life, remainder to the appellants with a charge of $6,000 against it for the benefit of certain children of the testator. Considering all provisions of the will it was the evident intent of the testator that the charge should be paid by the remaindermen within a reasonable time during the administration of the estate.

13035. BROWN V. OWEN, ET AL. Rush County. *Reversed.* Nichols, C. J. November 15, 1928.

Where, in an action to assert a judgment lien upon interest in real estate, the complaint alleged that the judgment lien became of record before a petition for partition was filed, it was error to sustain in a demurrer to the complaint, although in fact the partition proceeding was commenced prior to the attaching of the judgment lien. The proper pleading was a motion to make more specific in respect to the date of the commencement of the partition proceeding. If a lien attaches after the commencement of a partition proceeding, it does not attach to follow the interest, but the one holding it must come in by petition in the partition proceedings to have it attached to the proceeds.

13333. BUILDERS & MANUFACTURERS MUTUAL CASUALTY CO. V. EVANS, ET AL. Industrial Board. *Affirmed.* McMahan, J. November 2, 1928.

The finding of a single member of the Industrial Board and the entering of an award based upon such finding, without any notice to the then insurance carrier, was such an irregularity and mistake as to warrant the Board upon seasonable application to set aside and vacate such award, even though no appeal was taken therefrom; and a subsequent order of a single member vacating the original award, not having been appealed from, was final and conclusive, and it was the duty of the Board to hear and determine the matter the same as if no former award had been made.

13110. BURROUGHS V. SOUTHERN COLONIZATION CO. Starke County. *Reversed.* Nichols, C. J. Enloe, P. J., not participating. Remy, J., concurring. November 1, 1928.

This is an action growing out of an exchange of 4480 acres of land in Laporte and Starke Counties of Indiana owned by appellant, for 61,000 acres of land in Florida owned by appellee. In an 18 page opinion the court discussed a few of the 243 reasons assigned by appellant for a new trial. See the opinion for full discussion of the various points raised by the appeal.

13074. CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY V. SCHRAEDER. Posey County. *Affirmed.* McMahan, J. October 31, 1928.

In an action for damages for injury alleged to have been received by plaintiff while acting as servant of the defendant railway company, there was no error to give instructions relating to liability under the Federal Employers Liability Act where there was evidence tending to bring the cause of action within the Federal Act. For the same reason it was not error to refuse the defendant's instruction that the plaintiff could not recover if he was guilty of contributory negligence, since under the Federal Act contributory negligence is not an absolute defense.

12839. THE DAVIS CONSTRUCTION CO., ET AL. V. GRANITE SAND & GRAVEL CO. Marion County. *Affirmed.* McMahan, J. October 11, 1928.

Action by materialman against principal and surety to recover balance alleged to be due. No error in telling jury certain facts were shown by the evidence without dispute, where there is nothing in record to show there was any conflict of evidence in respect to these facts. See opinion for discussion of admissibility of certain evidence.

13076. DECKER V. DECKER, ET AL. Clark County. *Affirmed.* Remy, J. November 14, 1928.

Affirmed on authority of *Home Insurance Co. v. Cooter*, (1927) 86 Ind. App. 363, 156 N. E. 581.

13133. DORBECKER V. B. C. DOWNEY CO., ET AL. Marion County. *Affirmed.* Enloe, P. J. November 1, 1928.

In a suit on a note which contained the provision, "This note covers deferred installments under a conditional sale contract made this day between the payee and maker thereof," a motion to make the complaint more specific by including the conditional sale contract was properly refused. The fact that the note, by way of recitation, mentioned the sales contract did not make the sales contract a part of the note, and the court's instruction to return a verdict in favor of the holder of the note was not error as the note was negotiable and the holder, under the undisputed evidence, was a holder in due course.

12782. FIRST NATIONAL BANK OF WESTPORT V. MOORE, ET AL. Decatur County. *Affirmed.* Enloe, P. J. November 15, 1928.

When one loans money, on mortgage security, to the owner of land to pay off an existing mortgage which has priority over a judgment lien, the one advancing the money is entitled to be subrogated to the rights of the prior mortgagee; the later mortgagee, having advanced the money at the request of the debtor, cannot be held to be a volunteer.

13042. GALLMEIER, ET AL. V. KAISER. Wells County. *Affirmed.* Nichols, C. J. November 1, 1928.

In an action to revoke the probate of, and set aside a will, there was no error in an instruction which "clearly and correctly informed the jury as to what is a delusion, and that insane delusions would not destroy testamentary capacity unless they affected the disposition of the testator's property, and then left it to the jury to determine from all the evidence whether the testator had such delusions, and if so, whether they did affect the disposition of his property, made in his will, clearly instructing the jury that the burden was on appellee to establish that there were such delusions, and if so that they affected the disposition of the testator's property."

13023. GRAND TRUNK WESTERN RY. CO. V. GATHER, ETC. St. Joseph County. *Reversed.* Nichols, C. J. McMahan, dissents.

Appellee suffered a personal injury while a passenger in an automobile which was struck by appellant's train at a highway crossing. It was appellee's duty to look for trains and if she had, and informed the driver, the accident would not have happened. It was error to instruct that contributory negligence to be a defence must be "the" proximate cause of the injury, since it is sufficient if contributory negligence is "a" proximate cause.

12970. CITY OF HUNTINGBURG V. MORGEN. Spencer County. *Rehearing denied.* McMahan, J. November 15, 1928.

Petition for rehearing denied. For former opinion, see 162 N. E. 255.

12975. THE INTERNATIONAL HARVESTER COMPANY OF AMERICA v. HAAS, ET AL. Marion County. *Reversed.* McMahan, J. November 22, 1928.

Where there was a complaint in three paragraphs it was not reversible error to overrule a demurrer to the third paragraph when the record shows that all of the alleged defects of the third paragraph were covered by the evidence introduced. Representations of an agent inducing the trade were admissible under the paragraph alleging fraud.

12863. KEPP'S EXPRESS AND VAN CO. v. BOYD. Lake County. *Affirmed.* Remy, J. Thompson, J., not participating. October 31, 1928.

It was not reversible error to improperly admit testimony of the plaintiff as to statements of the alleged servant of the defendant since, during the progress of the trial, testimony of the alleged servant made the allegedly improper testimony proper in rebuttal.

13302. KESER v. U. S. S. LEAD REFINERY, INC. Industrial Board. *Affirmed.* Thompson, J. November 21, 1928.

The action of the Industrial Board in dismissing a claim for want of jurisdiction because of claimant's failure to file within two years from the date of his injury was not contrary to law, although the claimant alleged that his delay was due to the fraudulent agreement of his employer to give claimant a life job, claimant having been discharged after the two year period. The court says that the time limit must be regarded not merely *as a statute of limitations* but also *as one of the conditions of the right of action.* The Industrial Board has no equity jurisdiction and any right of action that the claimant might have would be in a court of law for damages for breach of contract.

13119. KUMLER, ET AL. v. GOSS. Fulton County. *Affirmed.* Nichols, C. J. October 5, 1928.

Evidence sustained finding of fact that contract had been rescinded. Common count for money had and received lies to recover money which has been paid under a contract which was subsequently rescinded.

13145. LOESER, ET AL. v. LOESER. Noble County. *Affirmed.* McMahan, J. November 1, 1928.

In an action for specific performance of a contract of settlement and to quiet title the Appellate Court says that findings of fact were supported by the evidence and that the sections sustain the conclusions of law as stated by the trial court. The employment of the appointee of a power of attorney, as a lawyer, does not of itself cancel the power of attorney.

13141. LUHRING LUMBER CO. v. BEAN, ET AL. Gibson County. *Reversed.* Remy, J. November 20, 1928.

It is reversible error to exclude admissible evidence unless the record shows that the exclusion of the evidence did not affect the decision.

12393. LUTEN, ET AL. v. SCHMIDT, ET AL. Marion County. *Appeal dismissed.* McMahan, J. October 30, 1928.

The statute governing appeals from a Board of Zoning Appeals to circuit and superior courts makes no provision for an appeal from these courts, and the general provisions of the Code of Civil Procedure does not apply to such appeals.

13149. NEW v. THE MOHAWK GRAVEL CO. Hancock County. *Affirmed.* McMahan, J. November 23, 1928.

Under sec. 3356 Burns 1926 it is necessary for a widow to elect when she desires to take under the law instead of under the will of her deceased husband, and this requirement of the election is general and applies to all widows sane or insane; sec. 3359 Burns 1926 merely makes it possible for an election to be made for an insane widow, and the failure of the guardian to petition the court for advice does not change the effect of the statute requiring the widow to make an election to take under the law, when such election would have been required of such widow if she had been sane.

13243. MARTIN v. HARDESTY. Lake County. *Affirmed.* Remy, J.. Nichols, C. J., dissents. November 22, 1928.

The consent of a woman to the performance of an unlawful operation to produce an abortion, which resulted in her death, does not bar her legal representatives from the prosecution of an action for damages.

13372. PEASE, ET AL. v. MANN, ET AL. Industrial Board. *Affirmed.* Enloe, P. J. October 26, 1928.

Evidence sufficient to sustain award.

12878. THE RAILROADMEN'S BLDG. AND SAVINGS ASS'N v. RIFNER. Marion County. *Affirmed.* Nichols, C. J. October 11, 1928.

Action to compel specific performance of contract to convey. Affirmed on condition pay certain sum into court for use of appellant and file certificate, showing such payment, with clerk of Appellate Court within 30 days.

13174. RODENBECK, ET AL. v. CREWS STATE BANK AND TRUST CO. Hendricks County. *Affirmed.* Enloe, P. J. November 14, 1928.

In an action on an Illinois judgment on a cognovit note, it was not error to instruct that the defendants had the burden of proving that they did not sign the notes. The case did not come under the 1927 statutes passed by the General Assembly of Indiana covering the subject of cognovit notes. (See Acts 1927, pp. 174 and 656.)

13135. SPRAY v. SHORT. Jackson County. *Affirmed. Per Curiam.* November 23, 1928.

Per Curiam.

13109. SPRY v. CORUM. Warrick County. *Affirmed.* McMahan, J. October 30, 1928.

In an action to recover damages for slander, the slanderous words including a charge of unchastity and also the word "bitch," an instruction was not objectionable upon which the jury would understand that the charge of unchastity was the charge which was actionable per se, even though the court did not expressly charge that the word "bitch" was not actionable per se.

13132. STRADLING v. HAHN. Delaware County. *Affirmed.* Remy, J. October 30, 1928.

This was an action by appellee against appellant to recover for personal injuries sustained by appellee by reason of appellant's negligently

operating a motor bus. The overruling of appellant's motion for judgment on answers to the interrogatories notwithstanding the general verdict, was properly overruled, since the facts were not irreconcilable with the general verdict.

24481. STRAUS BROTHERS CO., ET AL. v. FISHER, ET AL. Allen County. *Affirmed. Per Curiam.* October 11, 1928.

Appeal in drainage ditch proceedings on petition to change tile, etc. The evidence supported the court's findings of fact. (See sec. 6196 Burns' 1926 for facts which petitioners must show to defeat remonstrance.)

13317. SWIFT & CO. v. BOBICH. Industrial Board. *Affirmed.* Nichols, C. J. October 11, 1928.

The compensation period prescribed for the loss of a foot, or the leg below the knee, does not apply under a finding of the board that workman's total disability had not ceased, even though injury was confined to below the knee.

13479. TAUGBINBAUGH v. STATE. Delaware County. *Appeal dismissed.* Nichols, C. J. November 1, 1928.

Defendant was convicted in a circuit court, sitting as a juvenile court, on the charge of having contributed to the delinquency of a female child under the age of 18 years. Under sec. 1709 Burns' 1926 the appellate court has no jurisdiction, since the transcript of the record was not filed within 30 days after judgment was entered.

13128. TUXEDO STATE BANK v. KEOUGH. Marion County. *Affirmed.* Enloe, P. J. November 22, 1928.

There is no showing that the trial judge abused his discretion in overruling a motion for a new trial upon the ground of newly discovered evidence. The question sought to be presented upon the evidence could not be considered by the appellate court since the evidence was not properly within the record. When trial court exercises its power to extend the time for filing bills of exception to a day beyond the term, *this power must be exercised at the time the motion for a new trial is overruled.*

13062. WABASH RY. CO. v. BIXBY, ADMR. Huntington County. *Affirmed.* McMahan, J. October 10, 1928.

Action to recover for death alleged to have been caused by negligence of defendant. No reversible error in instructions, and answers of jury do not as matter of law show contributory negligence.

13220. WATERS v. SELLECK, ADMR. Marion County. *Reversed.* Remy, J. October 11, 1928.

The court says that the legacy created by item one of the will is a demonstrative legacy, since it is not a bequest of a specific article, or of specific funds; it is a bequest of "five thousand dollars in cash," with a demonstration of the source of payment.