Indiana Law Journal

Volume 4 | Issue 4 Article 10

1-1929

Indiana Docket

INDIANA DOCKET

SUPREME COURT

24707 ALEXANDER v. STATE. Delaware County. *Affirmed.* Travis, J. December 18, 1928.

No error presented for consideration by the appeal since neither the allegedly erroneous instruction, nor any of the instructions, is in the record by a bill of exceptions. Also the appellant fails to bring into the record by a bill of exceptions the affidavits supporting the claim of newly discovered evidence.

24790 BACHELOR v. STATE. Delaware County. *Reversed.* Travis, J. December 5, 1928.

Where one count charged the offense of receiving intoxicating liquor from a carrier and another count charged the offense of selling, bartering, etc., it was error for the court to instruct, in substance, that if the jury find that the defendant unlawfully received intoxicating liquor from a common or other carrier, or that he unlawfully possessed intoxicating liquor received from a common or other carrier, then in that case defendant is guilty under the count which charges an unlawful sale, barter, gift, etc.

25205 BOND v. STATE. Marion County. *Reversed.* Gammill, J. December 14, 1928.

The trial court erred in overruling the defendant's motion to suppress and reject the evidence secured by means of a search warrant; on the authority of *Wallace v. State.*

25188 BECKER v. STATE. Vanderburgh County. *Reversed.* Martin, C. J. December 5, 1928.

It was error to admit evidence obtained by a search where it appears from the record that the search warrant was issued without a sufficient showing that reasonable and probable cause for the search existed, whether by a positive affidavit alleging facts or by hearing of evidence by the issuing magistrate.

24751 BRUNER *v.* STATE. Kosciusko County. *Affirmed.* Willoughby, J. cember 21, 1928.

Error is not shown by reason of the appellant's failure to comply with the requirements of rule 22 in the presentations of errors relied on.

24622 DALE v. STATE. Delaware County. *Reversed.* Travis, J. December 13, 1928.

The trial court erred in sustaining a demurrer to appellant's plea in abatement, said plea being based on the failure of the clerk of the court, at the time of the drawing of the grand jury, to enter a list of the names of the persons who were to compose the grand jury upon the order book of the court and to annex a certificate of that fact as provided by law (1926 Burns', sec. 1822).

25485 JORMAN v. STATE. Marion County. *Affirmed.* Martin, C. J. December 4, 1928.

Appellant was convicted on the charge of conspiring to commit a felony and for ground of new trial alleged that the finding of the court was not sustained by sufficient evidence and was contrary to law. There is no merit in the appellant's contention that, because a principal may commit a crime by the acts of his agents, he cannot be guilty of entering into a conspiracy to commit a felony with such agents. There was sufficient evidence to sustain the finding of guilty.

24533 LANDESS v. STATE. Jay County. *Reversed.* Willoughby, J. December 21, 1928.

Where the state relies on circumstantial evidence to make out its cases, it is error to refuse to instruct the jury upon the subject of the effect of circumstantial evidence.

24680 LARGE v. ESTATE. Vigo County. *Reversed.* Willoughby, J. December 19, 1928.

The trial court erred in overruling appellant's motion to quash the affidavit charging him with the offense of maintaining a liquor nuisance, for the reason that the affidavit was defective in not defining the offense more particularly so as to make it appear upon what acts of the defendant, alleged to be criminal, the affidavit was founded. Dissenting opinion by Martin, C. J., in which Gemmill, J., concurs.

25575 LENCIONIA v. STATE. Lake County. *Affirmed.* Martin, C. J. December 11, 1928.

Appellant was prosecuted upon an affidavit in three counts and was tried by the court which found him guilty as charged, but rendered judgment only on the offenses charged in counts one and two. Since there is no judgment based on the three counts, it is immaterial whether there was evidence to support the finding of guilty on the three counts.

25557-25558 LENKO v. STATE. Lake County. *Affirmed.* Gemmill, J. December 7, 1928.

There was no error in overruling a motion for a new trial, the motion being based on the ground that the finding of the courts was not sustained by sufficient evidence, even though there was no evidence of assault and battery other than that which showed a complete crime of rape; since under the cases in Indiana assault and battery is included in the crime of rape and there may be a conviction of assault and battery only, even though the proof shows that the alleged rape was actually committed.

24981 IN THE MATTER OF THE ADMISSION TO THE BAR OF THOMAS A. MCDONALD. Vanderburgh County. *Affirmed.* Per Curiam. December 18, 1928.

This is an appeal from an order of the circuit court vacating and setting aside an order admitting the appellant to the practice of the law. The court says that the conduct of the appellant was sufficient to show inexcusable deception practiced upon the court and sufficient cause for revoking the order admitting him. The mere showing of good moral character by any voter of this state is not sufficient to entitle him to be admitted to practice law as a constitutional right, for courts may have reasonable rules and regulations for the admission of such applicant.

24782 RICHARDSON v. STATE. Henry County. *Affirmed.* Willoughby, J. December 14, 1928.

The appellant was convicted on a charge of transporting liquor. There was no reversible error in the record. The accused cannot object to the admissibility of evidence on the ground that it was obtained by illegal search and seizure of the property of a third person. When it is not affirmatively shown by the bill of exceptions that it contains all the instructions given in the case, no question is presented to the reviewing court on the giving or refusing of instructions.

25617 SAVICH v. STATE. Lake County. *Affirmed.* Gemmill, J. December 14, 1928.

The appellant was convicted on a charge of unlawful possession of intoxicating liquor. There was no error on the part of the trial court in sustaining the state's objection to a certain question on cross-examination, nor in the giving of a further instruction to the jury, upon their request.

25228 SCHREIBER v. STATE. Vanderburgh County. *Affirmed.* Martin, C. J. Willoughby, J., dissents. December 20, 1928.

The evidence was sufficient to justify the inference drawn by the jury that appellant was guilty of maintaining a common nuisance. The court says that it does not decide the question of whether unnecessary injury to one's property committed during a search will invalidate the search, since the record shows that a demand was made that the door be opened prior to the breaking of it, and that the breaking of the door was not an unnecessary injury.

25377 SEAGER v. STATE. Vanderburgh County. *Affirmed.* Gemmill, J. December 19, 1928.

The Supreme Court will not inquire as to what knowledge an affiant has upon which he bases his sworn statement when the facts stated in the affidavit directly and positively show the possession of a still and intoxicating liquor, and the affidavit states facts sufficient to support a judicial finding of probable cause to issue the search warrant.

25354 SHEPHERD ET AL. v. STATE. Pike County. *Reversed.* Martin, C. J. December 13, 1928.

Appellants had been convicted and sentenced for maintaining a common nuisance. Under the rule of *Wallace v. State,* 199 Ind. 317, there was not such a showing of probable cause as justified the issuance of the search warrant and the court erred in admitting the evidence obtained by virtue thereof. The remaining evidence, bearing on the reputation of the place in question, was not sufficient to sustain the conviction.

24925 SMITH v. STATE. Delaware County. *Reversed.* Travis, J. Martin, C. J., concurs in conclusion. December 14, 1928.

The evidence was not sufficient to sustain the verdict of guilty on counts charging the sale, barter, etc., of intoxicating liquor and with maintaining a common nuisance. The court says "an essential element of an offense, necessary in the proof of the offense and to sustain a verdict of guilty, may not be proved by an inference which is founded solely and wholly upon another inference." One sale of intoxicating liquor is insuffi-

cient to sustain a verdict of guilty of maintaining a common nuisance, since the words "maintain" and "maintaining" as used in the statute indicate continuous or concurrent acts.

25147 STATE v. SHUMAKER. Original action. Travis, J. December 28, 1928.

A charge which prefers a contempt against a court is not a criminal action; and is not an offense within the meaning of that word in section 17 of article 5 of the constitution which grants to the executive power to pardon; and by reason of the inherent power of the court to receive a charge of contempt and to try the cause, it has the power to enforce the execution of its judgment, notwithstanding the power to pardon granted to the executive department. Martin, C. J., writes a dissenting opinion in which Gemmill, J., concurs.

24873 SULLIVAN ET AL. v. STATE. Davies County. *Reversed,* Travis, J. December 6, 1928.

Appellants allege error by the trial court in overruling their motion for a new trial, for the cause that the verdict of guilty returned by the jury is contrary to law. It was error to overrule the motion for a new trial where the record shows that the accused were brought to trial in the circuit court upon the same affidavit that had been filed with the justice of the peace, and upon which the accused were recognized to appear in the circuit court, and where a verdict was returned and judgment rendered without an arraignment or plea to the judge. (196 Ind. 12, 197 Ind. 210.)

APPELLATE COURT

13223 ABSHIRE ET AL. v. BURNS ET AL. Delaware County. *Affirmed.* Per Curiam. *Per Curiam.*

13045 BAUM v. NORD ET AL. Whitley County. *Affirmed.* Nicholas, C. J. December 21, 1928.

In a suit for payment due on a note appellees pleaded payment to and through the officers of the payee company, payment being made by a transfer to the payee company through its officers of capital stock of the payee company and shares of stock of another company. The facts were sufficient to support the finding that the president was acting within his authority when he made the agreement as to the manner in which the note might be paid; there was sufficient consideration aside from the stock of the payee company, and generally payment can be made in anything that the creditor will accept.

13216 BOWEN ET AL. v. FRANKFORT LOAN & TRUST CO. Boone County. *Affirmed.* Remy, J. December 19, 1928.

The appellants owned land by entireties which was sold under a foreclosure proceeding to appellee, the certificate of sale naming the husband only as heir. In an action of ejectment judgment was rendered for the appellants. Thereafter appellee received a new deed on an amended certificate and brought a second suit for ejectment and recovered judgment. The first judgment did not bar an action on the after-acquired title.

13207 CARR v. DOUGLASS. Decatur County. *Affirmed.* Remy, J. December 14, 1928.

There was no error in overruling a petition of appellant's husband to be made a party defendant and there was sufficient evidence to support the decision of the trial court.

13421 CARRICO v. TEMPLETON COAL CO. Industrial Board. *Affirmed.* Remy, J. December 14, 1928.

Affirmed on authority of *Galkowski v. Hubbard* (1927), 87 Ind. App. (1927) 87 Ind. App. 97, 156 N. E. 523.

13154 CSEBITS v. BATA. St. Joseph County. *Affirmed.* Per Curiam. December 19, 1928. *Per Curiam.*

13020 ESSEX v. *MILLIKAN*, ET AL. Hendricks County. *Affirmed.* McMahan, P. J. December 20, 1928.

Action on an alleged oral contract to recover broker's commission for negotiating a lease. Cross-complaint asking damages. The facts were found specially and the court concluded as a matter of law that neither party could recover, judgment accordingly. The evidence was sufficient to sustain the decision and there was no reversible error in admitting an excluded evidence. See opinion for full discussion of facts and the rulings on the questions of evidence.

13305 FEAR CAMPBELL COMPANY v. YEARION. Industrial Board. *Affirmed.* Enloe, C. J. December 14, 1928.

Where there is a finding that an employee became wholly disabled and an award of compensation "during disability . . . not exceeding 500 weeks" there is no merit in the contention that the award is "indefinite," illegal, and prejudicial to appellant simply because the award did not read "during total disability." If the injured employee's condition should change the appellant can protect itself by an application for modification of the award. It was not necessary for the award to fix a time when payments should commence as the statute fixes the time.

13144 FELDMAN v. ELMORE. St. Joseph County. *Reversed.* Neal, J. December 7, 1928.

Where appellant's brief discloses prima facie reversible error and the appellee has failed to file a brief in support of the judgment of the trial court, such failure is taken to be a confession of error.

13366 FORK RIDGE MINING CO. v. SOU. RY. CO. ET AL. Crawford County. *Affirmed.* Per Curiam. December 11, 1928.

Per Curiam.

13221 GARDNER v. GARDNER ET AL. Marion County. *Affirmed. Per Curiam.* December 19, 1928.

Per Curiam.

13218 GILDER v. NAY. Vigo County. *Affirmed. Per Curiam.* December 18, 1928.

13176 GUSHARD ET AL. v. MOYER, ET AL. Wabash County. *Affirmed.* Enloe, C. J. December 19, 1928.

Suit on indemnity bond given by defendants, stockholders, to indemnify plaintiffs, directors, to protect plaintiffs against loss as surety on notes to keep the company operating. The bond was for the benefit of plaintiff directors and it was not material that one of the plaintiffs did not sign the bond; by its terms the bond covered liability and indebtedness. prior to its execution.

13224 HESSMAN ET AL. v. HESSMAN. Marion County. *Affirmed. Per Curiam.* December 18, 1928.

Per Curiam.

12973 GEORGE F. HINRICHS, INC., ET AL. v. UNITED STATES BANK & TRUST CO., ET AL. Miami County. *Affirmed.* McMahan, P. J. December 4, 1928.

When the drawee-consignee to whom goods are consigned for sale receives and sells the goods with notice that the consignor-drawer has made a draft on him on the credit of the goods the consignee-drawee holds the proceeds of such sales in trust for the bank cashing the drafts for the drawer, on the theory of an equitable assignment of which the drawee had notice.

13204 HUMPHRIES, ET AL. v. PEACOCK, ET AL. Delaware County. *Affirmed.* Remy, J. December 6, 1928.

Commissioners appointed by the court pursuant to the Act of 1921 (Acts 1921, p. 199, Section 7623, Burns' 1926 et seq.) which makes provisions for the recount of votes when voting machines and paper ballots are both used in the election are entitled to a per diem allowance of $10.00.

13142 INDIANA EQUITABLE LIFE INS. CO. v. NEWMAN. Lake County. *Affirmed. Per Curiam.* December 14, 1928.

Per Curiam.

13346 INLAND STEEL CO. v. FLANNERY. Industrial Board. *Affirmed.* Remy J. December 5, 1928.

An injury suffered as a result of an assault and battery at the hands of a fellow-workman following an altercation which grew out of the employment of the two men is an accidental injury arising out of the employment. The Industrial Board is controlled by the act of 1927 entitled "An act concerning workmen's compensation," which repeals by implication and takes the place of section 40 of the original act.

13117 KNOX-HARRISON BANK & TRUST CO. v. JOHNSON. Daviess County. *Reversed.* Nichols, J. December 21, 1928.

This was an action in replevin by appellee to recover possession of certain bonds held by the appellant as collateral securities. Appellee claims that he did not understand and assent to the terms of the agreement under which the bonds were deposited but the court says that under the facts he is charged with notice by reason of his official position and knowledge which his agent had.

13117 McNAIR v. PUBLIC SAVINGS INSHRANCE CO. OF AMERICA, ET AL. Jackson County. *Reversed.* McMahan, P. J. December 14, 1928.
Motion to modify mandate sustained.

12881 MIDLAND CASUALTY CO. v. LUCAS. Marion County. *Affirmed.* Thompson, J. December 19, 1928.

In a suit to recover judgment on an accident policy the defense was that the insured took out the policy on representations that he was in the automobile selling business, but was in fact engaged in transportation of liquor. The trial court's ruling on the reply was harmless, as the answers of the jury were that insured, at the time of the application, had a place for the sale of automobiles where he sold automobiles; there was no error in the refusal of instructions which assumed the existence of facts which the answers of the jury found did not exist.

13112 MISHLER, ET AL. v. EMERSON, ET AL. Kosciusko County. *Affirmed.* Nichols, J. December 21, 1928.

This case presents questions arising out of a suit commenced to restrain the township trustees and Advisory Board from abandoning schools in certain districts and from letting a contract to build a school building, but comes to the appellate court on the immediate question of whether the appellant and other legal voters, constituting a majority of legal voters of the interested school districts, have the right to intervene in the original suit and be made a party defendant. See opinion for full discussion of points involved.

13227 MOSLANDER, ET AL v. BELDON. Whitley County. *Affirmed.* McMahan, J. December 21, 1928.

This was an action to cancel the delivery of a deed which had been deposited in escrow. The only question presented relates to the sufficiency of the evidence to sustain the finding of the court and the correctness of the conclusion of law. The court concludes that there was sufficient evidence to sustain the finding of the trial court and that the conclusion of law was correct.

13015 NEW YORK, CHICAGO AND ST. LOUIS RD. CO. v. MAY. Wells County. *Reversed.* Enloe, C. J., December 15, 1928.

This was an action by appellee to recover damages for an injury sustained while serving as an employee of appellant, recovery being sought under the provisions of the Federal Employers' Liability Act. After reviewing the evidence the court says "that under the facts of this case, undisputed, the appellee assumed the risk of injury," and "that the verdict of the jury is contrary to law."

12875 NORTHERN INDIANA POWER CO. v. CRAIG. Hamilton County. *Affirmed.* Thompson, J. December 14, 1928.

Affirmed on authority of *Northern Indiana Power Co. v. Castor*, 156 N. E. 571.

13160 RIDDLE v. McNAUGHTON. Steuben County. *Reversed.* McMahan, J. December 6, 1928.

This was an appeal from a judgment entered denying appellant relief from a judgment which had been taken in violation of an agreement.

Section 423 Burns' 1926, authorizing the court to relieve a party from a judgment should be liberally construed and where there is a doubt as to the sufficiency of the facts alleged to show mistake, inadvertence, surprise or excusable neglect the trial court should resolve the doubt in favor of the complaint.

13186 ROBERTSON MUSIC HOUSE v. WM. H. ARMSTRONG CO. Marion County. *Affirmed.* Enloe, C. J. December 5, 1928.

This was an action against a landlord to recover damages alleged to have been sustained as a result of the negligence of the landlord in making repairs to the roof of the building occupied by the plaintiff. Although, under the lease by which the appellee held possession of the premises in question, there was no duty resting upon the appellant to make repairs yet, when appellant, having knowledge of the condition of the roof promised the appellee to see that the roof should be properly put in good condition so that it would not leak, and then, in fulfillment of his promise entered upon the work of making certain repairs, he owed to the appellee a duty to use reasonable care in the making of the repairs and to see that the repairs were not negligently made.

13137 RUBIN & CHERRY SHOWS, INC. v. DINSMORE, ETC. Marion County. *Affirmed.* Neal, J. December 21, 1928.

A general concessionary who sublets privileges to sub-concessionaries taking as compensation a percentage of the gross receipts of the latter, and retains a general supervision and control of all shows of the sub-concessionaries is not relieved from the duty of using reasonable care to keep the premises in a safe condition on the theory that the sub-concessionaries are independent contractors.

13031 STAMETS v. WILSON. Allen County. *Affirmed.* McMaha, J. December 14, 1928.

Appellee had recovered judgment against appellant in an action based upon negligence in failing to properly reduce and treat a fracture of appellee's right leg. There was sufficient evidence to support the verdict and no prejudicial error in the admission of certain evidence or in the giving of certain instructions objected to by the appellant.

13121 TERRE HAUTE, INDIANAPOLIS & EASTERN TRACTION CO. v. FERRELL, ADMX. Clay County. *Affirmed.* Nichols, J. December 21, 1928.

An action to recover for wrongful death caused by alleged negligence of appellant in running one of its interurban cars against an automobile in which the decedent was riding. There was no error in overruling motion to make complaint more specific, nor in overruling demurrer to the complaint. The evidence was sufficient to sustain the verdict and no reversible error in the instructions.