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Indiana Law Journal

Volume 4 | Issue 5 Article 9

2-1929

Indiana Docket

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Recommended Citation

(1929) "Indiana Docket," *Indiana Law Journal*: Vol. 4 : Iss. 5 , Article 9.
Available at: https://www.repository.law.indiana.edu/ilj/vol4/iss5/9

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INDIANA DOCKET*

SUPREME COURT

25481. ALLGAIER v. STATE. Vanderburgh County. *Affirmed.* Gemmill, J. January 4, 1929.

Where defendant was lawfully arrested for committing a misdemeanor he could be searched without a warrant, and the search could extend to an automobile which he was driving at the time; and intoxicating liquor found during the search would be competent evidence in a trial under a charge of unlawful and felonious transportation of intoxicating liquor in an automobile.

25603. COULTER v. STATE. Decatur County. *Affirmed.* Martin, C. J. January 25, 1929.

The question presented by the appeal was whether "the character of intoxicating liquors alleged to have been sold, bartered and furnished" was described with sufficient certainty. Charging the illegal sale or possession of "intoxicating liquor" describes the liquor sufficiently. Case is distinguished from Bernstein v. State, 199 Ind. 704, 160 N. E. 296.

25271. DEPPERT ET AL. v. STATE. Jackson County. *Affirmed.* Gemmill, J. January 25, 1929.

Appellants were charged with petit larceny and with conspiracy to commit a felony and were found guilty of petit larceny. See opinion for full discussion of the various instructions, the giving of which, is relied upon as error.

25362. FEAST v. STATE. Warrick County. *Reversed.* Gemmill, J. January 4, 1929.

An affidavit stating "that affiant has reason to believe that Mrs. Rose Sanders has in her possession intoxicating liquor," etc., does not show probable cause for the issuance of a search warrant.

24644. FENWICK v. STATE. Delaware County. *Affirmed.* Myers, J. January 22, 1929.

Appellant was charged, by an affidavit made by the sheriff of Delaware county, of offering the sheriff a bribe to influence the sheriff to obtain talesmen to serve as jurors who would not return a verdict of guilty against the appellant in a case then pending against the present appellant. The fact that the sheriff was the prosecuting witness does not disqualify him in the matter of calling talesmen in view of the fact that, under the statutes of the state, the sheriff has no discretion in summoning the jury or the order in which they should be called for service. The court, however, calls attention to the possibility of a situation arising as indicated by sections 1824, 1825, 1826 Burns 1926, wherein there might be an opportunity for a sheriff to exercise such a discretion as would be inimical to the defendant's constitutional right to be tried by an impartial jury. See opinion for full discussion of the various points raised.

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

25711. MASONIC ACCIDENT INSURANCE CO. v. JACKSON. Marion County. Transferred from Appellate Court under Sec. 1357, Burns 1926. *Affirmed.* Willoughby, J. January 23, 1929.

Appellee recovered on an accident insurance policy for the death of the insured who was injured by the falling of an airplane in which he was a passenger. One who suffers an accident while a passenger in an airplane does not suffer an accident "while engaged in aviation." The court says, "where any reasonable construction can be placed on a policy that will prevent the defeat of the insured's indemnification for a loss covered by general language, that construction will be given."

25168. MEAD CONSTRUCTION CO. v. WILSON ET AL. Johnson County. *Reversed.* Martin, C. J. January 3, 1929.

This was an action to foreclose a street improvement lien. The court says: "It may be that the Board of Public Works erroneously based appellees' assessment on a property line frontage of 42.4 feet when it should have been based only on a curb line fronting of 17 feet 9 inches, as contended for by appellees—that question we do not decide but the amount of benefits assessed having been determined by the Board of Public Works and appellees not having exercised their statutory right to appeal therefrom to the circuit court or superior court of the county as provided for in the act, the decision of the Board as to such assessment is final and conclusive on all parties."

24889. SHOCK v. STATE. Allen County. *Petition denied.* Martin, C. J. January 22, 1929.

Petition to the court for writ of error *coram nobis*, alleging that the appellant had been convicted by the perjured evidence of the prosecuting witness who now repudiates the same in an affidavit. The court says that the appellant may have sufficient grounds upon which to base an application for executive clemency but that he has not brought himself within the rules under which writs of error *coram nobis* may be issued.

25517. STATE v. DEARTH. Indiana Court of Claims. *Affirmed.* Willoughby, J. January 11, 1929.

This was an action filed in the superior court of Marion county, sitting as a court of claims, to recover for services rendered as judge of the forty-sixth judicial circuit of the state of Indiana. The case involved the validity of impeachment proceedings before the senate of the General Assembly of the state of Indiana in the case of a circuit judge. The court holds "that the impeachment proceedings against appellee Dearth were without authority of law and wholly void."

24802. STATE v. LOWE. Marion County. *Reversed.* Willoughby, J. Martin, C. J. Myers, and Travis, J. J., concur in conclusion. January 25, 1929.

The appellee filed a plea in abatement to an indictment against him charging him with the crime of transporting intoxicating liquor in an automobile. The trial court erred in overruling the demurrer to the plea in abatement as the plea does not show facts sufficient to abate the action, the allegations being mere statements of the opinion of the pleader.

APPELLATE COURT

13257. BECKELHIMER ET AL. v. BABCOCK ET AL. Newton County. *Affirmed.* Nichols, J. January 25, 1929.

Claims against an estate cannot be enforced except in the manner provided by the statute, and where no claim of any kind was filed against the estate within the year after the appointment, and within thirty days before the report in final settlement was filed, a claim cannot be presented in the form of exceptions to the final report.

13148. BELL v. PARTLOW. Montgomery County. *Affirmed.* Nichols, J. January 4, 1929.

Where plaintiff sues to recover on a contract and on a check given by defendant, and defendant in a cross-complaint seeks relief in equity by the cancellation of the check and contract sued upon, there was no reversible error in sustaining a demurrer to the cross-complaint, since it would have been subject to a motion to strike out; defendant should have pleaded the fraud as a defense at law by an answer setting up the acts which were alleged to be fraudulent. The court further says that the averments of the cross-complaint were insufficient to constitute a valid defense, even if they had been so presented.

13272. BOYER ET AL. v. MEEKS. Clinton County. *Affirmed.* McMahan, P. J. January 10, 1929.

After a judgment in an action in replevin to obtain possession of an automobile there was filed what purported "to be an affidavit in attachment" and later the justice issued an order to the constable directing him to sell as upon execution the chattels attached by him, to wit: "one Ford coupe," etc. The court says that an attachment may be had at the time of filing the complaint, or at any time thereafter before judgment, in the action to which it is auxiliary, but no attachment can issue after judgment in the main action. Judgment affirmed with 10% penalty.

13288. BRADFORD ET AL. v. FIRST NATIONAL BANK, ADMR., ET AL. Grant County. *Affirmed.* Nichols, J. January 10, 1929.

Action to revoke the administration of an estate so that the will of deceased might be probated. The court says that the action is wholly unnecessary as far as the probating of the will is concerned and that to revoke the acts of the administrator would be contrary to sec. 3101, Burns 1926, which provides that all lawful acts done by administrators, before notice of a will duly probated, shall be valid. The administrator having obtained a valid order for the sale of certain real estate, his acts thereunder, subsequent to the time of such order and until such will shall be duly probated, must be held to be valid for a will has no effect until it has been probated.

13289. BROWNING v. BARNES. Elkhart County. *Affirmed.* Per Curiam. January 25, 1929.

Per Curiam.

13342. CORY v. HOWARD ET AL. Johnson County. *Affirmed.* Nichols, J. January 25, 1929.

This was an action to set aside a judgment by default and is predicated upon the theory of fraud in the procurement of the judgment. The court

says that while the statute, sec. 423, Burns 1926, provides for the relief from a judgment taken through mistake, inadvertence surprise or excusable neglect, the courts, irrespective of the statute, have inherent power to relieve against judgment procured by fraud.

13085. GADDIS V. BARTON SCHOOL TOWNSHIP OF GIBSON COUNTY. Gibson County. *Affirmed.* January 11, 1929.

Action by appellant against appellee to recover for services rendered by appellant as architect in the preparation of plans and specifications for constructing of a school house. The finding that an advisory board had not authorized the trustees to execute the contract for architect's fees, and had made no appropriation therefor, supports the trial court's conclusion that there could be no recovery for appellant's service as architect, whether on contract or a *quantum meruit.*

13237. GARRISON V. STATE. Huntington County. *Affirmed.* Lockyear, J. January 9, 1929.

An action of the State of Indiana by affidavit filed in juvenile court charging the appellant with violation of the compulsory school law. The bill of exceptions does not show that it contains the evidence in the case, consequently no question arising upon the sufficiency of the evidence to sustain the finding are before the court; and the only ground upon which the appellate court is authorized to reverse a judgment of a juvenile court is the insufficiency of the finding of facts or the evidence to sustain the same.

13286. GERGACZ ET AL. V. MUESSEL. St. Joseph County. *Affirmed.* Nichols, J. January 10, 1929.

In an action to recover $2,200 alleged to have been promised by appellants to appellee in consideration of and on the condition that appellee vacate a leased premise and surrender her lease thereto, and redeliver to appellants certain goods and chattels previously sold by appellants to appellee, the trial court found that "appellee did surrender to appellants said premises together with all of said furniture," and the appellate court holds this is equivalent to saying that "she did surrender to them the lease." The court further says there is no merit in the appeal and affirms judgment with 10% damages.

13443. THE GRASSELLI CHEMICAL CO V. MARTZ. Industrial Board. *Affirmed.* Per Curiam. January 9, 1929.

Per Curiam.

13086. HAAG V. LAWRENCE LUMBER CO. Marion County. *Affirmed.* Nichols, J. January 4, 1929.

Action on guaranty with special findings of fact. The court says the findings are amply sustained by the evidence and the conclusions of law supported by the findings. The court rejects the contention that the trial court by delaying its action in making the findings and stating its conclusions and rendering judgment, until after the end of term, and until after the expiration of the term of office of the judge and the commencement of his new term of office, thereby lost jurisdiction of the case.

13252. HAMILTON ET AL. V. CAREY ET AL. Marion County. *Affirmed.* Per Curiam. January 10, 1929.

Judgment affirmed with penalty of 10%.

13063. HIPSKIND V. WHEELER. Huntington County. *Affirmed.* January 4, 1929.

Per Curiam.

13184. HORN 1. WILLARD, EXECUTRIX. Elkhart County. *Affirmed.* Enloe, C. J. January 4, 1929.

This case involves, on its facts, the validity of an assignment by an heir of his part of an estate but in view of errors in making the appeal the record fails to present either the ruling on the motion for a new trial or the evidence in the case. The court says there is no merit in the appeal and judgment is affirmed with 10% penalty.

13153. HUDSON V. THE CITY OF TERRE HAUTE. Vigo County. *Reversed.* McMahan, P. J. January 11, 1929.

This is an action against the city of Terre Haute to recover for personal injuries received as the result of the fall which was alleged to have been caused by the negligence of the city in placing and maintaining a safety zone marker on one of its streets. There was error in sustaining the demurrer to the complaint but the court adds: "We refrain from expressing any opinion as to what our holding would have been in the absence of the admission made by appellee by its demurrer of the dangerous character of the markers and of its negligence in maintaining them in the street."

13303. INLAND STEEL CO. V. STOICA ET AL. Industrial Board. *Affirmed.* Remy, J. January 3, 1929.

The Industrial Board ordered a deposition to be taken in a foreign country, but did not include in the order requirements set out in sec. 318 of the Code. A motion was made to suppress the deposition on the ground that a statute had not been complied with in that the certificate of the officer who took the deposition "does not show that the answers to the interrogaories were re-read to the witness giving opportunity to make corrections." The motion to suppress was properly overruled since the taking of foreign depositions is controlled by sec. 304 Code of Civil Procedure, sec. 477 Burns 1926; and under this statute a commissioner taking a deposition in a foreign country is required to certify the deposition "in such manner as the court may direct."

12895. JUDAH V. GOLDSMITH. Johnson County. *Affirmed.* Nickols, J. January 10, 1929.

Action for damages for the alleged alienation of affections of the wife of the appellee. Certain alleged errors in the matter of exclusion of testimony were not properly presented in the record. The trial court having passed on affidavits and counter-affidavits as to the misconduct of a juror, the appellate court refuses to disturb its findings. The court says that it cannot say that damages in the sum of $5,000, under the facts of the case, are excessive since in such a case there is no method for determining exactly the proper pecuniary compensation and the court will not interfere with the

findings of the jury unless it is apparent that the jury was influenced by prejudice and passion.

13247. KANUCH ET AL. v. PRENTISS. Lake County. *Affirmed.* Lockyear, J. January 31, 1929.

Action was brought to recover for the death of appellee's son alleged to have been caused by the negligent operation of defendant's truck. Although it was error to instruct the jury that it was prima facie evidence of negligence to operate vehicles at greater speed than ten miles an hour in a closely built up business portion of the city, or at a greater rate than six miles per hour when approaching or driving upon a curve in the highway or street, or if the vision of the driver is obstructed, the court says this was not reversible error in view of the fact that there was ample evidence to support the "verdict of the jury in finding that the truck was being driven at a speed higher than was reasonable and prudent having regard to the traffic and the use of the way." In the absence of evidence to mitigate the amount of damages, $2,600 damages is not excessive for the death of a five-year-old child.

13156. KOCH v. FISHBURN. Marion County. *Affirmed.* McMahan, P. J. January 29, 1929.

An action to recover an amount alleged to have been owing the plaintiff "for drilling and exploring for a well upon real estate and to foreclose a mechanic's lien." Drilling a hole in the ground in order to obtain water comes within the mechanics lien statute which allows a lien for labor and materials used for "constructing, altering, repairing, or removing" certain designated things, including a well. Since the plaintiff did not guarantee to drill a well that would furnish water in any quantity or of any quality it was not necessary to allege as a part of his performance that water was obtained.

13341. THE CITY OF LEBANON v. WALKER. Boone County. *Reversed.* Nichols, J. January 25, 1929.

Suit by the mayor of Lebanon to recover salary alleged to be due for acting as city judge of a city of the fourth class. The court takes judicial notice that the population of Lebanon in 1920 was 6,257 and the statement of facts show that in 1922 the assessed vaulation of property was less than $7,500,000 and the court says that the city automatically became a city of the fifth class, despite an ordinance passed in 1920 reciting that it is a city of the fourth class.

13368. LEWIS v. HANNEMAN. Porter County. *Affirmed.* Nichols, J. January 4, 1929.

An action by proceedings supplementary to execution by appellee under secs. 881 and 883 Burns 1926. The court says that under these sections their complaint states a cause of action and that the demurrer thereto was properly overruled. See Burkett v. Bowen, 116 Ind. 379, 21 N. E. 38, for a full discussion of the question involved.

13226. MACBETH v. STUNKARD ET AL. Clay County. *Affirmed.* McMahan, P. J. January 23, 1929.

Action to quiet title. The motion for a new trial challenges the sufficiency of the evidence to sustain the decision as to the issues presented by

the complaint, and also by the cross-complaint. See opinion for discussion of the evidence.

13533. MALOTT, TREAS., v. LAPSLEY ET AL. Pike County. *Affirmed.* January 22, 1929.

This was an action to enjoin the treasurer of Pike county from levying upon and selling certain personal property of appellees for delinquent taxes, the same property having been given in and listed for taxation in Gibson county where the appellees resided. The question was whether the property came within the first exception to section 14050, Burns' 1926, and this was upon the record, a question of fact for the court and there was sufficient evidence to support the decision of the court that the property was not within any statutory exception and was, consequently, improperly placed upon the tax duplicate of Pike county as omitted property.

13210. MCNAIR ET AL. V. ST. LOUIS JOINT STOCK LAND BANK OF ST. LOUIS. Marion County. *Affirmed.* Per Curiam. January 25, 1929.

Per Curiam.

13251. POLEDOR CORPORATION V. HAPP. St. Joseph County. *Affirmed.* Lockyear, J. January 25, 1929.

Action to recover commission for finding a tenant. The errors relied upon are that the decision of the court is not sustained by sufficient evidence and the decision of the court is contrary to law. No error.

13281. ROBINSON V. CHICAGO, INDIANAPOLIS AND LOUISVILLE RD. CO. White County. *Affirmed.* Per Curiam. January 10, 1929.

Per Curiam.

13365. SCHORTEMEIER, AS SECRETARY OF STATE OF INDIANA V. AUBURN AUTOMOBILE CO. Marion County. *Affirmed.* McMahan, P. J. January 31, 1929.

This action involves a question of the proper basis of computing the amount of fees to be paid by a corporation when it changes from par to no-par value stock and exchanges no-par value stock for outstanding par value stock. The court concludes that under secs. 4958 and 5001 Burns 1926 the fee should be calculated on the difference between the capital as originally authorized and the capital authorized by the certificate of increase; and that in valuing the capital of the corporation, after the change, each share of no-par value stock authorized should "be considered and estimated to have a par value of ten dollars each" and not the value placed on it for purposes of exchange for outstanding common stock.

13266. SECURITY FINANCE CO. V. PFOHL. Gibson County. *Affirmed.* Per Curiam. January 11, 1929.

Per Curiam.

13246. SELTENRIGHT V. COOK ET AL. Marshall County. *Reversed.* Lockyear, J. January 10, 1929.

An action to enjoin a county treasurer from selling real estate for an erroneous ditch assessment. The error alleged was the sustaining of the demurrer to the plaintiff's complaint. The appellee having filed no brief

the court says this would justify a reversal where appellant presents only prima facie error, but the court says the complaint states a cause of action.

13185. SHANK FIREPROOF STORAGE CO. v. LAIRD. Marion County. *Affirmed.* Remy, J. January 23, 1929.

Affirmed on authority of *Costello v. Wallace* (1916), 184 Ind. 734, 110 N. E. 660.

13538. STATE EX REL. KOEHLER v. THE INDUSTRIAL BOARD OF INDIANA. Petition for writ of Mandate. *Writ denied.* Per Curiam. January 22, 1929.

Petition for writ of mandate to require the Industrial Board to furnish transcript of proceedings had before said Board so that the relator may prosecute said appellee as a "poor person". The court says that it is not necessary to decide whether a person can "under our law" avail himself of the privilege of prosecuting an appeal from an award of the Industrial Board as a "poor person." The petition does not show that notice of intention to appeal was ever served upon the defendant and upon the secretary of the Industrial Board, and no appeal bond was given. As the giving of notice and the filing of the appeal bond are matters going to the jurisdiction of a court, any attempt now to appeal would be fruitless, since the time within which notice of the intention to appeal must be given has now passed.

13422. STEINMETZ v. LUCAS. Grant County. *Appeal dismissed.* Nichols, J. January 4, 1929.

Appellee enters special appearance for the purpose of filing and presenting his verified motion to dismiss the appeal on a showing that the appellant had not complied with the rules of procedure on appeal. Appeal was dismissed. The court says, "there was no mistake of fact here, but of law in that appellant was not advised as to the provision of Rule 2 of the rules of this Court, and it has been numerously decided that such rules have the force and effect of law." The instant case is distinguished from *Tate v. Hamlin*, 149 Ind. 94, 41 N. E. 356.

13196. TATE v. LEGG ET AL. Hancock County. *Reversed.* Nichols, J. January 25, 1929.

Reversed on authority of *Dinsmore v. Kreigbaum*, 85 Ind. App. 168, 151 N. E. 436.

13273. TATMAN v. ROCHESTER LODGE ET AL. Fulton County. *Affirmed.* McMahan, P. J. January 30, 1929.

This is an action by appellant against a local Odd Fellow Lodge as owner of a cemetery, to enjoin the enforcing of a resolution of the trustees by the terms of which any one using a vault not made by the lodge should pay $5 to the lodge for setting the vault. The court says the ruling is not unreasonable, is not against public policy and does not tend to create a monopoly.

13275. WALBURN v. MCGRIFF. Delaware County. *Affirmed.* McMahan, P. J. January 22, 1929.

Appellee recovered judgment against appellant and appellant conceding his own negligence, contends that appellee was guilty of contributory negligence as a matter of law. The court said there is no merit in this contention and affirms judgment with 10% penalty.