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INDIANA DOCKET*

SUPREME COURT

25644 BAUGH v. STATE. Monroe County. *Reversed.* Martin, C. J. March 12, 1929.

The appellant had been found guilty of second degree burglary. The court says that "one who takes property under a fair color or claim of title and in the honest belief of ownership and of a right to its possession is not guilty of larceny although his claim is based on a misconception of the law or his rights under it, as in such a case the felonious intent is lacking, and he can not be guilty of burglary or the felonious attempt to commit burglary when he enters an abandoned church building to which he holds the legal title, to remove such personal property."

25214 BRANAM v. STATE. Monroe County. *Affirmed.* Myers, J. March 7, 1929.

Appellant was found guilty on the charge of unlawful possession of intoxicating liquor. The court reaches the conclusion that the legislature used the word "possession" (Sec. 2717 Burns 1926) to mean "to have the actual physical control of outlawed intoxicating liquor."

25023 DRURY v. STATE. Marion County. *Affirmed.* Travis, J. March 7, 1929.

Appellant was found guilty upon a count charging the unlawful selling, giving away, etc. of intoxicating liquor. The finding was sustained by sufficient evidence, and was not contrary to law.

25010 FERRIS v. STATE. Jay County. *Reversed.* Travis, J. March 5, 1929.

This is an appeal from a judgment upon a verdict of guilty as charged by an affidavit. Upon the authority of *Graves v. State* (1921) 191 Ind. 197, 132 N. E. 369 it was reversible error to overrule appellant's motion to quash.

25552 GOODMAN v. STATE. Vanderburgh County. *Affirmed.* Gemmill, J. March 29, 1929.

There was probable cause for the issuance of the search warrant. The fact that the officer allowed the affidavit to be taken from his office did not make the search warrant invalid.

25630 HAWKINS ET AL. v. FIRST NATIONAL BANK OF FRANKFORT, ET AL. Boone County. *Affirmed.* Gemmill, J. Myers and Travis, J. dissent. March 27, 1929.

The mortgagee having delayed more than a year from the death of the mortgagor, and since there was a finding that the administrator with will annexed had not diligently prosecuted the proceedings to sell the real estate,

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

the court did not commit error in appointing a receiver and the order of appointment was not contrary to law. The Boone circuit court could award a decree of foreclosure although a petition was pending in the Clinton circuit court for an order to sell the real estate in question; the assumption of jurisdiction to foreclose the mortgage by the Boone circuit court did not divest the Clinton circuit court of authority to order the administrator with the will annexed to sell the real estate.

25322 HAWLEY ET AL. V. HUNTINGTON COUNTY STATE BANK ET AL. Huntington County. *Affirmed.* Martin, C. J. March 27, 1929.

The appellants as administrators brought this action and asked for the appointment of a receiver. The application for a receiver is addressed to the sound legal discretion of the court and the plaintiff seeking the appointment of a receiver must show that there is a reasonable probability that he will recover in the action.

25509 HOOSIER CHEMICAL WORKS, INC., ET AL. V. BROWN. Marion County. *Affirmed.* Gemmill, J. March 5, 1929.

Where the trial court found that the original stockholder had paid the agreed sum for stock, and where the certificate failed to show the existence of any lien, or restrictions upon the transfer of the stock, the original stockholder, on taking reassignment of the stock from one to whom he had assigned it, is entitled to have a transfer of stock made on the corporation's books and a new certificate issued under Burns' 1926, Sec. 4979.

25735 HUGHES-CURRY PACKING CO. V. SPRAGUE. Marion County. Transferred from Appellate Court to Supreme Court under sec. 1357, sub. 2 Burns 1926. *Affirmed.* Gemmill, J. March 5, 1929.

This appeal involves the construction of the bulk sales act (Acts 1919 c. 49; Burns Ann. St. 1926, secs. 8052-8054). By the Bulk Sales Act fixtures come within its provisions only when sold with merchandise and it does not cover a sale of fixtures only.

25635 KOSTA V. RICHMURD ET AL. Jasper County. *Affirmed.* Gemmill, J. March 15, 1929.

This case involves the procedure to be followed in taking an appeal to the circuit court from a county board of commissioners in a drainage matter.

25523 LOVETT V. CITIZENS TRUST & SAVINGS BANK ET AL. St. Joseph Court. Transferred under sec. 1351 Burns 1926, from Appellate Court. *Appeal dismissed.* Willoughby, J. March 27, 1929.

The appellees, appealing specially, filed a motion to set aside the submission of the cause and dismiss the appeal. The court denies the contention of appellant that Sec. 698 Burns 1926, relating to civil appeals, should be construed the same as 3311 relating to probate appeals, and says that in attempting to appeal the appellant has not complied with the provisions of Sec. 698 Burns 1926, the transcript having been filed in the office of the clerk of the Supreme Court on the 11th day of June, 1929, when it appears that the 60th day next after the date upon which the appeal bond was filed fell on June 10th.

24909 MATES v. STATE. Marion County. *Affirmed.* Myers, J. March 6, 1929.

Defendant had been found guilty under an affidavit charging violations of the prohibition law. The causes relied upon in support of a motion for a new trial are that the finding of the court was contrary to law and was not sustained by sufficient evidence. Judgment affirmed.

25396 MCSWANE v. STATE. Vanderburgh County. *Reversed.* Gemmill, J. March 6, 1929.

The affidavit which was sent with the transcript from the city court to the circuit court, and which was filed, had not been and was not at any time approved by the prosecuting attorney; and by reason of the omission of approval the affidavit was insufficient to lawfully present the claim and the finding of the court was contrary to law.

25100 SMITH ET AL. v. HILL. Morgan County. *Affirmed.* Martin, C. J. March 29, 1929.

This is an appeal from a judgment of a circuit court which reversed the decision of the county commissioner's court, the commissioner's court having decided that the appellee contractor had not furnished and constructed a certain road in accordance with plans and specifications. Granting that the judgment was erroneous in that it mandated the auditor of the county, who was not a party to the action, to issue a warrant, this question should have been raised by a motion to modify. There was no error in permitting contractor and road engineer to answer questions calling for their opinions as expert witnesses.

25745 STATE EX REL. HEFLIN ET AL. v. HINDS ET AL. Tipton County. *Affirmed.* Travis, J. Martin C. J. concurs in conclusion. March 29, 1929.

This is an action by relators to mandate defendants to proceed with the sale of bonds and to construct a school building. The numbered points of the brief do not present an alleged erroneous ruling of the trial court for review.

25067 VOYLES ET AL. v. STATE. Orange County. *Affirmed.* Myers, J. March 5, 1929.

Appellants were charged by affidavit, and convicted by a jury, of using dynamite in the water of a named river in Indiana in violation of Sec. 2834 Burns 1926. The affidavit was not rendered defective by reason of the fact that it alleged that the dynamite was placed in the water "for the unlawful purpose and with the unlawful intent thereby to kill and injure the fish in said water." Even though the statute does not mention the killing or injuring of fish, the essence of the offense was the use of dynamite in the water of the river "not for mining or mechanical purposes, without a permit from one authorized to grant it." Nor did the challenged allegation inject into the affidavit an independent or collateral fact improper for the jury to consider and to the prejudice of the defendant as in *Torphy v. State*, 187 Ind. 73.

25065 WILEY v. STATE. Delaware County. *Affirmed.* Travis, J. March 7, 1929.

Appellant had been found guilty of the charge of transporting intoxicating liquor. The evidence is sufficient to sustain the verdict; there was no error in giving the instructions complained of; and the requested instructions are not presented on appeal since they were not signed by the appellant or by his attorney in his behalf as required by law. (Sec. 2301, division sixth Burns 1926.)

APPELLATE COURT

13332 ALLEN v. SELIG DRY GOODS CO. ET AL. Marion County. *Reversed.* McMahan, P. J. March 7, 1929.

This was an action to recover from the appellant the value of a fur coat which was purchased by his wife. One who sells to a wife who is living apart from her husband is chargeable with knowledge of the allotment of alimony, and this applies to alimony *pendente lite*; and in such cases, when the husband has complied with the order of the court, he can not be held for goods purchased by his wife on his credit.

13292 BAKER v. BAKER. Madison County. *Affirmed.* Per Curiam. March 27, 1929.

Per Curiam.

12668 THE BALTIMORE & OHIO RD. CO. v. HORTON. Jennings County. *Affirmed.* Per Curiam. March 7, 1929.

Per Curiam.

13450 BAY v. SHORT, ET AL. Starke County. *Motion denied.* Per Curiam. March 25, 1929.

The appellant filed a motion asking that the court set aside an order of dismissal of appeal and reinstate the cause upon the docket. The appellant can not contradict the record as to the time at which the appeal bond was filed. If the entry as to the time at which bond was filed is, in fact, incorrect the remedy is to have the trial court correct that record, and then, after such correction has been made, bring to the court, by certiorari, the corrected record.

13606 BECK v. STATE. Allen County. *Affirmed.* Per Curiam. March 28, 1929.

Per Curiam.

13602 BERRY v. STATE. Vanderburgh County. *Affirmed.* Per Curiam, March 27, 1929.

Per Curiam.

13623 BURKUS v. STATE. St. Joseph County. *Affirmed.* Per Curiam. March 26, 1929.

Per Curiam.

12773 BURLEY TOBACCO GROWERS' COOPERATIVE ASS'N. v. ROEDER. Jennings Co. *Reversed.* Remy, J. March 6, 1929.

This is an action by appellee, a member of appellant association, against appellant upon a written contract referred to by the parties in the pleadings as a "pool contract" or "marketing agreement." Under the full faith and credit clause of the United States constitution, judgments of a court of general jurisdiction of any state having jurisdiction over the parties and the subject matter are conclusive in other states until reversed on appeal or vacated by the court which rendered the judgment, and are not, therefore, open to collateral attack. It appeared from the record that the trial court permitted a collateral attack upon the foreign judgment pleaded by way of set-off, which action, judgment not being void, was contrary to law and the appellant is entitled to a new trial.

13110 BURROUGHS V. SOUTHERN COLONIZATION CO. Starke County. On petition for rehearing. *Petition denied.* Nichols, J. March 29, 1929.

The court says it was wholly unnecessary to hold whether the contract in question was void; that it is sufficient to say that a foreign corporation which has failed to comply with the laws of the state that qualify it to do business in the state can not maintain a suit either at law or in equity upon any claim, legal or equitable, either arising out of contract or tort, in any court of this state.

13621 BUSCH V. STATE. Delaware County. *Affirmed.* McMahan, P. J. March 26, 1929.

Appellant was convicted of maintaining a common nuisance in violation of the statute. It is not necessary in a case like this to prove that the defendant sold, bartered or gave the liquor to any person. The manufacture of the same is sufficient to sustain a verdict. Appellant fails to present the question of alleged error in overruling his challenge to certain jurors. The testimony and facts developed on the *voir dire* examination must be set out in the brief; a mere reference to the place in the record where such testimony can be found is not sufficient.

13213 CALIN V. MARCOVICH ET AL. Lake County. *Affirmed.* Remy, J. March 7, 1929.

The case turns on the interpretation of a "customer's receipt," the appellant contending that it was in fact a contract showing on its face that he was the purchaser of a draft. The trial court did not err in ruling that the instrument was a mere receipt; and that, being a receipt and not a contract, parol evidence was admissible to show the intention of the parties.

13361 THE CHICAGO FIRE AND MARINE INS. CO. V. NEWMAN. Vanderburgh County. *Affirmed.* McMahan, P. J. March 26, 1929.

This case involves the interpretation of certain words contained in a rider attached to an insurance policy. The court interprets "additions and extensions, . . . and in the yards, on platforms, sidewalks or alleys, within 100 feet of the above described building" as including a warehouse

within 100 feet of the main building described in the policy and says that if there is any doubt as to whether the policy covered the property in the warehouse, that it will be resolved against appellant.

13587 CHOWING v. STATE. Delaware County. *Affirmed.* Remy, J. March 26, 1929.

Prosecution for unlawful transportation of intoxicating liquor. Where it appears that the jury could not have been misled by the instruction of the court, and that appellant was not harmed thereby, the court will not reverse because the instructions were improperly drawn.

CLARAGE v. PALACE THEATRE CORP. St. Joseph County. *Affirmed.* McMahan, P. J. March 27, 1929.

The contract of waiver of lien entered into between the appellee and general contractor complied with Sec. 9831 Burns 1926 and the contractor, for himself and for all others furnishing labor or material for the construction of the building effectually waived the right to any lien on the property, and appellant is bound by the waiver.

13201 THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. CITY OF INDIANAPOLIS. Marion County. *Reversed.* Remy, J. March 13, 1929.

Board of Works had ordered the appellant to elevate certain railroad tracks and the appellant filed its complaint for appeal within fifteen days of the date of the order but not within 10 days, and no bond was filed. The court says that the appeal was not governed by the act of 1919 (Acts 1919, p. 625) providing for appeals from a city board of public works as to improvement of streets but is governed by the Track Elevation Act of 1923 (Acts 1923 p. 425, secs. 10515-10525 Burns 1926) or by the general act providing for appeals from decisions of boards of public works (Acts 1919 p. 635, sec. 10344 Burns 1926), neither of which requires a bond, the periods for appeal being 15 and 20 days respectively.

13427 COMMERCIAL CREDIT CO. v. MACHT. Marion County. *Affirmed.* Nichols, J. March 29, 1929.

This was an action by appellee against appellant to recover for the alleged conversion of an automobile which the appellee had bought from the appellant on a conditional sales contract. The appellee became delinquent in making payments and the appellant's "adjustor" took possession of the car under an agreement to redeliver the car to appellee upon payment of a certain sum of money on or before the 3rd day thereafter. The money was tendered within this time but the appellant demanded an additional $50. The court says the appellant was bound by the agreement of its "adjustor" and that the appellee was entitled to the car upon payment of the agreed sum.

13636 DALE v. STATE. Delaware County. *Reversed.* Per Curiam. March 28, 1929.

Per Curiam.

13611 DAVIS v. STATE. Marion County. *Affirmed.* Per Curiam. March 26, 1929.

Per Curiam.

13580 DIETZ v. STATE. Washington County. *Affirmed.* Nichols, J. March 29, 1929.

The leave to file a bill of exceptions not being given until 3 days after the motion for a new trial was overruled, and the bill of exceptions not having been filed or presented within the term, it is not in the record, and the evidence it purported to contain is not before the court and without the evidence the court says "we can not say that there was any reversible error in the giving of the instructions."

13615 DOENCH v. STATE. Dubois County. *Affirmed.* McMahan, P. J. March 29, 1929.

Appellant pleaded guilty in a city court to the charge of manufacturing liquor and after sentence appealed to the circuit court and filed a petition to withdraw his plea of guilty and enter a plea of not guilty. The appellate court not being able to find the trial court abused its discretion in refusing to allow a plea of guilty to be withdrawn, the court did not err in refusing to submit the question of punishment to a jury, with the plea of guilty in the record.

13618 DRYBREAD v. STATE. Johnson County. *Reversed.* Per Curiam. Nichols, J., not participating. March 28, 1929.

Reversed on authority of *Wallace v. State,* (1927) 199 Ind. 317, 157 N. E. 657.

13588 EDWARDS v. STATE. Delaware County. *Affirmed.* Per Curiam. March 28, 1929.

Per Curiam.

13629 FLECKENSTEIN v. STATE. Allen County. *Affirmed.* Remy, J. March 29, 1929.

The evidence is not in the record since there is no showing that time beyond the term was given to file a bill of exceptions containing the evidence, and the record does show that the bill of exceptions was in fact filed beyond the term.

13426 FORT WAYNE CHECKER CAB CO. v. DAVIS. Allen County. *Affirmed.* Nichols, J. March 29, 1929.

It was not error to overrule appellant's motion for a change of venue since the appellant's attorney had been granted several continuances upon an oral agreement in open court with opposing counsel not to take a change of venue. There was no reversible error in permitting appellee's counsel to ask each prospective juror on his *voir dire* whether he was interested in any insurance company engaged in writing liability insurance on automobiles or taxicabs or whether he or any member of his family were agents for any such companies.

13581 GMIL v. STATE. Marion County. *Affirmed.* Remy, J. March 26, 1929.

Appellant had been convicted of maintaining a common nuisance and the only question presented by the appellant is the sufficiency of the evidence. The evidence is sufficient.

13581 GMIL v. STATE. Marion County. *Affirmed.* Remy, J. March 26, 1929.

Affirmed on authority of *Marshall v. Marshall* (1920) 74 Ind. App. 204, 128 N. E. 699.

13592 HALE v. STATE. LaPorte County. *Affirmed.* Nichols, J. March 29, 1929.

Affirmed on the authority of *Dietz v. State of Indiana* (decided this term).

13579 HECHE v. STATE. Wells County. *Affirmed.* Per Curiam. March 26, 1929.

Per Curiam.

13604 HEYVERESTS v. STATE. St. Joseph County. *Affirmed.* Per Curiam. March 28, 1929.

Per Curiam.

13182 HOBAN, ADMX. v. SOUTH BEND BEVERAGE & ICE ASS'N. St. Joseph County. *Affirmed.* McMahan, P. J. March 5, 1929.

The statute, Sec. 686 Burns 1926, providing that, "the date of the presentation shall be stated *in* the bill of exceptions" is mandatory and since the "purported bill of exceptions" contains nothing to show that it was presented to the judge within the time allowed, the court holds that the evidence is not in the record, and that no question is presented as to the admission or exclusion of evidence.

13378 HOBBS ET AL. v. HOBBS ET AL. Dubois County. *Affirmed.* Per Curiam. March 13, 1929.

Per Curiam.

13312 HOOSIER MUTUAL INS. CO. v. CITIZENS TRUST & SAVINGS BANK OF PRINCETON, IND. Posey County. *Affirmed.* McMahan, P. J. March 13, 1929.

This was an action on a note on the back of which is found the following: "The undersigned hereby guarantees the payment of the within note," which was signed by the appellant. The court says that in accordance with the great weight of the authorities "we hold that by virtue of the writing on the back of the note, appellant must be held as an indorser."

13358 HULL ET AL. v. BREEDLOVE ET AL. Boone County. *Reversed.* Nichols, J. March 8, 1929.

An oral agreement between adjoining land owners as to the part of a partial fence the respective owners should build, is not a covenant running with the land and is not binding on a subsequent purchaser without notice.

13259 CITY OF HUNTINGTON ET AL. SONKEN. Huntington County. *Affirmed.* Neal, J. March 8, 1929.

"If the municipality attempts some method other than that provided by the statute, or goes beyond the authority given, to that extent, it is without jurisdiction and its acts are void." (*City of Bluffton v. Miller*, 33 Ind. App. 521, 70 N. E. 989.) There is no statute applying to the construction of sewers in cities of the fourth class that would permit a council or board of works two years thereafter, by an independent proceeding, to localize a part of the main intercepting sewer and in such proceedings assess the abutting property owners for a part of the cost of construction of the main intercepting sewer as was done in this case.

13301 IROQUOIS AUTO INSURANCE UNDERWRITERS v. STIERWALT. Morgan County. *Reversed.* Nichols, J. March 8, 1929.

Appellee seeks to recover for loss of his automobile by fire, upon a policy of insurance containing the clause that "no recovery shall be had under this policy if at the time the loss occurs, there be any other insurance covering such loss which would attach if this insurance had not been effected." A demurrer to the answer by appellant was improperly sustained since the answer alleged facts showing the existence of another enforcible policy of insurance covering loss by fire at the time of the loss complained of.

13290 JACKSON v. HUNNICUT ET AL. Wells County. *Affirmed.* McMahan, P. J. March 14, 1929.

An action to quiet title involving the construing of a will. Construing the will as an entirety the court below correctly concluded as a matter of law that appellant owned an estate in the real estate in question during widowhood, which might be extended to an estate for life.

13467 KURATNIK v. ILLINOIS STEEL CO. INDUSTRIAL BOARD. *Affirmed.* Lockyear, J. March 13, 1929.

Affirmed on authority of *Inland Steel Co. v. Nan, et al.*, 83 Ind. App. 673, 149 N. E. 576.

13357 KREIGBAUM v. DINSMORE. Fulton County. *Reversed.* Lockyear, J. March 9, 1929.

A suit for damages for seduction and assault and battery. At a time when the plaintiff was pregnant as result of the alleged seduction she married one D and subsequently brought this action. Under the facts of the case the law prohibits the plaintiff and her husband from denying the parentage of the child; consequently an instruction which allowed recovery for the damages of pain and suffering occasioned by the birth of the child was error since the only damage recoverable in any event would be damages for the assault and intercourse.

13599 KRISTIAN v. STATE. Vigo County. *Affirmed.* Nichols, J. March 29, 1929.

Appellant's motion for a new trial was overruled and appellant was given 30 days in which to file a bill of exceptions. Two later extensions of

30 days each were allowed. By reason of failure to show compliance with Sec. 687 Burns 1926 relating to an extension of time for the filing of bills of exceptions, and for the further reason that there is no provision in the statute authorizing a second extension of time, the bill of exceptions is not in the record.

13617 LAMPKINS v. STATE. Delaware County. *Reversed.* Nichols, J. March 29, 1929.

This appeal involves chiefly the question of irregularities in impaneling the jury. The court says: "There should be a suppression of any act which might create even a suspicion that the jury was not fairly drawn, or that it was not wholly without prejudice and impartial. By the method adopted by the court in directing the sheriff to select his talesmen and have them ready to fill vacancies in the event of removal of jurors by challenge, the sheriff could have discriminated in the selection of the jurors, selecting such jurors as were prejudiced against appellant and his defense."

13593 LENKKIS v. STATE. Lake County. *Affirmed.* Per Curiam. March 28, 1929.

Per Curiam.

13603 MANERO v. STATE. Lake County. *Affirmed.* Per Curiam. March 26, 1929.

Per Curiam.

13473 MID-CITY IRON & METAL CO. ET AL. v. TURNER ET AL. Industrial Board. *Reversed.* Neal, J. March 28, 1929.

When the parties by their respective counsel, during the progress of the hearing before the Industrial Board, enter into a stipulation as to the average weekly wage of the employee, and no motion is made by counsel to set aside or withdraw the same, the stipulation is conclusive between the parties and the tribunal hearing the case.

13260 MILLER v. COX, EXR. ET AL. Marion County. *Affirmed.* Lockyear, J. March 27, 1929.

This was an action to construe a will. See opinion for full statement of provisions of the will and the conclusions of law of the trial court.

13576 MILLER v. STATE. Delaware County. *Affirmed.* Enloe, C. J. March 27, 1929.

There was no error in overruling appellant's motion to suppress evidence since the appellant was a stranger to the search warrant proceedings and was not the owner of the premises searched, immunity from unreasonable search being a personal privilege to owner of such premises.

13337 NEES, ET AL. v. ALLEN ET AL. Clay County. *Reversed.* Enloe, C. J. March 27, 1929.

This case involves the interpretation of Sec. 10440 Burns 1926 as respects the time for the filing of a remonstrance against a proposed street

improvement. The court construes "said statute as to the time within which the remonstrances last before mentioned may be filed as being the ten days following the date of confirming said preliminary resolution and the ordering of said improvement made."

13324 THE NEW YORK CENTRAL RAILROAD CO. v. NEWTON COUNTY STATE BANK. Newton County. *Reversed.* Nichols, J. Remy, J. dissents. March 8, 1929.

An action under the Federal act to recover damages on account of death of an employee of the appellant. The court says the decedent assumed the risk involved in following a "dangerous custom" and that if there was negligence of the tower man "it was but the negligence of a fellow servant, which the decedent assumed."

13373 NORTHWEST FINANCE CO. v. WINES. Dekalb County. *Affirmed.* Per Curiam. March 7, 1929.

Per Curiam.

13595 PFAFFLIN v. STATE. Warrick County. *Reversed.* Lockyear, J. March 27, 1929.

The defendant made no plea to the affidavit, nor did the court enter a plea for him. Upon confession of error the cause is reversed with instructions to grant a new trial.

13490 REKOSS ET AL. v. STANDARD STEELE CAR CO. Industrial Board. *Affirmed.* Per Curiam. March 7, 1929.

Under Sec. 37 of the Compensation Act (Sec. 9482 Burns 1926) the board must first find the average amount which had been contributed weekly by a deceased employee before there can be an award to partial dependents. In the absence of evidence to furnish the necessary data the board properly refused to make an award for partial dependents.

13310 THE CITY OF RUSHVILLE, IND. v. THOMAS. Rush County. *Affirmed.* March 8, 1929.

The common council having abolished the office of city judge and devolved the duties thereof on the mayor, he was entitled to pay at the rate of $600 a year in accordance with Sec. 10264, Burns' 1926. By the acts of the General Assembly the salary of the mayor of the city of Rushville was fixed at $2,000 a year although an ordnance of the city was in effect which set the salary of the mayor of the city at $600 a year. There is no ground for estoppel since the appellant had not in any way changed its position and was not harmed by the appellee's delay in bringing his suit. Appellee is entitled to interest on the amount of his claim from the time of the commencement of his action.

13330 ROCCO v. SERVER ET AL. Marion County. *Affirmed.* Nichols, J. March 8, 1929.

Where a defrauding vendee induced a vendor to deliver possession of an automobile with the intent to pass title to the vendee the fraudulent taking

was not larceny at common law and the transaction is voidable and not void; and the defrauding vendee having obtained registration and certificate of title from the Secretary of State by using the bill of sale, which was marked paid, innocent purchasers for value are entitled to hold a car against the original vendor.

13620 SCANLAN v. STATE. St. Joseph County. *Reversed.* Lockyear, J. March 27, 1929.

The trial court erred in overruling a motion to withdraw a submission and to discharge the jury and grant a new trial where the prosecuting attorney in his argument to the jury commented upon the defendant's failure to testify. The court distinguished from *Blume v. State,* 154 Ind. 343, where the court instructed the jury as to defendant's rights and where there was no motion to withdraw submission, etc.

13578 SCHOFIELD v. STATE. Vanderburgh County. *Affirmed.* McMahan, P. J. March 27, 1929.

This is a prosecution against appellant for maintaining a common nuisance where intoxicating liquors were sold, etc. The evidence was sufficient to sustain the verdict and there is a failure to present any question as to the admissibility of certain evidence; no error in the giving of instructions complained of.

13398 SCHOONOVER v. CARPENTER CONSTRUCTION CO. Hancock County. *Affirmed* and 10% damages assessed. Per Curiam. March 8, 1929.

Per Curiam.

13386 SECURITY UNDERWRITERS, ETC. v. WORLEY, ET AL. Marion County. *Motion denied.* Per Curiam. March 6, 1929.

The appellant filed a motion to set aside an order of February 13, 1929 dismissing appeal. One with an appealable interest should be made a party to prevent multiplicity of appeals.

13500 SIMPSON v. STATE. Marion County. *Affirmed.* Remy, J. March 27, 1929.

Appellant was charged with violation of the statute making it unlawful to "sell intoxicating liquor to be used as a beverage, and the evidence shows that he sold Jamaica ginger which was from 60 to 80% alcohol per volume and that sale was made with the knowledge that the same was purchased for beverage purposes. The court will take judicial notice that Jamaica ginger which is from 60 to 80% alcohol per volume is intoxicating. The cas is distinguished from *Hedges v. State,* 194 Ind. 122, 142 N. E. 13, in which case there was no evidence that the Jamaica ginger was sold for beverage purposes.

13209 SMITH v. ROBERTSON. Vigo County. *Reversed.* Per Curiam. March 8, 1929.

Per Curiam.

13371 SPARTA STATE BANK v. MYERS ET AL. Wabash County. *Reversed.* McMahan, P. J. March 12, 1929.

An official bond for the faithful performance of the duties of a cashier of a bank is a security for competent skill and ordinary diligence, as well as for integrity in the discharge of the duties of the office; and in an action upon such bond, alleging that the cashier as such, has received money for which he has not accounted, is a sufficient assignment of a breach.

13585 STRATTON ET AL v. STATE. Madison County. *Affirmed.* Neal, J. March 26, 1929.

This appeal involves the sufficiency of evidence to sustain the verdict of the jury. The record discloses that during the April term of court the appellant was given 60 days in which to file a bill of exceptions. The purported bill of exceptions was not filed in the April term of said court and was not presented to the judge within the time allowed and consequently evidence is not before the reviewing court.

13577 THINNES v. STATE. Ripley County. *Affirmed.* Per Curiam. March 27, 1929.

Per Curiam.

13597 TSCHAON v. STATE. Dearborn County. *Affirmed.* McMahan, P. J. March 28, 1929.

The appellant's contentions on appeal are that the court erred in the admission of certain testimony and in giving certain instructions. The court says: "No attempt has been made to show why the court erred, and it being no part of the duty of this court to search out reasons for reversing a judgment not suggested by the appellant, we content ourselves with saying no error is shown in the admission of any of the testimony."

13613 TURK v. STATE. Marion County. *Affirmed.* Enloe, C. J. March 27, 1929.

Where upon a hearing to quash an affidavit and search warrant issued thereon, and to suppress evidence, the officer who filed the affidavit for said warrant testified that at the time he made said affidavit he was sworn by a judge, and that he informed the said judge that a certain person had told him that he had seen whisky sold in the place of the appellant, and that he made the affidavit for the search warrant upon information and belief, and that the court issued a warrant after hearing the said information, the testimony disclosed probable cause for the issuing of said warrant.

13367 VAN BLARICON, ADMX. v. WABASH RY. CO. Allen County. *Affirmed.* March 27, 1929.

Per Curiam.

13641 VILLA v. STATE. Elkhart County. *Affirmed.* Remy, J. March 29, 1929.

The only question sought to be presented is the alleged error of the trial court in the giving of one certain instruction. The appellant fails to

set out all of the instructions given by the court as required by clause 5 of Rule 22 of the Appellate Court.

13548 WACKER v. WACKER. Marion County. (On Petition for writ of Certiorari). *Petition denied.* Per Curiam March 15, 1929.

A copy of an entry in a book called "clerk's docket" if certified to the Appellate Court, by the clerk of the trial court, would be of no avail against an order book entry duly certified and in the record.

13189 WALLACE ET AL v. DOHNER ET AL. Dekalb County. *Reversed.* Remy, J. Neal J. not participating. March 27, 1929.

The question as stated by the court is: Did the state entomologist and his assistant, as representatives of the Conservation Department of the state, have the right to go on the land of appellees where the crops were growing, and destroy the corn stocks and cobs which lay upon the surface? The facts as shown by the evidence created an emergency which justified action on the part of the officers, and the rules and regulations embraced in the quarantine were held reasonable and are within the authority delegated by the statute.

13423 THE WESTERN & SOUTHERN LIFE INS. CO. v. MCCOOL, ADMR. Vanderburgh County. *Reversed.* Nichols, J. March 29, 1929.

Reversed on the authority of *Metropolitan Life Insurance Co. v. Head,* 86 Ind. App. 326, 157 N. E. 448.

13596 WILLIAMS v. STATE. Marion County. *Reversed.* Enloe, C. J., March 29, 1929.

Appellant was convicted of violating Sec. 2956, Burns' 1926, which makes it a misdemeanor for a contractor to accept payment in full for labor, services, etc., without notifying the person from whom payment is received of the existance of outstanding indebtedness in favor of another in respect to such service or material, etc., with the result that the person making such payment suffers loss. The facts fail to show that there was a payment "in full' and consequently the verdict was not supported by sufficient evidence and is contrary to law.

13532 WOLF v. SHUTTS ET AL. Steuben County. *Reversed.* Per Curiam. March 8, 1929.

Appellee having filed no brief and having failed to show cause why judgment should not be reversed, the cause is reversed without prejudice.