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SUPREME COURT

25732 HIVELY V. SCHOOL CITY OF NAPANNEE, INDIANA ET AL. Kosciusko Circuit Court. *Reversed.* Martin, J. December 5, 1929.

The appellant, as a resident taxpayer, brought this action to enjoin a school corporation from entering into a lease contract made under the provisions of Ch. 223, Acts 1927, for the construction of a school building. The court concludes that the contract set up in the complaint constituted a present indebtedness on behalf of the school city for the total amount to be paid out thereunder, and since the total amount together with the existing indebtedness of the school city is in excess of the 2% limit of indebtedness permitted under the Constitution, the contract is void and the complaint states a good cause of action and is good as against demurrer. The constitutionality of Ch. 223, Acts 1927, is not determined.

25140 HIZER V. HIZER. Fulton Circuit Court. *Reversed.* Willoughby, J. December 6, 1929.

This is an appeal from an order of court appointing a receiver for the property of appellant, the order having been made without notice and without evidence upon which to support a finding except the verified complaint or petition. Under Sec. 1301, Burns 1926, when a receiver is appointed without notice, it must appear, either in the verified complaint or by affidavit, not only that there was a cause for the appointment of a receiver, but that there was cause for such appointment *without notice;* and if sufficient cause for not giving reasonable notice is not shown by affidavit, the appointment is forbidden by such section and is erroneous. The evidence in this case is not sufficient to justify the appointment of a receiver without notice.

25560 KOSTOFF ET AL. V. MEYER KISER BANK. Marion Circuit Court. *Petition for rehearing denied.* Per Curiam. December 3, 1929.

The court concludes that the decision already reached is correct but the mandate heretofore entered is modified in the matter of interest and costs.

25281 MITCHELL V. STATE. Marion Criminal Court. *Affirmed.* Willoughby, J. December 3, 1929.

Appellant was convicted of the crime of conspiracy to commit a felony. The overruling of a motion for a new trial is not presented for review on appeal where the motion or its substance is not set out in appellant's brief. Appellant seeking reversal of a judgment because the finding of the court was not sustained by sufficient evidence, must point out in his brief under the heading of "Points and Authorities" wherein the evidence is insufficient to prove some material element of the crime charged.

25166 WERTHEIMER ET AL. V. STATE. Delaware Circuit Court. *Affirmed.* Martin, J. Myers and Travis, J. J., concur in result. December 13, 1929.

Appellants were convicted on an indictment charging them with receiving stolen goods in violation of Sec. 2465, Burns 1926. In this state the receipt of stolen goods, knowing them to have been stolen, is an independent, substantive offense and not merely an accessorial one, and the name of the thief or other person from whom the person received the goods is not necessary as identifying matter and for that reason need not be alleged in the indictment. The unexplained possession of recently stolen goods by one charged with unlawfully receiving them is a strong circumstance to be considered, with all the evidence in the case, on the question of guilty knowledge. The court expressly disapproves certain language used in *Foster v. State,* (1855) 106 Ind. 272, which language would seem to require that, in order to be guilty of receiving stolen goods, one must receive the property *knowingly from the thief.* The court also disapproves the statement in *Foster v. State* to the effect that when the indictment states that the goods were stolen "by some person to the Grand Jury unknown" that it must be made to appear in the trial that the name of the thief was unknown to the Grand Jury and that reasonable diligence was used to ascertain the name.

APPELLATE COURT

13781 ADAMS V. STATE. Marion Juvenile Court. *Appeal dismissed.* McMahan, J. December 4, 1929.

Where the record shows that the parent was found guilty of child neglect and "judgment withheld during good conduct," there is no judgment from which an appeal can be prosecuted.

13509 THE AMERICAN INSURANCE CO. V. WOOLFOLK ET AL. Perry Circuit Court. *Affirmed.* McMahan, J. December 17, 1929.

Action against appellant on a fire insurance policy. It is the well established law of this state that when a policy contains a provision that it shall be void if the interest of the insured is not directly stated therein, or, if the interest of the insured is other than "unconditional and sole owner," such provision means voidable at the option of the insurer; and where the insurer has knowledge of the facts and would be justified in declaring the policy void and after a loss occurs requires proof of loss and fails to give timely notice to the insured of its election to avoid the policy, it waives the right to recover because of such fact. Granting that the court erred in its finding as to the respective amounts due the vendor, the mortgagee and the owner, this error does not affect the appellant insurance company as the appellant is not interested in the division of the funds recovered in the suit.

13501 BETTER HOMES CO. V. HILDEBRAND HARDWARE CO. ET AL. Allen Circuit Court. *Affirmed.* Nichols, J. December 6, 1929.

Action to recover personal judgment against one of the appellees and to foreclose a mechanic's lien against certain real estate owned by appel-

lant. Under the facts as found appellant gave such active consent to the construction of the house as to subject its real estate to mechanic's liens for labor and material furnished, even though the contract between appellant and appellee Bennett could be construed as an executory contract of purchase.

13441 BEYER V. TRUSLER ET AL. Ripley Circuit Court. *Affirmed.* McMahan, J. December 19, 1929.

Complaint by appellant against appellees to declare a trust, with cross-complaint to quiet title. On the facts the court stated a conclusion of law in favor of appellees and entered a decree quieting title. The evidence is sufficient to establish a gift of the lot in question to appellees.

13239 BIGGS V. MARSHFIELD ET AL. Warren Circuit Court. *Affirmed.* McMahan, J. December 10, 1929.

This is an action to enjoin the sale and removal of articles alleged to be fixtures. Equity does not require irreparable injury for issuance of injunction when the threatened injury to the inheritance presents a question of waste as distinguished from trespass. Equity will not enjoin trivial acts of waste; it will enjoin acts of waste which from their nature can be a serious injury to the realty.

13513 CITIZENS LOAN & TRUST CO. OF LEBANON, IND., ADMR., V. TAYLOR. Boone Circuit Court. *Affirmed.* Nichols, J. December 12, 1929.

Action by appellee, by claim filed against estate, to recover for services alleged to have been rendered to deceased and wife. The rule that should prevail under the facts of this case is that "if the circumstances authorized the person rendering the services reasonably to expect payment therefor, . . . the law will imply a contract therefor. . . ." The evidence in the case was sufficient to justify an inference of a contract to pay for services and would have sustained a verdict for a larger amount than was returned.

13425 CITY NATIONAL BANK V. BOARD OF CO. COMMISSIONERS OF DEKALB COUNTY ET AL. Dekalb Circuit Court. *Affirmed.* Nichols, J. December 6, 1929.

This suit involves the legal interests of certain laborers and materialmen, the surety on a contractor's bond and the appellant bank, in a sum of money retained by the appellee Board of Commissioners. Although the laborers and materialmen were precluded from recovering against the surety company because of their failure to comply with the provisions of the Act of 1925 (Burns, Secs. 6121 and 6122), their claim was superior to that of the bank, which claimed under an assignment of the contractor; and as between the assignee bank and the surety company, the fund remaining in the hands of the company is charged with an equity in favor of the surety which relates back to the time the contract of suretyship was entered into and is superior to the right of the contractor or his assignee.

13709 DEMENEY v. BOARD OF COMMISSIONERS OF WHITLEY COUNTY. Huntington Circuit Court. *Affirmed.* McMahan, J. December 4, 1929.

Suit by appellant against the county to recover a sum of money paid as the purchase price of certain real estate sold for delinquent taxes, the land in question having subsequently been sold upon foreclosure of a school fund mortgage. The facts do not bring plaintiff's claim within Sec. 14334, Burns 1926, which sets forth the conditions under which a sale or conveyance of land for taxes shall be invalid.

13457 DUNKIN ET AL. v. LAFAYETTE LOAN & TRUST CO. ET AL. Tippecanoe Superior Court. *Affirmed.* McMahan, J. December 19, 1929.

The appellee trust company as receiver filed its petition to sell the assets of the gravel company. The evidence was ample to sustain the finding in favor of the receiver that the property should be sold; that certain mortgages held by trustees were valid and that the substituted defendants and intervenors had no interest in the real estate and should recover nothing.

12885 ELLIOTT v. KERN ET AL. Marion Probate Court. *Motion to strike sustained.* Myers, J. December 10, 1929.

Petition to transfer the above titled cause to the Supreme Court. Since it appears that the party in whose interest the petition is filed died prior to the filing of the petition and since no substitution was had, petition filed in the name of the dead party is a nullity and hence subject to the motion to strike it out.

13458 THE EXCHANGE BANK OF WARREN, INDIANA, v. WEINER. Huntington Circuit Court. *Affirmed.* Nichols, J. December 12, 1929.

Action by appellee to recover from appellant bank the sum of money represented by a certificate of deposit issued by appellant to appellee, the appellant bank having already paid the amount of the certificate on an endorsement which the appellee claims was a forgery. Since there was no issue of estoppel or of negligence of appellee presented, and since the court expressly found for the appellee on the issues of forgery and want of authority, the court correctly stated its conclusion of law in favor of appellee.

13505 FIDELITY HEALTH & ACCIDENT CO. v. HOLBROOK. Marshall Circuit *Affirmed.* Remy, C. J. December 4, 1929.

Action by appellee to recover on a policy of accident insurance issued by appellant to the husband of appellee. When the language in an insurance policy is ambiguous the court will adopt the construction more favorable to the insured and the particular clause in question in this suit, "while doing any act or things pertaining to any occupation so classified as more hazardous," must be interpreted to mean while doing "any act pertaining to another occupation classed by the company as more hazardous, but in *no way* pertaining to *his own occupation.*"

13521. FLAMION v. DAWES. Dubois Circuit Court. *Affirmed.* Nichols, J. December 12, 1929.

Action by appellee to recover damages for the wrongful death of her daughter, who was killed in an automobile accident. The court did not err in overruling appellant's motion to make more specific, and the evidence objected to by the appellant was properly admitted as a part of the *res gestae*, helping to explain the conduct and motives of the parties at the time of the accident. It was not error to overrule appellant's motion to discharge the jury and declare a mistrial because of the sickness of the juror even though it became necessary to continue the trial, on account of a juror's sickness, from October 15th to October 22d. Since the appellant voluntarily gave evidence that he carried insurance, he cannot, after giving such evidence, complain that appellee commented thereon.

13779. FRENCH v. STATE. Fayette Circuit Court. *Affirmed.* Neal, P. J. December 20, 1929.

Appellant was convicted on the charge of unlawful possession of intoxicating liquor. Although the premises were erroneously described in the search warrant, in that the wrong political township was named, the description was sufficiently definite to satisfy the constitutional requirements. It is settled in this state that the question as to the qualification of a witness to testify as an expert is for the trial court in the exercise of a sound discretion.

13855 GONSIOREK ET AL. v. INLAND STEEL CO. Industrial Board. *Affirmed.* Nichols, J. December 12, 1929.

Proceeding by appellant against appellee before the Industrial Board. The Industrial Board was justified in denying compensation on the ground that the evidence was not sufficient to establish the dependency of appellants.

13542 HEACOCK v. ARNOLD. Pike Circuit Court. *Affirmed.* Neal, P. J. December 11, 1929.

The alleged error in overruling appellant's objection to one question propounded to each of the twelve jurors on the *voir dire* examination is not presented unless the record contains the entire *voir dire* examination. Further, no error assigned can be considered since the general bill of exceptions fails to become a part of the record by reason of the fact that the person signing the same was neither the regular judge nor a judge *pro tempore* at the time of signing, and is without authority to sign the bill.

13527 HOLLENZER v. TRADERS INVESTMENT CO. Lake Superior Court. *Affirmed.* Lockyear, J. December 6, 1929.

Since the record shows and the parties agree that the superior court had no power to render personal judgment, and that the only object of the proceeding was to reach certain property belonging to the appellant, the personal judgment is reversed and all other proceedings pertaining to the attachment and sale of appellant's property are affirmed.

13837 INTER-SOUTHERN LIFE INSURANCE CO. OF LOUISVILLE, KY., v. BOWYER, ADMR. Floyd Circuit Court. *Affirmed.* Remy, C. J. December 12, 1929.

Action to recover on an insurance policy. While the insured was riding upon the tail gate of an automobile truck the chain, which held the tail gate in position, broke, causing the insured to be thrown to the pavement and so injured that he died the same day. Construing the policy liberally in favor of insured, the court holds that the accidental death of the insured was the result of his being thrown from a "disabled automobile" within the meaning of the clause of the policy reading "or by being accidentally thrown from such wrecked or disabled automobile or vehicle."

13364 LEVIN v. MUNK. Huntington Circuit Court. *Reversed.* Enloe, J. December 10, 1929.

Action by appellee to recover sum alleged to be due as rental under a lease, the appellant having occupied the premises in question as assignee of the lease. A covenant to "pay rent," is a covenant which runs with the land; and an assignee of a term who enters and takes possession, though not bound by any express promise to pay such rent, is, by reason of privity of estate, bound to pay the rental. The question of a surrender of lease is a question of fact and there is ample evidence that the appellee refused to accept such surrender. It was error to instruct that the appellee was entitled to interest on the rent remaining unpaid from the time the same became due, the appellee being entitled, by force of our statute, to interest on such rent in arrears from the time of bringing the suit.

13311 LEWIS v. PENNSYLVANIA RD. CO. Johnson Circuit Court. *Petition for rehearing denied.* Nichols, J. Remy, C. J., and McMahan, J., dissent. December 6, 1929.

It is a well established rule of law that a complaint must proceed upon some definite theory, and that the evidence must support that theory or there can be no recovery and the majority opinion concludes that there was no evidence to support the theory of negligence upon which the complaint proceeded. The dissenting opinion of Remy, C. J., disagrees with the majority opinion's view of the theory of the complaint and the dissenting opinion assumes that the conclusions in the majority opinion involve a weighing of the evidence, McMahan, J., dissenting, "in so far as this court holds the evidence is undisputed or that but one inference can be drawn therefrom."

13355 LOHRIG v. ROCHAT ET AL. Switzerland Circuit Court. *Affirmed.* Nichols, J. December 12, 1929.

Action by appellant to recover from certain school trustees and appellee bank on the theory that the appellees fraudulently conspired to defraud appellant by inducing him to contract to build a school building, the contract and all proceedings being declared illegal by the state tax board after the appellant had partially performed his contract. The complaint discloses that the acts resulting in the loss to appellant, grew out of the ignorance of appellant and appellees of the law under which they were

attempting to operate and appellant cannot be heard to say that he was ignorant of the law, and that he was depending on the superior knowledge thereof on the part of appellees. One dealing with municipal authorities is bound to know their limited authority to enter into contracts involving expenditures of public funds.

13802 THE MAJESTIC CO. v. KREIG. Industrial Board. *Affirmed. Per Curiam.* December 17, 1929.

Per Curiam.

13399 MERCANTILE COMMERCIAL BANK v. SOUTHWESTERN INDIANA COAL CORP. ET AL. Pike Circuit Court. *Reversed.* Nichols, J. December 6, 1929.

Action by appellant as a receiver upon the demand of the stockholders of the company to recover assets which the insolvent company had wrongfully and illegally attempted to transfer or convey to appellee corporation, and which appellee had leased to its co-appellee. See opinion for discussion of the right of stockhoders and receiver to avoid the effect of unauthorized and *ultra vires* action of officers and of action in stockholders' meetings.

13449 MERTZ, ADMR., ET AL. v. WALLACE. Tippecanoe Circuit Court. *Affirmed.* Nichols, J. December 20, 1929.

Action by appellee against appellant for breach of a written contract whereby appellant agreed to lease certain premises owned by him to appellant Burt and decedent Mertz upon the terms and conditions set out in the contract, and to sell to them certain items of personal property specified therein. (See *Wallace v. Mertz, Admr.*, 86 Ind. App. 185, 156 N. E. 562, for opinion on former appeal.) See opinion for the extended statement of special findings and discussion of conclusions based thereon.

13496 MILLER v. MILLER. Marion Superior Court. *Affirmed.* Lockyear, J. December 3, 1929.

This was an action by the appellant against the appellee as defendant for a divorce. The chief contention of the appellant on appeal is that the amount of appellee's recovery of alimony is too large and that the assessment of appellee's attorney's fees is excessive. There is sufficient evidence to sustain the finding of the court both as to alimony and to the allowance of attorney fees.

13400 MORRIS v. PIERSON & BROS. ET AL. Parke Circuit Court. *Affirmed.* Neal, P. J. December 5, 1929.

This is an action seeking by complaint and cross-complaint the foreclosure of various mechanic's liens and asking for personal judgment against different parties. See opinion for statement of material facts and the discussion of findings based thereon.

13411 MURPHY ET AL. v. STATE EX REL. Johnson Circuit Court. *Reversed.* Nichols, J. December 6, 1929.

Action by appellee against appellant whereby appellee sought to recover from appellants on a bond for the faithful performance of a contract for

the construction of a school building. Since the contract provided that "no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of performance of this contract . . ." and since the evidence disclosed that the final payment was made pursuant to a regular order, and since there is no allegation in the complaint and no facts shown in the evidence, and no finding by the court that such acceptance and final settlement were procured through fraud or mistake, the parties are bound thereby.

13528 NATURAL ROCK ASPHALT CORP. v. HIGHWAYS IMPROVEMENT CORP. ET AL. St. Joseph Superior Court. *Affirmed.* Nichols, J. December 6, 1929.

Suit on construction bond to recover value of materials furnished by appellant to contractor. Under Sec. 6122, Burns' 1926, as amended by Acts 1925, the complaint was subject to demurrer since it did not allege that the appellant filed its notice of claim within 60 days and that suit was commenced within one year thereafter.

13526 TOWN OF NEW CHICAGO v. FIRST STATE BANK. Lake Superior Court. *Affirmed.* Lockyear, J. December 6, 1929.

Suit by appellee upon judgments recovered 14 years prior to the beginning of this suit. An action on a judgment may be commenced, without any prior proceeding to revive the judgments, any time within 20 years.

13566 NORTH AMERICAN LIFE INSURANCE CO. OF CHICAGO v. COPELAND. St. Joseph Superior Court, No. 2. *Affirmed.* Lockyear, J. December 17, 1929.

Affirmed on authority of *Indiana Nat'l Life Ins. Co. v. McGunnie,* 180 Ind. 9, (1913) 101 N. E. 289.

13875 G. W. OPELL CO. v. PHILLIPS ET AL. Industrial Board. *Reversed.* Enloe, J. December 20, 1929.

An appeal from an award of the Industrial Board. Liability cannot be established on hearsay testimony which is properly objected to. Disregarding the hearsay testimony, there is no basis for an award of compensation in this case.

13362 PENNSYLVANIA RD. CO. v. JOHNSON, ADMX. Allen Superior Court. *Reversed.* Lockyear, J. December 19, 1929.

Action by the appellee against the appellant to recover damages for the death of appellee's decedent, death resulting from injuries while employed by the appellant as head brakeman upon one of its trains. Under the undisputed facts of the case the appellant was not negligent. See opinion for statement and discussion of facts.

13726 PILLSBURY FLOUR MILLS CO. v. CITIZENS NAT'L BANK OF PERU, INDIANA, ET AL. Wabash Circuit Court. *Affirmed.* Remy, C. J. December 21, 1929.

Action by appellee bank to recover from the appellant company part of the amount of a draft drawn by the appellant company on the appellee

bank and alleged to have been paid by the bank on the condition that the appellant company deliver to the drawee bank a certain amount of flour. There is evidence tending to show that a local agent of appellant had authority to bind appellant to deliver the flour to the bank and there is evidence from which the jury had a right to believe that the bank's payments of draft was conditioned on an agreement of appellant to deliver to it the flour in question. In view of the evidence, there was no error in giving the instruction complained of.

13461 THE PRUDENTIAL INSURANCE CO. OF AMERICA V. SMITH, ADMR. Dearborn Circuit Court. *Reversed.* Enloe, J. December 3, 1929.

An action upon a policy of life insurance. Where the pleadings presented no question of estoppel an instruction embracing the element of estoppel could only tend to confuse and mislead the jury by calling their attention to facts not within the issues. It was error to omit from the instructions the issue as to the good health of deceased at the time the policy was delivered, such issue having been raised by appellants in the third paragraph of answer.

13517 REICHERT V. MCCOOL ET AL. Vanderburgh Probate Court. *Reversed.* McMahan, J. December 5, 1929.

This is an action by an alleged owner of certain real estate to quiet title and involves the conflicting claims of one claiming under a tax deed and another claiming a lien on the lot in question because of certain street improvements. Appellant in this action having previously brought suit to foreclose a street assessment lien and the judgment for foreclosure of the street lien having been given against the other parties to this suit, appellant's judgment in the prior foreclosure proceeding is conclusive as against the rights of both appellees. See opinion for full statement of the facts and discussion of the legal points involved.

13432 RHODES V. NEWMAN. Laporte Superior Court. *Affirmed.* McMahan, J. December 6, 1929.

This was a suit in equity by appellant against appellee to enforce in appellant's favor a lien upon certain real estate, the validity of appellant's claim depending on the alleged delivery of a deed. The trial court was correct in its conclusion of law that the deed had never been delivered to appellee or to a third person on behalf of appellee.

13514 ROTH V. BOLENS ET AL. Allen Superior Court, No. 2. *Affirmed.* McMahan, J. December 20, 1929.

Appellant filed a petition asking that the superior court require the appellees, administrators *de bonis non*, to convey to him a one-sixth interest in certain letters patent. The contract for the sale of a one-sixth interest in the letters patent, upon which the appellant relies, was void by reason of failure to comply with Sec. 12225, Burns' 1926; under the rule in this state the contract in question being void from the beginning, its invalidity could be raised under a general denial without being specially pleaded. The application of appellant is "in fact, an action for specific performance of a void contract."

13484 SMITH ET AL. V. VINCENT ET AL. Kosciusko Circuit Court. *Affirmed.* McMahan, J. December 20, 1929.

Complaint by appellees, husband and wife, against appellants to recover damages for fraudulent representatations alleged to have been made by defendants in an exchange of lands. The facts found specially are sufficient to fully support the conclusions of law as stated by the court. The evidence is sufficient to sustain the facts as found concerning the value of the properties exchanged.

13269 STOUT, EXRT., V. EASTERN ROCK ISLAND PLOW CO. Wabash Circuit Court. *Affirmed.* Enloe, J. December 4, 1929.

Where a note is signed in blank with authority to some person to fill the same in for a particular amount, and such blank is filled in with a larger amount, the note is not rendered entirely unenforceable, but is unenforceable only as to the excess amount so written in said note.

13488 UNDERWRITERS EXCHANGE, INC., V. MONTGOMERY ET AL. Marion Superior Court. *Appeal dismissed.* McMahan, J. December 11, 1929.

The attorney in fact of the subscribers of a reciprocal insurance association has no such interest in the funds of the association in the hands of a receiver as authorizes it to file exceptions in its own name to the report of the receivers, where it is prosecuting an appeal upon the action of the court therein. Even if the attorney in fact were a proper party and entitled to file exceptions, its conduct in this case would preclude it from filing exceptions to the receiver's report or prosecuting an appeal.

13462 WAGGONER V. HONEY. Henry Circuit Court. *Affirmed.* Remy, C. J. December 19, 1929.

Suit by appellee seeking the appointment of a temporary receiver to take charge of an automobile and asking the court to adjudge the undivided interest of the parties in the automobile and to distribute the proceeds between them. The trial court overruled a motion requesting that "all issues presented by the pleadings except the dissolution and the appointment of receiver to make sale of the property be submitted to a jury." Equity has exclusive jurisdiction of suits for partition of personal property and even though the evidence submitted at the trial showed appellee to be the sole owner of the property the court's ruling was not erroneous since it was based on the complaint as drawn and the complaint stated a cause of equitable cognizance.

13697 WILSON ET AL. V. BROADLICK. Marion Municipal Court. *Affirmed.* Nichols, J. December 20, 1929.

An action on a check signed by one appellant and an action on a note signed by both appellants cannot be joined and consequently the court did not err in overruling appellant's motion challenging the jurisdiction of the court on the ground that the check and the note were mere evidence of portions of the original transaction and should have been combined for suit in one action with the result that when so combined the municipal

court would have lost jurisdiction for the reason that the court's jurisdictional limit would thereby be exceeded.

134698 WILSON ET AL. v. BROADLICK. Marion Municipal Court. *Affirmed.* Nichols, J. December 20, 1929.

Affirmed on authority of *Wilson v. Broadlick*, No. 13497, decided this term.

13932 WORSDORFER v. STATE. Vanderburgh Circuit Court. *Affirmed.* Remy, C. J. December 6, 1929.

Appellant was convicted on the charge of maintaining a nuisance under the prohibition act. There was no error in overruling the motion to suppress evidence, the affidavit and evidence being sufficient to show reasonable and probable cause for issuance of the search warrant. Under the circumstances the officers did not enter the apartment of appellant as trespassers, but rather upon invitation; and the search was not improper since the warrant was read before any attempt to search the premises was made.