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SUPREME COURT

25364 COMPTON v. STATE. Vanderburgh Circuit Court. *Reversed.* Willoughby, J. February 26, 1930.

Appellant was convicted of the crime of obtaining merchandise by means of false pretenses, the prosecution being based on Sec. 2947 Burns', 1926. Since the affidavit does not allege the ownership of the goods and, further, does not allege that the owner was induced by false pretenses to part with the goods alleged to have been obtained, the affidavit does not state the charge with sufficient certainty. "The true test to apply to an affidavit of this kind is, could every statement or allegation in the affidavit be true and yet the defendant be innocent of violating the provision of this statute?"

25832 ESHELMAN v. STATE. Fayette Circuit Court. Transferred from the Appellate Court under Cl. 1, Sec. 1357, Burns', 1926. *Reversed.* Martin, J. February 4, 1930.

Appellant was charged by an indictment with selling intoxicating liquor. Where there has been a trial of issue raised by a plea in abatement, questions arising thereon must be presented by a motion for a new trial as to such issues. (*Williams v. State*, 169 Ind. 384, 386, 82 N. E. 790; *Johnson v. State*, —— Ind. ——, 167 N. E. 531; *Pleak v. State*, —— Ind. ——, 167 N. E. 524.) But where, as in the instant case, there has been no trial of issue on the plea of abatement, the action of the court in overruling the same is properly presented by an independent assignment of error. It is within the discretion of a trial court to permit a plea in bar to be withdrawn and to give leave to file a plea in abatement, and when this is done the plea in abatement is not "pleaded with an answer in bar." The plea in abatement should have been sustained since the grand jury was not legally organized in accordance with the provision of Sec. 580 Burns 1926.

25304 HEADLEE v. STATE. Rush Circuit Court. *Petition for Rehearing Denied.* Gemmill, J. February 25, 1930.

The act upon which the indictment was founded was not unconstitutional for the reason that the statute embraces more than one subject and matters connected therewith. The trial court did not lose jurisdiction of this cause for the reason that judgment was rendered and the verdict pronounced.

25851 THE INDIANA NATIONAL BANK OF INDIANAPOLIS v. LAMER, RECEIVER OF THE DIRECT ADVERTISING CORPORATION. Marion Superior Court. *Per Curiam.* February 25, 1930.

Question raised on this appeal is whether an intervening petition respecting the claim of the appellant was a final judgment or an interlocutory order. The action of the lower court was a final determination of the particular matter and it did not leave any question for future determination and was, therefore, a final judgment.

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* These brief digests are merely to identify the cases.

25833 McHUGH v. STATE. Fayette Circuit Court. Transferred from the Appellate Court under Cl. 1, 1357 Burns 1926. *Reversed.* Gemmill, J. Willoughby, J., concurs in result. February 6, 1930.

Appellant was indicted and convicted of the unlawful purchase and receipt of intoxicating liquor. The court erred in overruling the plea in abatement, since the plea disclosed the failure to follow the proceeding of Sec. 580 Burns 1926 in filling a vacancy in the grand jury; and since there was no trial of issue on the plea in abatement, the action of the court in overruling same was properly presented by an independent assignment of error.

25869 FLYING SQUADRON FOUNDATION, OLIVER WAYNE, STEWART LEWIS, HALLIE McNEIL, JEANNETTE ZWEIER, ET AL. v. CLARENCE E. CRIPPEN, DUANE E. JACOBS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF J. FRANK HANLEY, ET AL. Marion Probate Court. Transferred from the Appellate Court of Indiana under Sec. 1357, Cl. 2, Burns 1926, Acts 1901, p. 565. *Affirmed.* Travis, C. J. February 4, 1930.

This is a suit in equity to decree a trust in certain capital stock of appellee Printing and Publishing Co. and to appoint a trustee for such a trust; and now to dissolve the trust upon the trustee's distribution of corporate capital stock in question to the beneficiaries. See opinion of 30 pages for full statement and discussion of the involved facts and for conclusions and final judgment, affirming in part and reversing in part the judgment of trial court.

25511 STATE v. BRUBECK. Vigo Superior Court. *Affirmed.* Gemmill, J. February 19, 1930.

This is an appeal in a condemnation proceeding brought by the State of Indiana, under the provisions of the State Highway Act (Acts 1919, Ch. 53; Sec. 8268 et seq., Burns 1926) and the general Eminent Domain Act (Acts 1905, Ch. 48; Sec. 7680 et seq. Burns 1926). The most important question presented upon this appeal is whether in such a proceeding any possible benefits to appellee's land can be considered in fixing his damages. The court did not err in refusing to give instructions tendered and requested by the appellant to the effect that benefits should be determined and deducted from damages. The state is not a municipal corporation within the meaning of the Eminent Domain Act and is not entitled to deduction for "benefits".

25870 WATERS v. SELLECK, ADM'R., ET AL. Marion Probate Court. Transferred from the Appellate Court (No. 13220) under Cl. 2, Sec. 1357 Burns 1926. *Affirmed.* Martin, J. February 6, 1930.

Clause in will providing for request of "five thousand dollars in cash out of the Burbank estate, Pittsburgh, Pa.," creates a specific legacy and not a demonstrative legacy.

APPELLATE COURT

13803 BALLARD v. BAGWELL, TRUSTEE OF JACKSON TWP. Howard Circuit Court. *Affirmed.* Remy, C. J. February 28, 1930.

Suit by appellee, township trustee, against appellant to foreclose a lien which had been assessed against appellant's real estate for the cost of

cleaning out an open ditch. The assessment against the land of appellee is enforceable. (Secs. 6218-6236 Burns 1926.) See *Ballard v. Bagwell*, 83 Ind. App. 331, 147 N. E. 311, for opinion on a previous appeal, and for the facts of the case.

13549 BALTIMORE & OHIO RAILROAD CO. v. FAUBOIN. Dearborn Circuit Court. *Affirmed.* Neal, P. J. February 20, 1930.

Action to recover damages for injuries received as a result of a railroad crossing accident, the theory of the complaint being that the negligence of appellants in failing to blow the whistle and ring the bell, as provided by Sec. 13080 Burns 1926, was approximate cause of appellant's injuries. Appellee's alleged contributory negligence was a question of fact for the jury.

13842 BARNHART v. ROGERS, ADM'R., ET AL. Vermillion Circuit Court. *Reversed.* Lockyear, J. McMahan, J., not participating. February 28, 1930.

Action by appellants against the appellees asking that a certain contract and conveyance be rescinded and deed set aside, and that appellees be compelled to re-convey the real estate in question to the appellants. A demurrer to the second paragraph of answer raised the question whether, prior to the act of 1923, the guardian of a person of unsound mind had authority as guardian to bring an action, and whether a judgment rendered against the guardian, if he had no power to bring the action, was void or voidable. The court concluded that prior to the Act of 1923 the guardian had no power to bring the action in question and the proceeding must be adjudged to be a nullity.

13545 BOWSER v. WOODRUFF. Marion Municipal Court. *Affirmed.* Neal, P. J. February 26, 1930.

Action to recover on two promissory notes, the only question on appeal being whether the evidence sustains the appellant's answer of partial failure of consideration. The allegations of appellant's answer constitute an answer of fraud and the evidence is insufficient to sustain a finding of fraud; and even if the allegations warrant the conclusion that failure of consideration is properly averred, still the court would be constrained to hold the evidence insufficient to sustain a recovery thereon.

13748 BRIGHT AND FEDERAL SURETY CO. v. LAKETON STATE BANK. Wabash Circuit Court. *Affirmed.* McMahan, J. February 21, 1930.

Action by appellee bank to recover on a bond executed by appellants as principal and surety, bond being given "for faithful and honest discharge of the duties," etc., of appellant Bright as cashier of appellee bank. See opinion for full statement of facts as found by the court and conclusions based thereon.

13816 CAPITOL AMUSEMENT CO. v. THE JENNINGS CO. Hancock Circuit Court. Per Curiam. *Affirmed.* February 19, 1930.

Per Curiam.

13791 THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. v. SHELLY. Marion Circuit Court. *Reversed.* Enloe, J. February 25, 1930.

This action was brought by the appellant Railroad Company to restrain the appellee from prosecution a suit brought in the Circuit Court of the

City of St. Louis to recover for injuries received while at work in the yard of the appellant company in Indianapolis, Indiana, the appellant being an actual bona fide resident of the City of Indianapolis, Indiana. It was error to sustain the demurrer to the complaint.

13978 CLINE v. MASSEY, ESPY, ESPY, CLINE, SCOTT, RECEIVER. Hendricks Circuit Court. *Affirmed.* Nichols, J. February 7, 1930.

Action by appellee to foreclose a second mortgage upon real estate owned by appellant, and also asking for the appointment of a receiver; appellant having purchased the land subject to a lien of the mortgage, without assuming or agreeing to pay the same. Since the land did not sell for a sum sufficient to pay the judgment in full, including the costs of the suit, it was not error for the trial court to refuse to discharge the receivership, nor to order the receiver to pay, out of rents received, certain taxes which constituted a lien on the real estate at the time of the foreclosure and to apply any remainder of the rents to the discharge of the balance of the judgment of the purchasing mortgagee.

13978 CLINE v. MASSEY, ESPY, ESPY, CLINE, SCOTT, RECEIVER. Hendricks Circuit Court. *Petition for rehearing denied.* Nichols, J. February 28, 1930.

The provision in the mortgage involved in the instant case distinguish it from *World Bldg. Co. v. Marlin,* 151 Ind. 635, 32 N. E. 198, as respects appellant's claim to rents of the real estate during the year for redemption and the appointment and discharge of receiver.

13438 THE CITY OF COLUMBUS, INDIANA, v. GOODNON, ADMX. OF THE ESTATE OF JAMES I. GOODNOW, DECEASED. Bartholomew Circuit Court. *Petition for rehearing denied.* Nichols, J. February 7, 1930.

The court withdrew so much of its decision in this case as holds that there was a waiver of objection to the notice, but concludes without deciding as to such waiver, that the notice was sufficient upon the merits.

13505 FIDELITY HEALTH & ACCIDENT CO. v. HOLBROOK. Marshall Circuit Court. *Petition for rehearing denied.* Remy, C. J. February 25, 1930.

The definition of "Chief operator, office and superintendent only," as urged by appellant is too narrow.

13877 HAMILTON v. INDIANA INSURANCE SERVICE BUREAU, INC. Industrial Board. *Affirmed.* Remy, C. J. February 7, 1930.

Affirmed on authority of *Buckley v. Inland Steel Co.* (1921), 75 Ind. App. 84, 129 N. E. 860.

13495 HARRIS v. CITIZENS TRUST CO., ET AL. DeKalb Circuit Court. *On Petition for Rehearing.* McMahan, J. February 26, 1930.

The question involved in this appeal is fully presented by the exceptions to the conclusions of law, and it is not necessary to set out at length the pleadings or to discuss the correctness of the rulings on the several demurrers.

13817 HOFFMAN v. HOFFMAN. Hancock Circuit Court. *Affirmed.* Per Curiam. February 4, 1930.

Per Curiam.

13712 HEGE & KENDALL v. NEWSON, AND THE FARMERS MUTUAL INSURANCE CO. OF BARTHOLOMEW COUNTY. Jackson Circuit Court, *Reversed.* Lockyear, J. February 19, 1930.

This is an action by appellees against appellants to recover damages for the destruction of a house belonging to appellees, the destruction of the house being due to the alleged negligence of workmen of the appellants in building a fire in the house while working therein. It was not error to strike out the cross complaint. Since the value of the property in question at the time of the fire had been enhanced by the work and materials furnished by the appellants, and since the work had not been accepted by the appellee, nor paid for by him, it was error to instruct the jury that the measure of damages in this case was the "difference between the fair market value of the real estate, including the buildings and trees thereon, immediately prior to the fire and their fair market value immediately after the fire . . ."

13826 HIGHWAY IRON PRODUCTS CO. v. PHILLIPS, ET AL. Starke Circuit Court. *Reversed.* Enloe, J. February 6, 1930.

Action upon bond given to the appellant, a principal contractor, to secure the performance of certain sub-contractors' contracts. (See 85 Ind. App. 700, for former appeal in this case.) Where the trial court's finding of primary facts shows no change in the principal contract, the trial court's conclusion, as an ultimate fact, that the principal contract was changed, must be disregarded; and consequently the trial court erred in its conclusions based on the finding that the contract was changed.

13446 INDIANA ASPHALT PAVING CO. v. GRAND LODGE KNIGHTS OF PYTHIAS, ET AL. Morgan Circuit Court, *Affirmed.* Remy, C. J. February 20, 1930.

Suit by appellee against the appellants to cancel an assessment and enjoin its collection. A city may have the power to make a public improvement and yet have no power to levy a special assessment against the property benefited to pay the expense of such improvement. There is no statutory authority for the levy of an assessment for the cost of the improvement involved in this suit, and the assessment "was, and is, null and void." The contractor is presumed to know the law and appellee is not estopped to question the legality of the assessment. See opinion for facts.

13887 KEMP v. ELDER. Vigo Circuit Court, *Affirmed.* Lockyear, J. February 21, 1930.

This was an action for the purpose of establishing a resultant trust in respect to certain real estate. There was not sufficient evidence for the trial court to have found that any part of the real estate in question was held in trust by appellant.

13547 KEUR v. TEN EYCK. DeKalb Circuit Court. *Affirmed.* Per Curiam. February 21, 1930.

Per Curiam.

13906 KOSIBA v. GARY WHOLESALE GROCERY CO., ET AL. Lake Circuit Court. *Reversed.* Enloe, J. February 21, 1930.

This was an action upon a note and for foreclosure of a mortgage given to secure the same. The defense was that the note and mortgage were giv-

en in settlement of a criminal prosecution in violation of Section 2584 Burns 1926. The burden of establishing the facts of the violation of this statute was upon appellant and depended upon whether there was a promise to dismiss the criminal prosecution, which was a question of fact for the trial court.

13831 THE LAWRENCEBURGH OVERALL MFG. CO. v. KEISER. Dearborn Circuit Court. *Reversed.* Lockyear, J. February 28, 1930.

This is an appeal from a judgment rendered in favor of appellee against appellant corporation for services as secretary and treasurer of appellant corporation, the complaint alleging among other things that the appellant corporation had prevented appellee's continuing his duties as secretary and treasurer. The decision of the court was not sustained by sufficient evidence. See opinion for statement of facts and conclusions.

13970 MICHIGAN CENTRAL RAILROAD CO. v. CITY OF MICHIGAN CITY, IND., ET AL. LaPorte Superior Court. *Affirmed.* Lockyear, J. February 6, 1930.

This is an action by appellant Railroad Company asking that a certain crossing be decreed the property of the appellant and "that the appellee have no right or claim thereto, and it be decreed not to be a place of travel by anyone," etc. See opinion for full statement of the finding of facts and for a review of the authorities applicable to the case.

14019 MONEY v. STATE. Vanderburgh Circuit Court. *Affirmed.* Nichols, J. February 21, 1930.

Appellant was convicted in a city court of charge of unlawfully possessing intoxicating liquor, and appealed to the circuit court, where she was tried before a court without a jury and found guilty and judgment was rendered. There was sufficient evidence to sustain the court's finding and the objections of appellant to the admission of the testimony of officers came too late, there being no motion before the trial to suppress the evidence of what occurred, or what was seized, under the allegedly invalid search warrant. (*Hantz v. State,* —— Ind. App. ——, 166 N. E. 439.) Assuming the officer was lawfully inside, it can not be said that the use of unnecessary force would make evidence obtained in the search inadmissible.

13979 IN RE W. A. MONTGOMERY & SON. Industrial Board. *Certified Question of Law.* Nichols, J. February 7, 1930.

Great weight of authority to the effect that a copartner in a partnership business can not become an employee of himself and his copartner so as to be covered by a policy taken under the provisions of Workmen's Compensation Acts and the question certified and answered in accord with the weight of authority.

13492 MORRIS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE TERRE HAUTE BUICK CO., v. TRINKLE. Vigo Superior Court. *Affirmed. Petition for Rehearing Granted.* McMahan, J. February 20, 1930.

Action by appellee against appellant to recover for alleged breach of warranties under contract for purchase of an automobile, with a second par agraph based on alleged fraudulent representations; the appellant havin

recovered possession of the automobile, which had been sold under conditional sale contract. (See 168 N. E. 706, for original opinion and 5 Ind. Law Journal, 229, for digest of same.)

12793 THE PENNSYLVANIA RAILROAD CO. OF FORT WAYNE v. LINCOLN TRUST CO., ADM'R. OF THE ESTATE OF HERMAN BAUERMEISTER, DECEASED. Adams Circuit Court. *Petition for Rehearing Denied.* McMahan, J. February 19, 1930.

For original opinion see 167 N. E. 721. This is an action by an administrator to recover damages for the death of administrator's decedent, whose death was the result of typhoid fever alleged to have been caused by drinking impure water which had been infected by reason of the negligence of the Railroad Company and the city in maintaining a dual connection between water mains of the city and the railroad.

13862 RASTOVASKI v. BETZ. Lake Superior Court Room No. 1. *Affirmed.* Per Curiam. February 6, 1930.

Complaint by appellant to set aside and vacate a judgment rendered against them on default. The sole and only ground for relief is the alleged neglect of appellant's attorney. The trial court correctly sustained demurrer to the complaint (76 Ind. App. 44, 131 N. E. 229; 74 Ind. App. 47, 128 N. E. 612; 78 Ind. App. 565, 136 N. E. 563.)

13856 RATCLIFFE v. KREIGH, ADM'R. OF THE ESTATE OF MAY CHAMPER, DECEASED. Putnam Circuit Court. *Affirmed.* McMahan, J. February 26, 1930.

Appellant filed a claim against an estate, the validity of the claim depending on whether in the expression "if the said James E. Champer and his wife shall decease" refers to their death at any time, either before or after the death of the testatrix. Well recognized rules of construction lead to the conclusion that the clause in question referred to the death of Champer and his wife prior to the death of the testatrix.

13517 REICHERT, DOING BUSINESS AS LOUIS REICHERT CONSTRUCTION CO., v. HENRY F. MCCOOL, RUTH BURKET. Vanderburgh Probate Court. *Petition for Rehearing Denied.* McMahan, J. February 21, 1930.

See 169 N. E. 86 for original opinion in this case.

13896 ROYALTY v. GUTHNER, ADMX. Marion Probate Court. *Dismissed.* Remy, J. J. February 18, 1930.

Dismissed on authority of *Nilbum v. Cory* (1916), 184 Ind. 341, 110 N. E. 193.

13898 SCHOLL, ET AL., v. STATE. Clark Circuit Court. *Affirmed.* Enloe, J. February 27, 1930.

Appellants were sureties on a bond for "her appearance to answer any indictment that might be returned . . . ." The bond was declared forfeited by the court and appellants later "moved the court" to withhold declaring a forfeiture of said bond. The court having already "declared a forfeiture," the only recourse left to the sureties was to present some legal reason why judgment should not be entered against them, or to make such a showing as would appeal to the sound discretion of the court and thereby procure a

delay in entering judgment. There was not sufficient showing to excuse the principal for not appearing, and no showing that the trial court abused its discretion in the matter of refusing delay.

13833 SCHROEDER v. CITY OF NEW ALBANY. Floyd Circuit Court. *Affirmed.* Nichols, J. February 21, 1930.

Action by appellant against appellee city to recover for alleged overtime while appellant was a member of the paid fire department of appellee city. Since the complaint fails to allege that there was available appropriation out of which the claim was to be paid, and also fails to show that there was any contract by which the appellee city was bound to pay appellant for alleged extra services, the court did not err in sustaining appellee's demurrer to the complaint. It will be presumed either that appellant volunteered his services or that the salary or other compansation provided for in the contract was intended to compensate him also for extra work.

13334 SECURITY UNDERWRITERS, INCORPORATED, v. LONG. Marion Superior Court. *Petition for Rehearing Denied.* Nichols, J. Remy, C. J., Dissents.

Petition for rehearing denied.

13466 STATE OF INDIANA FOR THE USE OF LINCOLN TWP. v. CITIZENS NATIONAL BANK. St. Joseph Superior Court. *Petition for Rehearing Granted. Reversed.* Nichols, J. February 28, 1930.

Action by appellant against appellee to recover with respect to checks, warrants and orders belonging to the school township and which, at the instance of the trustee of the township, appellee cashed. Taking the allegation of fact as true, and considering them in the light of authorities cited, the complaint was good against demurrer and the trial court erred in sustaining appellee's demurrer to the complaint. See opinion for allegations and discussion of authorities cited.

13885 STROLL & STROLL, EXECUTORS OF THE ESTATE OF JOHN B. STROLL, DECEASED, v. PYLE AND CITIZENS TRUST AND SAVINGS BANK, AS EXECUTOR OF THE ESTATE OF DANIEL RICH, DECEASED. St. Joseph Superior Court No. 2. *Affirmed. Per Curiam.* February 6, 1930.

Per Curiam.

13930 STOTEN v. BOARD OF COMMISSIONERS OF WAYNE COUNTY. Industrial Board. *Affirmed.* Nichols, J. February 21, 1930.

Affirmed on the authority of *Waterman et al. v. Riehl,* 65 Ind. App. 347, 117 N. E. 272.

13846 TALGE MAHOGANY CO. v. AITKEN, RECEIVER. Elkhart Circuit Court. *Affirmed. Per Curiam.* February 7, 1930.

Per Curiam.

13841 TEETERS v. SCOTT. Clark Circuit Court. *Affirmed.* Nichols, J. February 7, 1930.

Affirmed on authority of *Adams v. Shamrock Oil Co.,* 84 Ind. App. 169.

13843 TERRE HAUTE FOUNDATION, INC., v. BOGART, RUTHERS, FILBECK, EXECUTOR UNDER THE LAST WILL OF PAUL KUHN, DECEASED. Vigo Circuit Court. *Affirmed.* Lockyear, J. February 7, 1930.

This appeal involves a claim filed against the executor of the testator's estate, the claim being for unpaid installments under a stock subscription. The trial court correctly construed the subscription contract, which by its terms relieved from obligation to take any stock not paid for by the testator prior to his death.

13556 UNION SECURITIES, INC., v. THE MERCHANTS TRUST AND SAVINGS CO., RECEIVER. Delaware Superior Court. *Affirmed. Per Curiam.* February 4, 1930.

Per Curiam.

13834 UNITED STATES RUBBER CO.—CORPORATION, v. THOMAS B. HOBBS, ETC., ET AL. Tipton Circuit Court. *Affirmed. Per Curiam.* February 21, 1930.

Per Curiam.

13555 VAN LANINGHAM v. TINDALL, ET AL. Marion Superior Court. *Affirmed.* McMahan, J. February 7, 1930.

Where the certificate of the judge to the bill of exceptions names a date of presentment, which was not within the time allowed by the court to present the bill of exceptions, and also certifies that the date was "within the time allowed by the court," the certified date controls.

13794 WEBB v. ST. EX REL. ETHELWYN CARPENTER. Steuben Circuit Court. *Affirmed. Per Curiam.* February 7, 1930.

Per Curiam.

13811 WILSON, ET AL., KILLINGWORTH. Lake Circuit Court. *Affirmed.* Enloe, J. February 7, 1930.

Action by appellee to recover damages for loss alleged to have been sustained by reason of destruction by fire of certain property belonging to the appellee; the complaint alleging that the appellants were negligent in starting a fire on their premises while a strong and steady wind was blowing from and across appellants' land to the land owned by appellee. There was evidence to support the finding of negligence on the part of appellants.

13800 ZURICH GENERAL ACCIDENT & LIABILITY INSURANCE CO. v. SAFE-T-KROS DRUG CO. Lake Superior Court. *Affirmed.* Nichols, J. McMahan, J., not participating.

Action by appellee to recover on a policy of burglary insurance covering loss or damage to money, securities and merchandise by robbery; the appellant contending that $2,000.00 held by appellee, at the time of the robbery, was the subject of a bailment and not covered by the terms of the policy. Where appellee received money from a bank under an agreement that it would be used for cashing pay-checks of certain corporations and with the further agreement that either the cash so received would be returned, or an equivalent sum in good and sufficient checks drawn by the corporations, the transaction constituted a loan and not a bailment.