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SUPREME COURT

25786 AKERS v. STATE. Wabash Circuit Court. *Affirmed.* Willoughby, J. March 18, 1930.

The appellant was tried and convicted upon indictment in two counts charging him with forging a certain promissory note and with uttering the same instrument. Forging and uttering are separate and distinct crimes defined by the same section of the statute and may be joined in one indictment in separate counts. The statute which applies in a civil case is not applicable in a criminal case and the instructions will not be considered unless put in the record by a special bill of exceptions. Any question relating to the overruling of the motion for a new trial will not be considered. Appellant's brief failed to set out therein a copy of the motion for a new trial or to substance thereof. It is the duty of appellant to point out error and the court will not search the record to reverse.

25733 ALEXANDER v. STATE. Monroe Circuit Court. *Affirmed.* Travis, C. J. March 11, 1930.

This appeal is from a judgment rendered upon the verdict guilty of assault and battery with intent to commit a felony. The crime charged being carnal knowledge of a female child under sixteen years of age. The question of the misconduct of the jury is not presented by reason of failure to bring to the reviewing court affidavit supporting the charge of misconduct of the jury. There was no error in the giving of instructions complained of.

25646 and 25482 THE CITY OF CRAWFORDSVILLE, INDIANA v. JACKSON. Parke Circuit Court. *Affirmed.* Gemmill, J. April 2, 1930.

These actions were brought by the appellant city against the appellee to recover damages for violations of an ordinance of the city which prohibited the operation of motion pictures and other shows where money or things of value were received for admission to same. It is well settled in this jurisdiction, not only by statute, but by decisions of the Supreme Court, that an offense punishable under the criminal law of this state cannot be punished by a municipal ordinance. The ordinance in question is invalid since it must be regarded as "Sunday legislation" and it is inconsistent with the statutes of the state. The question of the validity of the state statute is not before the court for review. See opinion for discussion and construction of statutes involved.

25412 GAMBINO v. STATE. Cass Circuit Court. *Affirmed.* Willoughby, J. March 11, 1930.

Appellant was tried and convicted on the charge of unlawfully transporting intoxicating liquor in an automobile. The various errors alleged are waived by reason of appellant's failure to properly present the questions involved.

25620. GROSS v. STATE. Marion Criminal Court. *Affirmed.* Willoughby, J. April 3, 1930.

Appellant was prosecuted and convicted on a charge of unlawfully transporting intoxicating liquor. The contention that the court erred in permitting a witness to testify in the search of defendant's automobile and seizure of intoxicating liquor has no merit in view of the fact that there is nothing in appellant's brief to show that there was any evidence showing the search of appellant's car. Proof that the liquor in question was white mule was sufficient proof that it was intoxicating.

25006 HART ET AL. v. SWYGMAN ET AL. White Circuit Court. *Reversed.* Gemmill, J. March 11, 1930.

This case involved certain drainage proceedings and was before the Supreme Court on a prior appeal. (*Higgins v. Swygman*, 194 Ind. 1, 141 N. E. 788.) When there has been an assessment of benefits and a levy of assessments for the purpose of paying the estimated cost of a drain, and when by reason of changed conditions the cost of construction and the amount of benefits have been enhanced before a contract to dig the ditch is let, the court has the power, on proper petition and notice, to refer to qualified drainage commissioners the question whether the cost of construction will still be less than the benefits, and to reassess benefits if it be found that the cost will be less than the benefits. The petition in the instant case fails to show either the additional necessary assessments could be made within the limits of the benefits assessed, or that by reason of changed conditions the amount of benefits has been enhanced. The petition therefore was insufficient to warrant the action asked in the petition.

25304 HEADLEE v. STATE. Rush Circuit Court. On petition to recall ruling of court on petition for rehearing. *Denied.* Gemmill, J. March 11, 1930.

While the Act of 1915 (Sec. 2332, Burns' 1926) makes a motion for a new trial a part of the record without a bill of exceptions, it does not require the court to take the allegations of fact in such motion as being true unless they have been shown to be true by the evidence.

25443 HERMANN v. STATE. Marion Criminal Court. *Affirmed.* Willoughby, J. March 21, 1930.

Appellant and another were tried on an affidavit charging them with a conspiracy to commit a felony of unlawfully possessing a still apparatus, etc. (Sec. 2882, Burns' 1926.) An assignment in a motion for a new trial challenging all instructions given by the court as an entirety is not available on appeal unless all instructions so challenged are erroneous. In prosecutions under Sec. 2882, Burns' 1926, for conspiracy to commit a felony by possessing a still for the manufacturing of intoxicating liquor, it is not necessary to charge in the affidavit that conspirators were to have joint possession of the still or distilling apparatus; and the conspiracy may be inferred from all circumstances accompanying the doing of the act.

25758 HINDS v. STATE. Monroe Circuit Court. *Affirmed.* Martin, J. Willoughby, J., concurs in result. March 11, 1930.

The appellant was charged by affidavit with the felonious transportation of intoxicating liquor in an automobile and was tried and found guilty. No error may be predicated on the action of the court in "refusing to permit the defendant to withdraw his plea of not guilty hereinbefore evidenced," etc., where there is nothing in the record to show that appellant offered any evidence to withdraw his plea in bar, or what the evidence was, if any was offered. The facts proven at the trial are sufficient to show that the officers who arrested appellant had reasonable and probable cause for making the search. The facts in this case distinguish it from *Boyd v. State,* (1926) 198 Ind. 55, 163 N. E., and other cases where the court held that the officers had no reasonable and probable cause on which to make the arrest.

25775 KELLY v. HERBST ET AL. Huntington Circuit Court. *Reversed.* Martin, J. April 2, 1930.

This case involves a proceeding under the county unit road law (Sec. 8313 et seq., Burns' 1926) for the improvement by grading, etc., of certain established highways. See opinion for full statement of the errors assigned and relied upon and the discussion of the statutes applicable to the facts of the case.

25325 IN RE APPLICATION TO PROBATE THE JOINT LAST WILL AND TESTAMENT OF MARGARET KLEIN AND MICHAEL J. KLEIN, MARY A. COPLAND, APPELLANT SAMUEL J. COPELAND, ADMINISTRATOR, ETC., ET AL. Marion Probate Court. Transferred from the Appellate Court under Sec. 1351, Burns' 1926. *Affirmed.* Travis, C. J. Martin and Gemmill, JJ., concur with opinions. April 1, 1930.

This is an appeal from judgment of a probate court denying the probate of a will. There is not sufficient evidence to establish the facts necessary to admit to probate the instrument in writing, produced as the will of the parties. See case for full discussion of the act. Martin and Gemmill, JJ., concur in the result reached but not fully in the reasons stated in the prevailing opinion. The case involves an interesting question in the matter of proving a will when one of the witnesses is dead and the other witness merely identifies his signature and fails to remember any of the facts connected with the execution of the will.

APPELLATE COURT

13830 BRADY, REC., ETC. v. SKINNER. Marion Circuit Court. *Reversed.* Enloe, J. March 20, 1930.

Action by appellee to recover for injuries received when struck by a car operated by employees of appellant, the appellee being employed at the time in welding rails on the tracks of his employer, the tracks were being used by cars of appellant company. The instructions, as given, contained reversible error.

13754 CHICAGO AND EASTERN ILLINOIS RAILWAY COMPANY v. WHIPKING. Posey Circuit Court. *Reversed.* McMahan, J. March 14, 1930.

This was a suit by the beneficiary of an accident insurance policy issued by appellant to one of his employees. The appellant's contention is that the evidence was not sufficient to show that the insured's death was due to an accident suffered while engaged in the service of appellant and on duty. See opinion for full statement of the facts. While the court is constrained to hold that the evidence is sufficient to sustain the verdict and that it is not contrary to law, the giving of one of the instructions was error.

13686 CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD CO. v. LUCA. Porter Superior Court. *Affirmed.* Remy, C. J. Nichols, J., not participating. March 13, 1930.

Action by appellee to recover damages for personal injuries sustained as result of a collision of a motor truck operated at the time by appellee, with appellant's traction car, at a railroad highway crossing. The court cannot say as a matter of law that the evidence conclusively shows that appellee was guilty of contributory negligence, such question being for the jury.

13733 CLARK FRUIT COMPANY v. STEPHAN. Allen Superior Court. *Reversed.* McMahan, J. March 11, 1930.

Appellee recovered a judgment against appellant for injuries received from falling into an elevator-shaft in appellant's place of business. While there is merit in the contention that the evidence was not sufficient to charge appellant with negligence because of failure of the gates to properly function, yet there was sufficient evidence to show negligence on the part of appellant by reason of its failure to properly light the place in question. There was error in the court's refusal to give instructions requested by appellant.

13956 CLYNE & KELLEY v. MILLER & MILLER. Industrial Board of Indiana. *Affirmed.* Remy, C. J. March 14, 1930.

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

13746 CROWDER, AS RECEIVER OF CITIZENS TRUST COMPANY OF SULLIVAN, INDIANA v. WYNE. Sullivan Circuit Court. *Reversed.* Lockyear, J. April 3, 1930.

This is an action on a claim filed in a receivership of a trust company. The appellee was entitled to a preferred claim in respect to two notes which the evidence shows the appellee had bought from the trust company and which were in the possession of the trust company at the time a receiver was appointed.

13745 CROWDER, AS RECEIVER OF CITIZENS TRUST COMPANY OF SULLIVAN, INDIANA v. SANDUSKY. Sullivan Circuit Court. *Affirmed.* Lockyear, J. March 19, 1930.

This is an appeal from a judgment rendered upon a claim filed by the appellee in a receivership of an insolvent trust company, the appellee

seeking to have the claim declared prior and preferred to the claim of general creditors. The conclusion of the trial court as to the priority of appellee's claim was correct, but the judgment based on such conclusion is reversed with instructions to grant the parties to introduce further evidence relative to the dissipation of the funds received by reason of transactions with appellee and with the further instructions to make a finding as to amounts of deposit available to pay claims of other creditors similarly situated.

13947 EBENEZER'S OLD PEOPLE'S HOME ET AL. V. BERNHARD, EXECUTOR OF THE ESTATE OF GEORGE BERNHARD, DECEASED. St. Joseph Circuit Court. *Dismissed.* Nichols, J. March 14, 1930.

This is an appeal from a judgment of the trial court, the party in whose favor the judgment was rendered not being made a party. In order to give the court jurisdiction of appeals, the assignment of errors must name as appellees all the parties to the judgment below who are interested in sustaining this judgment, and consequently this appeal must be dismissed.

13458 THE EXCHANGE BANK OF WARREN, INDIANA V. WEINER. Huntington Circuit Court. *Reversed.* Nichols, J. March 20, 1930.

Action by appellee against appellant on a certificate of deposit issued by appellant to appellee, and which appellant had already paid after endorsement and presentment for payment. Since the facts show that appellee, the payee of the certificate of deposit, placed the certificate of deposit in the hands of another person for the purpose of obtaining case to make a cash bond in a business deal, the person thus entrusted would be presumed to have authority to endorse the paper for the principal and the appellee cannot charge the loss to appellant bank.

13926 FISHER V. HUGHES. Industrial Board of Indiana. *Affirmed.* Remy, C. J. March 12, 1930.

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

13847 GARRETT SAVINGS LOAN & TRUST CO. V. SANDERS. DeKalb Circuit Court. *Reversed.* Neal, P. J. Nichols, J., dissenting with an opinion. March 14, 1930.

This is an action to cover personal judgment on a promissory note and to foreclose a mortgage given to secure the same, the appellant trust company being named as payee of the note and mortgagee of the mortgage. The appellee set up the defense of payment and discharge by reason of a certain transaction between the appellee and a builders company, the builders company having agreed that the appellee should be released and discharged from all further liability on the note and mortgage; the contention of the appellee being that by reason of the relations existing between the builders company and the appellant trust company, the release by the builders company was binding on the trust company. The evidence is insufficient to establish the contention of the appellee.

Nichols, Justice, in a dissenting opinion, concludes that the evidence was sufficient to justify the conclusion that the appellee understood that he was transacting business with the trust company, as well as with the building and loan association, the one with whom he dealt being president of the trust company and secretary-treasurer of the building company.

13788 GRAY v. ACTON. Marion Municipal Court. *Affirmed.* Remy, C. J. March 21, 1930.

This was an action by appellee against appellants for malicious prosecution, the trial resulting in a verdict and judgment for appellee against both of the appellants. In an action for malicious prosecution based upon an affidavit which charged a criminal offense, liability is not limited to the person or persons who signed the affidavit; all persons concerned in originating and carrying on the prosecutions are jointly and severally liable. While the instructions are subject to criticism, they fairly state the law of the case when taken and considered as a whole.

13919 HALEY v. BURKE-CADILLAC COMPANY. Marion Municipal Court No. 1. *Affirmed.* Enloe, J. March 18, 1930.

In an action to set aside a judgment and default upon the grounds that the attorney for the other party had agreed not to take any default and judgment against the appellant, is a question of fact for the trial court whether or not the attorney made the promise. The evidence being in conflict, the Appellate Court will not weigh the evidence.

13905 HOLCOMB & HOKE MFG. CO. ET AL. v. WATTS. Vigo Superior Court. *Reversed.* Remy, C. J. April 3, 1930.

In an action on a replevin bond, where the only breach is the failure to prosecute with effect, as by dismissal without adjudication for return of the property and where the evidence shows title and right of possession in the plaintiff in the replevin action, it is a well established fact that only nominal damages can be recovered. Under the facts as shown by the record in this case, the trial court erred in holding that appellee was entitled to recover more than nominal damages.

14030 THE INDIANA NATIONAL BANK OF INDIANAPOLIS v. DANNER, RECEIVER OF THE DIRECT ADVERTISING CORPORATION. Marion Superior Court. *Affirmed.* Lockyear, J. March 14, 1930.

On the authority of *Union Trust Company v. Fletcher Savings & Trust Co. et al.* (194 Ind. 314) the court holds that a creditor of an insolvent corporation in the hands of a receiver who has received a part of his debt by the sale of collateral which he held as security therefor, is not entitled to have his claim allowed for the full amount of the debt as a basis for determining his share of the fund for distribution among creditors, but only the remainder of the debt after deducting the amount received from the collateral.

13872 KENT v. SPEAKMAN. Dearborn Circuit Court. *Affirmed.* Per curiam March 14, 1930.

Per curiam.

13810 LINCOLN LOAN CO. v. PLOTKIN. Lake Superior Court No. 4. *Reversed.* Enloe, J. McMahan, J., not participating. April 1, 1930.

This is an action in replevin, brought by the appellee against the appellant, to recover certain household goods and also damages for their alleged wrongful detention. The evidence does not sustain the verdict as to the damages awarded.

13773 THE PENNSYLVANIA RAILROAD COMPANY v. MARTIN. Miami Circuit Court. *Reversed.* Lockyear, J. March 14, 1930.

This was an action by appellee, an employee of the appellant, under the Federal Employers' Liability Act, to recover damages for the loss of an eye, caused by alleged negligence of the appellant. The uncontradicted evidence in this case shows a state of facts where the appellee assumed the risk and therefore the verdict of the jury is not sustained by sufficient evidence and is contrary to law.

13957 PREMIER CONSTRUCTION COMPANY v. GRINSTEAD. Industrial Board. *Reversed.* Enloe, J. March 11, 1930.

This appeal involves the question of jurisdiction. Where an employee enters into a contract with his employer, an Indiana corporation, whereby the employee agrees to work on construction work in different states, and where the employee makes his election to operate and work under the compensation law of another state, the state of his residence, and subsequently the employee receives a compensible injury while working in this other state, the rights of the parties are controlled by the laws of the other state and the Industrial Board of Indiana is without jurisdiction in the premises.

13895 P. AND A. DISPATCH, BLUE STAR TRANSIT CO. ET AL. v. MACDOUGALL. Marion Superior Court. *Affirmed.* Neal, P. J. March 14, 1930.

This is an action to recover the value of goods which had been received for storage by the defendant, the plaintiff alleging that the goods had been lost by reason of the fact that the defendant negligently and carelessly failed to take proper care of the goods and protect the same from fire. The law requires that a warehouseman furnish a building for the storage of property which is reasonably fit and safe, although he is not required to store goods in a fireproof building in the absence of a contract to that effect. There is evidence to support the contention that appellants failed to supply a building that was safe for storing appellee's property; and even if the complaint of appellee provided upon a theory of negligence there is sufficient evidence to warrant a verdict by the jury in favor of appellee.

13876 RIESBECK DRUG COMPANY v. WRAY. Marion Superior Court. *Reversed.* Lockyear, J. April 2, 1930.

This is an appeal from a judgment in favor of appellee, administratrix, for damages alleged to have been sustained by reason of the death of her husband caused by the alleged negligence of the appellant drug store in selling carbolic acid to a minor child of the deceased, the child having

thereafter delivered the acid to appellee's husband, who drank it and died as a result thereof. The sale of the acid was not the approximate cause of the decedent's death, which was caused by the drinking of the acid by the decedent, a man of full age and a free moral agent. The verdict of the jury is not sustained by sufficient evidence and is contrary to law.

13943 STARBUCK v. FLETCHER SAVINGS & TRUST CO. ET AL. Marion Superior Court. *Affirmed.* Nichols, J. April 3, 1930.

Action by appellant to recover on an implied contract for services rendered. While an implied contract is an agreement of the parties arrived at from their acts and conduct viewed in the light of surrounding circumstances, it is like an express contract in that it grows out of the intentions of the parties to the transaction and there must be a meeting of the minds. Under the facts of the instant case there is created a conclusive presumption that appellant had been paid in full.