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SUPREME COURT

25598 ACTON, ALIAS JOHN SOUTHWICK v. STATE OF INDIANA. White Circuit Court. *Affirmed.* Willoughby, J. April 22, 1930.

Appellant was convicted on an affidavit charging him with the crime of rape on a female child under 16 years of age, the jury finding the appellant guilty of assault and battery with an intent to commit a felony. When an affidavit charges the crime of rape the jury may find the defendant guilty of an attempt to commit rape. A variance in names is not regarded as material unless it appears to the court that the jury was misled by it or that some substantial injury is done to the accused.

25094 JASON FARMS, INC. v. CITY OF INDIANAPOLIS. Marion County Court, Room 3. *Reversed.* Martin, J. April 22, 1930.

The appellee, sanitary district, brought an action to permanently enjoin the appellant from collecting, removing, etc., any "garbage, that is to say, kitchen refuse from cooking food, etc."; appellant filing a cross-complaint seeking an injunction to prevent appellee from interfering with appellant "in the collection of food products . . . left from tables" purchased under contract from certain restaurants. The appellee does not have such a property right in the garbage of private individuals and corporations before the same has been collected as would give it standing in a court to protect the same. The definition of "garbage" as given in the sanitary district law does not include the products involved in the case.

25715 KRAFT v. STATE OF INDIANA. Allen Circuit Court. *Affirmed.* Martin, J. Myers, J., absent. April 8, 1930.

Appellant was convicted upon the second count of an amended affidavit which charged him with involuntary manslaughter. (Sec. 2416 Burns 1929, supp.; Sec. 1 ch. 203, Acts 1927.) The indictment sufficiently charges the crime of involuntary manslaughter since the averments are sufficient to apprize the defendant of the nature and character of the charge against him. See opinion for the facts and instructions objected to and discussed therein.

25637 KUSLULIS v. STATE OF INDIANA. Lake Criminal Court. *Affirmed.* Willoughby, J. April 11, 1930.

This is an appeal from the judgment of conviction of the crime of assault and battery with intent to commit rape upon a female child under the age of consent. The findings of the court that the appellant was guilty of a lesser offense than that charged in the affidavit is not contrary to law. The evidence was sufficient to sustain the verdict and the court did not err in refusing a new trial on the ground of newly discovered evidence.

25619 LANDRETH v. STATE OF INDIANA. Lawrence Circuit Court. *Affirmed.* Travis, C. J. April 22, 1930.

Appellant was found guilty of murder in the second degree, the court rendering judgment upon the verdict that the appellant be imprisoned during life in the state prison. The evidence in the case was sufficient to support the verdict of the jury and the evidence tending to prove self-defense was insufficient to overcome the finding that the killing was done purposely and maliciously. See opinion for discussion of instructions.

25585 TITZER v. STATE OF INDIANA. Posey Circuit Court. *Reversed.* Willoughby, J. Myers, J., absent. April 8, 1930.

The appellant was found guilty of unlawfully having in his possession and under his control and use a still, etc. (Sec. 2719 Burns 1926.) The verdict is not sustained by sufficient evidence and is contrary to law. While the court will indulge every reasonable inference in support of the verdict, yet such inference must be drawn from premises established by proof; a verdict can not be based on inferences drawn from other inferences.

25676 IN THE MATTER OF THE PETITION OF NORTHWESTERN INDIANA TELEPHONE COMPANY TO SELL AND OF WINONA TELEPHONE COMPANY AND CROWN POINT TELEPHONE COMPANY TO PURCHASE THE STOCK AND ASSETS OF SAID NORTHWESTERN INDIANA TELEPHONE COMPANY. Lake Circuit Court. *Reversed.* Myers, J. April 14, 1930.

This appeal involves petitions for the purchase and sale of capital stock and assets of a Public Utility. See opinion for the facts and the discussions of the respective jurisdictions of the legislature and the courts.

APPELLATE COURT

13899 GLENN, DOING BUSINESS UNDER THE FIRM NAME OF GLENN ELECTRIC & BATTERY CO. v. JOHNSON, BY HIS NEXT FRIEND, DOYLE JOHNSON. Tippecanoe Superior Court. *Reversed.* Lockyear, J. April 11, 1930.

Action for damages for personal injuries suffered by the appellee from a collision with an automobile truck owned by the appellant, the truck being driven at the time of the collision by a person who was alleged to be a servant of the appellant. The court concludes that on the undisputed evidence the relation of master and servant did not exist at the time of the accident between the driver and appellant.

13965 GUARD v. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R. R. CO. Dearborn Circuit Court. *Reversed.* Remy, C. J. Nichols, J., not participating. April 24, 1930.

Action to recover the value of a cow alleged to have been killed by appellant's locomotive and train. It was error to refuse the instruction purporting to set out the requisites for the creation of a public highway.

13901 LONDON & LANCASHIRE INDEMNITY COMPANY v. INDIANA JOBBING & MERCANTILE CO. Marion Superior Court. *Affirmed.* Remy, C. J. April 22, 1930.

Action on a burglary insurance policy to recover for loss of money and securities alleged to have been feloniously taken from a steel safe. The language of the policy being ambiguous, doubtful meaning must be resolved in favor of the insured; the clause in controversy, interpreted in the light of the above rule, covers the loss in question.

13994 MCGLAUGHLIN v. GENERAL AMERICAN TRUCK CAR CORPORATION. Industrial Board of Indiana. *Affirmed.* Lockyear, J. April 22, 1930.

When there has been an award for a specific number of weekly benefits for a specified impairment and the injured person dies before he has received all the payments, his dependent is entitled to the remaining payments.

13575 MASTERS v. THE GEORGE E. THOMPSON LIGHTNING ROD CO. AND EDGAR W. HOSTETLER. Clark Circuit Court. *Affirmed.* McMahan, J. April 11, 1930.

On authority of the *Citizens Street Railway Company et al. v. Marvil* (1903) 161 Ind. 506, 67 N. E. 921, the court holds that no question is presented relative to the overruling of the motion for a new trial for the reason that the evidence is not in the record.

13693 METROPOLITAN LIFE INSURANCE COMPANY v. BRADY, ADMR. OF THE ESTATE OF MARY FRANCIS BRADY, DECEASED. Marion Circuit Court. *Reversed.* Neal, P. J. April 4, 1930.

Suit against appellant, insurance company, one paragraph of the complaint being on the theory that appellant's agent negligently failed to deliver policy until insured was ill and the policy was never delivered; a second paragraph on the theory that appellant failed to promptly act upon the application for insurance until the appellee was fatally ill and that appellant thereafter refused to deliver the policy. The court holds that in the absence of any statute of the State of Indiana imposing a duty upon an insurance company to accept or reject an application within a specified time no legal duty devolved upon appellant to either accept or reject the application in the instant case or submit a counter proposal within a reasonable time. See opinion for full discussion of the points of law involved.

13399 MERCANTILE COMMERCIAL BANK AS RECEIVER OF THE VULCAN COAL COMPANY v. NORTHWESTERN INDIANA COAL CORPORATION ET AL. Pike Circuit Court. *Petition for rehearing denied.* Nichols, J. May 1, 1930.

On petition for rehearing a party can not raise a question which is not presented in the original brief.

13449 MERTZ, ADMR. OF THE ESTATE OF WM. F. MERTZ, DECEASED, ETC. v. WALLACE. Tippecanoe Circuit Court. *Petition for rehearing denied.* Statement by Nichols, J. April 24, 1930.

Because of an inadvertent error in the publication of the opinion in the present appeal, appellants have been misled without their fault into charging that the court in this appeal erred in holding that appellants were bound by the contract in suit because of the decision of the appellate court in the former appeal. (86 Ind. App. 186, 156 N. E. 562.)

13808 MILLER CONSTRUCTION COMPANY ET AL. v. STANDARD OIL COMPANY. Marshall Circuit Court. *Affirmed in part and reversed in part.* Enloe, J. April 24, 1930.

Action by appellee, as a material man, upon a bond given to the state to secure the faithful performance of a contract for the construction of a portion of the state highway, the claim being for gasoline and oil furnished to the construction company during the progress of the work. Since the findings of the court disclose that a part of the oil and gasoline in question was furnished to the foreman and employees of the construction company and by them used in connection with the operation of "cement mixers, graders, and other machinery being used in the construction of said road," and that a part of the oil and gas was delivered to the construction company and "resold" to the truck driver, only the materials delivered to the foreman and employees and by them used in operating the mixers, etc., are within the bond.

13568 OHIO TOWNSHIP, WARRICK COUNTY, INDIANA v. LIPKING. Warrick Circuit Court. *Reversed. Rehearing granted.* Nichols, J. April 24, 1930.

Action to recover on an account for work and labor alleged to have been performed by appellee as a road supervisor and for money alleged to have been advanced by appellee, as such road supervisor. The allegations of the complaint fail to show compliance with statutory requirements which are prerequisite to the township trustee's authority to bind the township. The demurrer to the complaint should have been sustained.

13565 OLD FOLK'S AND ORPHAN CHILDREN'S HOME, ETC. v. ROBERTS. Clinton Circuit Court. *Affirmed.* McMahan, J. Nichols, J., not participating. April 9, 1930.

This is a suit against appellant, a private charitable organization, the complaint proceeding on the theory that appellant was negligent in failing to exercise reasonable care in the selection of officers and employees; and also in retaining these officers and employees after it knew, or should have known, that they were careless and incompetent. The opinion distinguishes between the liability of a charitable institution for the negligence of its servants and its liability for employing and retaining incompetent servants. (See 83 Ind. App. 546, 149 N. E. 188, for former appeal.)

13992 OVEGNATT COMPANY v. BOARD OF TRUSTEES OF THE INDIANA STATE FARM AND HOWARD, SUPERINTENDENT OF THE INDIANA STATE FARM. Putnam Circuit Court. *Affirmed.* McMahan, J. April 23, 1930.

Action by appellant company against the board of trustees and superintendent of the Indiana State Farm to enjoin the defendants from manufacturing and selling floral baskets. See opinion for discussion of the acts of legislature upon which the appellant relies for relief.

13944 POE v. CASWELL-RUNYAN COMPANY. Industrial Board. *Reversed.* Remy, C. J. April 25, 1930.

The failure of the Industrial Board to find that there had been a change in the condition of appellant's injury was equivalent to a finding against appellee on its application for review; or in other words equivalent to a finding that there was no change in condition. Consequently the finding should have been for appellant, which would have left the previous award in force.

13739 ROETZEL, RIMSTIDT, SNYDER, EXECUTRIX v. STATE OF INDIANA EX REL. Gibson Circuit Court. *Affirmed.* Lockyear, J. April 24, 1930.

An action by the state, ex rel., for breach of the conditions of the bond executed by the appellants to secure the faithful performance of a contract for the construction of a certain drain. The superintendent of construction was the proper relator; and if he made a mistake and collected funds which he should not have collected for the purpose of properly completing the work, his acts should not inure to the benefit of the appellants or relieve them from a plain liability on their bond.

13546 ROSS v. STOUT, STOUT, AND FELTHOUSE. Elkhart Superior Court. *Affirmed.* McMahan, J. April 22, 1930.

This was an action seeking to set aside a deed conveying certain real estate on the ground that the conveyance was procured by the fraud of one of the defendants and that the present owner took with knowledge of the fraud. Where a request for trial by jury is general and includes the issues presented by the complaint as a whole it is not error to overrule the request even though the party in question might be entitled to a trial by jury on one issue. The evidence is ample to sustain a finding in favor of appellees.

13861 SALT SPRINGS NATIONAL BANK v. HERBERT C. SCHLOSSER. Elkhart Circuit Court. *Reversed.* Neal, P. J.

Action by appellant to recover on two promissory notes executed by appellee. The answer of "fraud by the payee in procuring the execution of notes" placed the burden upon appellant to prove that he took as holder in due course and gave appellant the right to open and close the case. The appellant did not lose this right by reason of the fact that at the close of all the evidence the paragraph of answer alleging fraud by the payee was withdrawn, since the "burden of issues" is determined from the issues made by the pleadings. The jury was not authorized under the law to find that there was a failure of consideration under an answer of no consideration.

13796 SHELTON v. WARMOTH ET AL. Marion Superior Court. *Affirmed.* Lockyear, J. April 9, 1930.

This is a suit for an accounting upon a complaint filed by appellant for certain royalties on a patent. The court properly overruled a demurrer to the plea in abatement which challenged the jurisdiction of the court on the ground that complaint did not state the name of the court in which the alleged action was brought. The complaint was sufficient and the decision of the court was sustained by sufficient evidence.

13867 TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION COMPANY v. OTIS SCOTT. Boone Circuit Court. *Affirmed.* Nichols, J. May 1, 1930.

Action by appellee to recover damages on account of personal injuries alleged to have been sustained by reason of the negligence of appellant's servants in failing to render assistance against a highwayman. There is a duty on a railroad conductor to use reasonable care to protect passengers from injuries by third parties where there is reason for suspecting danger therefrom. (See 197 Ind. 587, 150 N. E. 777, for the former appeal of this case.)

13950 VINCENNES BRIDGE COMPANY v. VARDMAN. Industrial Board. *Affirmed.* McMahan, J. May 1, 1930.

The evidence is sufficient to show a common law marriage and to establish the dependency of the appellee.

13961 WESTERN AND SOUTHERN LIFE INSURANCE COMPANY v. ROSS, ADMR., ETC. Pike Circuit Court. *Affirmed.* Enloe, J. April 25, 1930.

This was an action upon an industrial policy of life insurance in the sum of $500, the insurance company denying liability upon the ground of alleged fraud in procuring said policy; the appellant claiming that at the time of the delivery of policy the insured was not in sound health.

14061 WORRELL v. STATE OF INDIANA. Delaware Circuit Court. *Affirmed.* Neal, P. J. April 9, 1930.

Appellant was found guilty of the unlawful possession of intoxicating liquor. Appellant by his brief waived all alleged errors except his motion to suppress, but fails to disclose that the intended evidence mentioned in the motion to suppress was ever introduced in evidence; consequently there is no showing that appellant was harmed by the overruling of the motion to suppress.