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## Indiana Docket

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# INDIANA DOCKET

## SUPREME COURT

25346 **BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY V. LULA A. CARROLL, ADMINISTRATRIX OF THE ESTATE OF GUERNEY O. BURTCH, DECEASED.** Jennings Circuit Court. On Remand from the Supreme Court of the United States. Martin, J. May 23, 1930.

On remand from the Supreme Court of the United States the order of judgment of the Indiana Supreme Court affirming the judgment of the Jennings Circuit Court is set aside and annuled and the judgment of the Jennings Circuit Court in said cause is reversed, etc. (See 192 Ind. 199, 134 N. E. 858; 263 U. S. 540, 44 S. Ct. 165, 68 L. Ed. 433; 194 Ind. 701, 142 N. E. 865; 200 Ind. 589, 163 N. E. 99; — U. S. —, 50 Sup. Ct. 16, — L. Ed. —.)

25810 **BELL V. BUESCHER BAND INSTRUMENT COMPANY, ET AL.** Elkhart Circuit Court. On Motion to Dismiss. Appeal dismissed at the cost of the appellant. Gemmill, J. May 16, 1930.

An action to enjoin the reorganization of a company under and pursuant to the provisions of the General Assembly of the State of Indiana, and known as the Indiana General Corporation Act. Since it appears that the reorganization has been fully and finally consummated the question raised in this appeal has become moot and the motion to remove should be sustained. Since the appeal bond was not filed and notice of appeal was not served on the appellees, until after the reorganization of the Company had taken place, appellant should pay the costs of the appeal.

25903 **BETTER HOMES CO., ETC., V. HILLEBRAND HARDWARE COMPANY, ET AL.** Allen Circuit Court. Transferred from the Appellate Court under Sec. 1357, Subd. 2, Burns', 1926. Affirmed. Gemmill, J. May 14, 1930.

Whether the estate of a vendor of land is liable to a mechanic's lien on a contract, for a building or other improvement thereon, made with the vendee in possession depends upon the language of the statute and also on the relation, if any, of the vendor to the contract for the improvement, as consenting to or authorizing it, or requiring it to be made.

25858 **BRODIE V. STATE OF INDIANA.** Greene Circuit Court. Affirmed. Gemmill, J. June 3, 1930.

Appellant was charged by affidavit with the crime of rape on a female child under the age of sixteen years. The finding by the jury was not so defective and uncertain that the court could not pronounce a judgment upon it.

25817 **BRYANT, ET AL. V. SCHOOL TOWN OF OAKLAND CITY, INDIANA, ET AL.** Gibson Circuit Court. Reversed. Martin, J. May 22, 1930.

This appeal presents the same question of law with refence to a lease contract made under the provisions of Ch. 223, Acts 1927, for the construc-

tion of a school building as was presented and decided in *Hively v. School City of Nappanee* (1929), — Ind. —, 169 N. E. 51. The amount of indebtedness provided for in the contract is in excess of the constitutional limit and the contract is void.

25732 *HIVELY v. SCHOOL CITY OF NAPPANEE, ET AL.* Kosciusko Circuit Court. Petition for rehearing denied. Martin, J. May 22, 1930.

In the original opinion the court held that the contract in question created a present debt or liability on the part of the school city in excess of the limits set by the constitution, but did not decide that the act itself is unconstitutional. It does not follow that if the statute is valid, then every contract made in pursuance of it is valid.

25884 *MILLER, ET AL. v. STATE, EX REL.* LaPorte Circuit Court. Affirmed. Martin, J. Willoughby, J., absent. May 21, 1930.

Quo warranto proceedings resulted in judgment in favor of relators ousting the defendants (appellants) from their respective offices in the city of Michigan City. See opinion for full discussion.

25876 *PHILLIPS v. STATE OF INDIANA.* Marion Criminal Court. Motion to dismiss appeal denied. Travis, C. J. May 20, 1930.

This is an appeal from a judgment upon a verdict of guilty of having committed a criminal offense. Appellee moves to dismiss the appeal. An appellant in a criminal case is not so bound by the giving of the statutory notice of appeal, that he may not abandon such appeal, and take another appeal by giving another statutory notice, provided the notices are given within the time limited for taking judgment in criminal cases.

25425 *ROSS, RECEIVER OF TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY v. TERRE HAUTE, INDIANAPOLIS AND EASTERN TRACTION COMPANY.* Clinton Circuit Court. Transferring to the Appellate Court. *Per Curiam.* June 12, 1930.

The appellate court is not deprived of jurisdiction to construe and apply the constitution when the validity of the statute is not involved, and it does not appear that the constitutionality of the act in question was presented to the circuit court and, consequently, can not be presented on appeal to reverse the judgment of the trial court.

#### APPELLATE COURT.

14073 *AHERN v. STATE OF INDIANA.* Marion Criminal Court. Dismissed. Neal, P. J. May 14, 1930.

Dismissed upon the authority of *Dudley v. State* (—), 200 Ind. 398, 161 N. E. 1.

13842 *BERNHART AND BERNHART v. ROGERS, ADMINISTRATOR, ET AL.* Vermillion Circuit Court. Affirmed. Lockyear, J. May 20, 1930.

This was an action to rescind a certain contract and conveyance and to set aside a deed and to compel the reconveyance of certain described real

estate. Granting that a guardian did not have the power to bring the original action, yet the guardian properly appeared and defended the cross-complaint, and the acts of the guardian in the original case in entering his appearance to the cross-complaint and filing an answer thereto and the judgment rendered on the cross complaint precluded his ward from bringing this action.

13890 BOLLY V. CISCO, BY WALTER L. CISCO, NEXT FRIEND. Clark Circuit Court. Affirmed. McMahan, J. May 18, 1930.

Action to recover damages because of injuries received when struck by automobile owned by appellant and operated by his minor son. The evidence is ample to warrant a finding that appellant had authorized his son to take the automobile and bring the daughter home from her work on the evening when appellee was injured.

13822 BABACZ V. KIRK AND KIRK. Lake Superior Court. Affirmed. Neal, P. J. May 23, 1930.

Action in ejectment, the appellant claiming to be the owner and entitled to the immediate possession of certain described real estate. Adjoining property owners may, by establishing a dividing line, etc., be estopped from later questioning this dividing line even though the statutory period has not run and title cannot be passed by parol.

14013 COBB V. INDIANAPOLIS POWER & LIGHT COMPANY. Industrial Board. Affirmed. *Per Curiam*. June 12, 1930.

*Per Curiam*.

14014 COBB V. INDIANAPOLIS POWER & LIGHT COMPANY. Industrial Board. Affirmed. *Per Curiam*. June 12, 1930.

*Per Curiam*.

13912 DINNEN, ET AL. V. FRIES, ADMINISTRATOR OF THE ESTATE OF WILLIAM W. SMITH, DECEASED. Affirmed. Nichols, J. Dekalb Circuit Court. June 11, 1930.

Action on behalf of a minor child of a deceased to recover damages on account of death of deceased caused by injuries received in a collision on a public highway. There was evidence to sustain the finding of the jury as to appellants negligence and as to whether it was the approximate cause of the accident. When drivers are approaching an intersection of highways the one who reaches the intersection first does not have an absolute right of way.

13814 FLANAGAN V. COMPTON. Shelby Circuit Court. Affirmed. McMahan, J. May 20, 1930.

This is a suit involving an oral agreement for the sale and purchase of an automobile and the further question of whether this oral agreement was subsequently modified. This was a question of fact and the testimony is sufficient to support the finding of appellant upon that question.

13688 FOULKES CONTRACTING COMPANY V. CROWDER, ET AL. Sullivan Circuit Court. Affirmed. McMahan, J. May 2, 1930.

Action to set aside acceptance by the common council of a city of a sewer and sewage disposal plant and to enjoin enforcement and collection of assessment, etc. The finding is not ambiguous or indefinite and facts were sufficient to warrant judgment in favor of appellees upon the conclusions of law properly based upon the finding. See opinion for statement of facts and full discussion.

13968 HOOVER, ADMINISTRATOR, V. TRI COUNTY MUTUAL PROTECTIVE ASSOCIATION. Delaware Circuit Court. Affirmed, *per curiam*. June 11, 1930.

*Per Curiam.*

13923 HUNTER, ET AL. V. C., C., C. & ST. L. RAILWAY CO. Marion Circuit Court. Affirmed. *Per Curiam*. May 21, 1930.

*Per Curiam.*

13881 JOHNSON V. PRITCHARD. Union Circuit Court. Reversed. McMahan, J. June 10, 1930.

Action by appellee to recover for work and labor performed at a time when appellee, under an oral contract of tenancy, occupied a farm owned by appellant. There was no evidence of any express agreement on the part of appellant to pay appellee for any of the work and the tenant can not charge his landlord for work and labor performed in and about leasehold estate, where there is no agreement that he shall be compensated therefor.

13690 LAPORTE DISCOUNT CORPORATION V. BESSINGER. LaPorte Circuit Court. Affirmed. Lockyear, J. May 14, 1930.

Complaint in two paragraphs, the first paragraph for the replevin of a certain automobile and the second for the conversion of the same automobile. The appellant was the owner of a note secured by a conditional contract of sale of the automobile. The appellant did not take possession of the automobile but allowed it to remain in the possession of a dealer on the floor of the sales room and did not require the certificate of title to protect itself. The appellee, having bought the automobile in good faith and for value, etc., has a title superior to that of appellant.

13870 LINDSEY V. YOUNGBLOOD. Warrick Circuit Court. Affirmed. *Per Curiam*. June 11, 1930.

*Per Curiam.*

13836 MORRIS V. MORRIS. Marion Superior Court. Reversed. Remy, C. J. May 16, 1930.

This appeal involves the single question whether under the facts the court could properly require appellant to provide funds to defray expenses for a general college education for his son. The trial court, under the facts disclosed by the record was without authority of law to require appellant to provide funds to defray the expenses of a general college education

for his son. But the court says that the legal duty of a parent to furnish his minor child means with which to procure educational training, in preparation for a chosen vocation for which the child has a peculiar aptitude is not involved in this case and need not be considered.

13983 PLACH V. STATE OF INDIANA. Marion Criminal Court. Dismissed. Remy, C. J. May 14, 1930.

Dismissed on authority of *Dudley v. State* (1929), 200 Ind. 398, 161 N. E. 1.

13946 RED STAR YEAST COMPANY V. SHACKLEFORD. Marion Municipal Court, No. 1. Reversed. Enloe, J.

Action to recover damages alleged to have been suffered by reason of a collision the automobile of appellee and a delivery truck alleged to have been owned by appellant whereby the automobile of appellee was damaged. Motion to strike out a certain answer, for the reason that the same was not a part of *res gestae* should have been sustained. Upon the record the court can not say that the cause has been fairly tried and the judgment is therefore reversed.

13827 RUBENS V. COHEN. Hancock Circuit Court. Affirmed. Remy, C. J. May 2, 1930.

The only question presented by this appeal is the sufficiency of the evidence. There is competent evidence to sustain the verdict.

13892 RYAN V. INDIANA LOAN & FINANCE Co. Sullivan Circuit Court. Reversed. McMahan, J. June 10, 1930.

Action by appellee against appellant on what is designated as a "lease note." The transaction in question involves a loan made in violation of section 9777-9781, Burns' 1926; and under the facts the appellee was not acting as a broker within the provision of Section 9727, Burns' 1926.

13941 SHERFICK V. THE MARTIN COUNTY BANK. Orange Circuit Court. Affirmed, *per curiam*. May 16, 1930.

*Per Curiam.*

13942 STATE OF INDIANA, EX REL. GEORGE H. HOLZBEG V. BAIRD, FIDELITY & DEPOSIT COMPANY OF MARYLAND. Harrison Circuit Court. Dismissed. Remy, C. J. May 10, 1930.

Dismissed on authority of *Chicago Horseshoe Company v. Lewis* (1901), 156 Ind. 232, 59 N. E. 466.