Indiana Law Journal

Volume 21 | Issue 2 Article 2

Winter 1946

Procedure and Property

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PROCEDURE AND PROPERTY

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The materials on Procedure and Property do not include any extended comments. It has been thought that if the important recent cases and statutes were cataloged with a brief statement as to the decision in the case or the substance of the statute that lawyers would have little difficulty in fitting the cases and statutes into their present knowledge on the subject. A good many cases, particularly in the field of Procedure, have been included which decide nothing new but which involve points which appear to be rather frequently overlooked or about which there appears to be some misapprehension because of the frequency with which the questions are presented for decision.

RULES OF THE SUPREME COURT

The 1943 Revision, Rules of the Supreme Court, will be found published in the front of Vol. 220, Ind.; in the front of Vol. 112, Ind. App.; and also in the supplement to Vol. I, Burns Stat. Pamphlet copies may be secured from the Clerk of the Supreme Court.

CIVIL PROCEDURE
JURISDICTION; RES JUDICATA

General American Life Ins. Co. v. Carter 222 Ind. 557, 54 N.E. (2d) 944 (1944), holds that a foreign insurance corporation which qualifies in this state and appoints an agent for the service of process under the applicable statute only consents to jurisdiction as to contracts made in this state, and therefore there is no jurisdiction where the plaintiff is a nonresident and the policy was not delivered in this state.

Sherburne v. Miami Coal Co. 109 Ind. App. 587, 37 N.E. (2d) 12 (1941), holds that where a Federal Court in Illinois had appointed a receiver such receiver had constructive possession of the defendant's real estate located in Indiana, and an Indiana court may not exercise jurisdiction in rem as to the property.

Note: On the problem of concurrent jurisdiction in personam and injunction against litigation in another jurisdiction

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see, Baltimore & O. R. v. Kepner (1941) 314 U.S. 44, (Actions under the Federal Employer's Liability Act. This case is consistent with McConnell v. Thomson (1937) 213 Ind. 16, 8 N.E. (2d) 986, 11 N.E. (2d) 183, 113 A.L.R. 1429, but it is inconsistent with Kern v. Cleveland, C. C. & St. L. Ry. (1933) 204 Ind. 595, 185 N.E. 446). See also Toucey v. N.Y. Life Ins. Co. 314 U.S. 118 (1941).

State ex rel. Shepherd v. Nichols, Judge 219 Ind. 89, 36 N.E. (2d) 931 (1941), holds that a circuit court during vacation has power to issue a restraining order without notice against a party to a divorce action.

Simmons, et al. v. Woodward, et al. 217 Ind. 15, 26 N.E. (2d) 37 (1940), holds that a judgment against a public officer is res judicata in a subsequent action brought by a taxpayer involving the same subject.

Castor v. Gary Lumber Co. 220 Ind. 260, 41 N.E. (2d) 945 (1942), holds that a judgment in an action to foreclose a mortgage, where a defendant filed a cross-complaint asking for the enforcement of a contract to remove certain property, and recovered no judgment for the balance of the purchase price of the property involved, is res judicata as to that claim, because it might have been asserted.

Hine et al v. Wright et al 110 Ind. App. 385, 36 N.E. (2d) 972 (1941), holds that one not a formal party may be foreclosed by a judgment if he actually participates in the litigation, or was represented, but the assertion by another of representation does not conclude the matter. (There is a due process question in such cases, i.e., was there fair representation? See, Hansberry v. Lee 311 U.S. 32 (1940).

Padol v. Home Bank & Trust Co. 108 Ind. App. 401, 27 N.E. (2d) 917 (1940), holds that Sec. 2-2601, Burns Stat. (vacation of a judgment where the only notice was by publication) is applicable to an action brought under Sec. 2-1068, Burns Stat. (excusable neglect) where the defendant was notified by publication.

(Note: Sec. 2-1068, Burns Stat. as amended in 1941 now limits proceedings under 2-2601, Burns Stat. to one year if an action to quiet title is involved.)

Freimann v. Gallmeier —— Ind. App. ——, 63 N.E. (2d) 150 (1945), holds that the holding of a trial and entry of judgment on a legal holiday is erroneous, but under the facts of the case not reversible error.

PROCESS

Knue v. Knue 217 Ind. 319, 28 N.E. (2d) 76 (1940), holds that a summons to be served out of the state can only be issued during term time by order of court (as in the case of publication) and that such a summons issued by the clerk during term does not constitute the commencement of an action against a non-resident.

(Quaere: Is this a fair interpretation of the pertinent statute? The statute makes no such requirement.)

Donnelly v. Thorne 114 Ind. App. 468, 51 N.E. (2d) 873 (1943), holds that by an answer in abatement a non-resident defendant may dispute the correctness of a sheriff's return reciting service at a last and usual place of residence; and that participation in the taking of a deposition on the answer is not a general appearance.

(See Note on this case, 19 Ind. L. J. 279).

STATUTE OF LIMITATIONS

See note under *Padol v. Home Bank & T. Co.*, above.

Sec. 2-621, Burns Stat. (Ch. 8, Sec. 1, Acts 1943, p. 17) provides a five year limitation for the foreclosure of special assessment liens, and in any event 15 years from their approval if payable in instalments.

Sec. 2-626, Burns Stat. (Ch. 141, Sec. 1, Acts 1941, p. 428) undertakes to cure, except as to "vested rights" or persons under disability all defects in title to real estate after 35 years.

Sec. 2-627, Burns Stat. (Ch. 116, Sec. 1, Acts 1941, p. 328) limits actions for malpractice, in contract or tort, to 2 years.

Graf v. City Transit Co. 220 Ind. 249, 41 N.E. (2d) 941 (1942), holds (overruling 180 Ind. 386) that the husband's claim for loss of services, etc. arising out of wrongful injury to his wife is for property damage and not for personal injury and governed by the 6 year and not the 2 year statute of limitations.

Deep Vein Coal Co. v. Dowdle 218 Ind. 495, 33 N.E. (2d) 981 (1941), holds that if a new defendant is substituted the action, as against the statute of limitations, is commenced as of the date of the substitution.

PLEADING

Rule 1-2.

Ratcliff et al v. Ratcliff et al 219 Ind. 429, 39 N.E. (2d) 435 (1942), states that the purpose of Rule 1-2 is to facilitate the answer required by Rule 1-3 and to narrow the issues.

Answer in Abatement

Cushman Motor Delivery Co. et al. v. McCabe, Admr. 219 Ind. 156, (1941). This case repeats and follows the established rules as to the sufficiency of an answer in abatement (it must show as against every possible exception that it is well taken; and on demurrer the court may not look beyond the plea).

Donnelly v. Thorne 114 Ind. App. 468, 51 N.E. (2d) 873 (1943), holds that a challenge as to the factual correctness of a sheriff's return is correctly made by answer in abatement rather than by motion to quash.

(See Note on this case, 19 Ind. L. J. 279).

Ritter v. Ritter 219 Ind. 487, 38 N.E. (2d) 997 (1942), holds that where incapacity appears on the face of the complaint the question may not be raised by answer in abatement, but only by demurrer.

Griffith, Exec. et al v. Thrall, Admr. et al 109 Ind. App. 141, 29 N.E. (2) 345 (1940). A husband brought an action to contest his wife's will because of unsoundness of mind and the verdict was against the will. Apparently the marriage and execution of the will occurred at about the same time. It was argued that the finding of insanity forced the conclusion that the plaintiff's marriage was invalid, and therefore he was not the testatrix's heir. Held, the defendants had not challenged the right or capacity of the plaintiff by special answer and therefore had waived the question. (But, quaere? It certainly was not a question of capacity; the plaintiff necessarily alleged that he was the surviving husband and heir. Why was not the fact in issue?)

Jones v. Evanoff 114 Ind. App. 318, 52 N.E. (2d) 359 (1944), holds that the failure of a landlord to give a tenant the statutory notice to quit goes to the prematurity of an action and the question is properly raised by an answer in abatement.

Joinder of Actions.

Sec. 2-304, 2-305, Burns Stat. (Ch. 68, Sec. 1, Acts 1937,

p. 33; Ch. 227, Sec. 1, Acts 1943, p. 662) permit the joinder of actions for personal injury and property damage arising out of the same accident in the same or separate paragraphs of complaint.

Long v. Archer 221 Ind. 186, 46 N.E. (2d) 818 (1942), holds that a plaintiff may proceed on inconsistent theories if they are separately stated, and that he cannot be required to elect between them on the trial. Semble, if they are alleged in one paragraph of pleading and no attack on the pleading is made on that ground.

Parties.

Demurrers and Motions; Form of Allegations.

Oliver v. Coffman 112 Ind. App. 507, 45 N.E. (2d) 351 (1942). In this case the court undertakes to define "legal conclusions" and "ultimate facts", and to define the functions of a motion to strike out and to make more specific.

State ex rel. Dept. of Financial Institutions v. Hardy 218 Ind. 79, 30 N.E. (2d) 974 (1941), holds that an allegation that one is the owner of property is an ultimate fact; that a ruling sustaining a demurrer may be sustained on appeal on grounds not assigned in the demurrer; that a complaint anticipating a defense and not avoiding it is demurrable.

Ederer v. Froberg —— Ind. App. ——, 59 N.E. (2d) 595 (1945), holds that a motion to strike out an entire pleading cannot be used to serve the function of a demurrer and thus deprive a party of his privilege to amend.

City of Evansville v. Maddox 217 Ind. 39, 25 N.E. (2d) 321 (1940), holds that a complaint alleging facts "and/or" is subject to a motion to make more specific but is not subject to a demurrer for insufficient facts if it states a claim on either alternative.

State ex rel Cedar Creek School Township v. Curtin 217 Ind. 190, 26 N.E. (2d) 909 (1940), holds that a complaint is sufficient against demurrer if the plaintiff is entitled to any relief other than that prayed for (i.e., equitable rather than mandate.)

Long v. Archer 221 Ind. 186, 46 N.E. (2d) 818 (1942), holds that prior to the adoption of Rule 1-6 a demurrer addressed generally to a complaint containing two pleading paragraphs is properly overruled if either paragraph is good. (Under Rule 1-6 the demurrer must be regarded as addressed to them separately.)

State ex rel. City of Loogootee v. Larkin et al 218 Ind. 382, 33 N.E. (2d) 112 (1941), holds that a demurrer for insufficient facts raises the question of the real party in interest. (i.e. the complaint shows the right in question to be in X and not in the plaintiff.)

Change of Ruling.

Dick et al v. Glenn et al 218 Ind. 282, 32 N.E. (2d) 698 (1941), holds that conclusions of law inconsistent with a prior ruling on demurrer are not improper or invalid on that ground, as the trial judge may change his mind during the progress of the trial.

Answers.

Butler v. Wolf Sussman, Inc. 221 Ind. 47, 46 N.E. (2d) 243 (1942), holds that a general denial filed in violation of Rule 1-3 entitles the plaintiff to judgment on the pleadings.

(For a discussion of Rule 1-3 see Gavit, Indiana Pleading and Practice (1941) Sec. 21, 23.)

Lindley v. Sink 218 Ind. 1, 30 N.E. (2d) 456 (1940), holds that in an action for wrongful death the plaintiff need not negative contributory negligence, as it is an affirmative defense. Holds further that the negligence of one of several beneficiaries is no defense.

Hoesel v. Cain; Kahler v. Cain 222 Ind. 330, 53 N.E. (2d) 769 (1944), holds that contributory negligence is no defense to an action under the guest statute.

Sec. 2-305, Burns, Stat. Supp. (Ch. 227, Sec. 1, Acts 1943, p. 662) provides that if a plaintiff joins actions for personal injury and property damage arising out of the same accident the burden of proof as to the contributory negligence is on the defendant as to both claims.

Ayres v. Lucas —— Ind. App. ——, 63 N.E. (2d) 204 (1945), holds (following a long established rule) that a defendant may plead in separate paragraphs of his answer inconsistent defenses and that on the trial they may not be used as admissions against interest.

Universal Credit Co. v. Collier 108 Ind. App. 685, 31 N.E. (2d) 646 (1940), holds that until default a conditional sales vendee is the real party in interest to bring an action for injury to the property; after default both the vendee and ven-

dor are proper parties, and therefore the vendor may intervene in an action brought by the vendee and assert his claim by cross-complaint.

Ritter v. Ritter et al 219 Ind. 487, 38 N.E. (2d) 997 (1942), holds that one adjudged insane, and for whom a guardian has been appointed, may nevertheless maintain an action challenging the adjudication and appointment on the ground of fraud.

Hoesel v. Cain; Kahler v. Cain 222 Ind. 330, 53 N.E. (2d) 769 (1944), holds that a plaintiff may join as defendants the driver of a guest car and one alleged to have negligently caused the accident, as they are joint tort-feasors.

Barnard v. Kruzan 221 Ind. 208, 46 N.E. (2d) 238 (1942), holds that a petition to intervene need not be verified, and that as against a motion to strike it out its allegations must be accepted as true, unless they are false on their face.

Holds that in a class representation suit the court is bound to insure a fair and honest representation, and therefore should consider on its merits a petition to intervene, filed by a member of the class, which raises such an issue.

Board of Commissioners of Vanderburg Co. v. Sanders 218 Ind. 43, 30 N.E. (2d) 713, 131 A. L. R. 1048 (1940), sustains a class suit by one of several thousand claimants to recover illegal fees paid to a county.

Amendment.

Inter-State Motor Freight System v. Morgan 113 Ind. App. 374, 47 N.E. (2d) 326 (1943), holds that where the trial court permits a defendant to file an additional paragraph of answer the ruling will not be reversed on appeal except for a "clear abuse of discretion".

Motion In Arrest of Judgment.

McDaniels v. McDaniels —— Ind. App. ——, 62 N.E. (2d) 876 (1945), holds that a motion in arrest of judgment filed after judgment has been rendered presents no question.

Cassell et al v. Cochran 114 Ind. App. 115, 51 N.E. (2d) 21 (1943), holds that if a defendant does not question the sufficiency of the complaint by demurrer a motion in arrest of judgment raises no question, and the motion in arrest, filed prior to a motion for a new trial, waives the latter; that the waiver by failure to demurrer is only as to the sufficiency of

the pleading and on a motion for a new trial the defendant may question the right to recover on the merits and the evidence.

SPECIAL ACTIONS

An act of 1941 §3-623, et seq. (Burns Stat. Supp.) is a complete revision of the law of adoption and illegitimate children.

These statutes have been amended by Acts 1945, Ch. 69, p. 154, Ch. 95, p. 212, Ch. 356, p. 1724.

Divorce.

Smith v. Smith 217 Ind. 55, 26 N.E. (2d) 41 (1940), holds that a final decree in a divorce case that the plaintiff recover from the defendant $75 as an attorney's fee "for the use of her counsel" gave the attorney no interest in the judgment, the latter phrase being surplusage; the decree could only be enforced in the name of the plaintiff.

(Sec. 3-1220, Burns, Stat. Supp.; Ch. 18, Sec. 1, Acts 1943, p. 37, apparently is intended to give the attorney a right to the payment, but the statute is not free from ambiguity.)

Berghean v. Berghean 113 Ind. App. 412, 48 N.E. (2d) 1001 (1943), holds that the residence witness requirement as to "householder" means "master or head", and that two married women who testified did not satisfy the requirement where their evidence simply was that they were married and kept house for their husbands.

Habeas Corpus.

State ex rel. Bevington v. Myers 220 Ind. 149, 41 N.E. (2d) 353 (1941), holds that the criminal court in Marion County may not entertain jurisdiction of an action for habeas corpus although the petitioner was convicted in that court where he is confined in the State Prison, as the action must be brought in a court of the county in which he is being restrained.

(Note, that the Supreme Court also holds that the La-Porte County courts have no jurisdiction and the Supreme Court has no jurisdiction. Thus unless the defendant is convicted in the county in which he is imprisoned habeas corpus is an academic remedy. Clearly the matter should receive legislative attention.)

Dowd, Warden v. Anderson 220 Ind. 6, 40 N.E. (2d) 658 (1941), holds that a court in LaPorte County has no jurisdiction by habeas corpus to review a conviction entered by the Crawford Circuit Court.

Wood v. Dowd, Warden 221 Ind. 702, 51 N.E. (2d) 356 (1943), holds that a constitutional question which might have been raised on the original trial may not be raised in an action for habeas corpus.

(The Federal Rule is to the contrary. See, Gavit, Indiana Pleading and Practice, Sec. 236 (o). The latest case on the subject is Hawk v. Olson 66 S. Ct. 116 (1945). The result is that in Indiana the Federal Courts should get all of the habeas corpus business.)

Receivers.

Ratcliff v. Ratcliff 219, Ind. 429, 39 N.E. (2d) 435 (1942), holds that in an action to set aside a fraudulent conveyance a receiver may be appointed.

Mandate and Prohibition.

State ex rel Gillette v. Niblack, Judge 222 Ind. 290, 53 N.E. (2d) 542 (1944), holds that the Criminal Court of Marion County, because it has appellate jurisdiction over the Municipal Court in criminal matters, has power to mandate or prohibit that court and the Supreme Court has no jurisdiction where the matter in question involves action relating to an appeal to the Criminal Court.

Note: See also the cases on Mandate, Prohibition and Certiorari, under Jurisdiction of Supreme and Appellate Courts. These cases are pertinent if the powers of a trial court over an inferior court or administrative agency within its territorial jurisdiction are involved.

TRIAL PRACTICE

Special Judges and Change of Venue.

Ploughe v. Indianapolis Railways, Inc. 222 Ind. 125, 51 N.E. (2d) 626 (1943), holds Rule 1-9 to be constitutional.

State ex rel. Mayer v. Youngblood 221 Ind. 408, 48 N.E. (2d) 55 (1942), holds that the judge who presided at the trial should rule on a writ of error coram nobis, if he is available.

State ex rel. Wm. H. Block Co. v. Superior Ct. of Marion Co. 221 Ind. 228, 47 N.E. (2d) 139 (1942), holds that where

the regular judge sustained a motion for a new trial his successor has no jurisdiction to reconsider the ruling.

State ex rel. Hodshire v. Bingham, Judge 218 Ind. 490, 33 N.E. (2d) 771, 134 A. L. R. 1126 (1941), holds that under Rule 1-9, a judge pro tem whose term has expired may rule on a motion for a new trial and file a bill of exceptions.

State ex rel. Uservo, Inc. v. Circuit Court of Huntington Co. 217 Ind. 297, 27 N.E. (2d) 79 (1940), holds that where a special judge is appointed in a contempt proceeding he has jurisdiction to certify bills of exceptions, etc., but after final disposition of the contempt proceedings he has no jurisdiction of a petition to modify the original decree, and further contempt proceedings.

State ex rel. Emmert v. Gentry —— Ind. ——, 62 N.E. (2d) 860 (1945), holds that on a petition for a writ of error coram nobis, if the judge who tried the case is not available, the state is entitled to a change of venue from the regular judge.

State ex rel. Kiser, Cohn & Shumaker, Inc. v. Sammons et al —— Ind. ——, 57 N.E. (2d) 587 (1944), holds that a special judge may not act judicially (i.e., grant a motion for a change of venue) in his office in another county; that he may not in any event act on such a motion in the absence of notice to the other parties.

(On the latter point the case is extremely significant, and may well be construed to repudiate the rule that once a party has appeared he has constructive notice of all further proceedings. The court suggests that the trial courts may well adopt a general rule requiring notice of motions, demurrers, etc.)

State ex rel. Harlan v. Municipal Court of Marion Co. et al 221 Ind. 12, 46 N.E. (2d) 198 (1942), holds that under Rule 1-9 a judge pro tem must rule on a motion for a new trial, and that Sec. 2-2102 Burns Stat. (requiring the appointment of a special judge after a matter had been under advisement more than 90 days) is probably unconstitutional, and in any event it is superseded by Rule 1-9.

Holds that a court should not rule on a motion in the absence of all parties, or until after notice.

General Am. Life Ins. Co. v. Carter 222 Ind. 557, 54 N.E. (2d) 944 (1944), holds that a defendant may take a change of venue while an answer in abatement is still pending, and

in so doing he does not appear and waive the matter in abatement.

State ex rel. Parker v. Vosloh, Judge 222 Ind. 518, 54 N.E. (2d) 650 (1943), holds that where the probate judge is related to a beneficiary of the estate he is disqualified because of interest and must appoint a special judge.

State ex rel Karsch v. Eby, Judge 218 Ind. 431, 33 N.E. (2d) 336 (1941), holds that where one of several defendants vacated as to him a default judgment under Sec. 2-2601 Burns Stat. and the venue of the action was changed to an adjoining county the second court acquired jurisdiction of the entire case and could act upon a similar petition to vacate filed by another defendant.

Hoffman v. Hoffman et al (two cases) —— Ind. App. ——, 57 N.E. (2d) 591, 58 N.E. (2d) 201 (1944), holds that after a change of venue had been taken to an adjoining county an attorney of record had presumptive authority to agree to a transfer back to the original court, even although the case had already been tried but not finally disposed of.

Ch. 9, Sec. 1, Acts 1939, p. 16, provides that actions under the non-resident motorist statutes may be filed in the county of the residence of the plaintiff or in the county where the accident occurred.

Ch. 60, Sec. 6, Acts 1939, p. 407, provides that actions against a foreign corporation not authorized to do business in Indiana may be begun in any county in the State.

Sec. 2-1430, Burns Stat., on change of venue and certification of a panel by the Supreme Court, is amended by Ch. 235, Acts 1945, p. 1082. (The amendment seems to be designed to exclude the inferior courts from the general language of the statute.)

Introduction of Evidence; Burden of Proof.

Schreiber v. Rickert et al 114 Ind. App. 55, 50 N.E. (2d) 879 (1943), holds that a stipulation as to the evidence or the facts is binding on the parties and the court until set aside or withdrawn, and contradictory evidence is inadmissible.

Heinrich v. Ellis 113 Ind. App. 478, 48 N.E. (2d) 96 (1943), holds that one who propounds a question to a witness may move to strike out an answer which is not responsive, but the adversary may not. His remedy is to move to strike out because the evidence was inadmissible. If the evidence is admissible the fact that it is volunteered does not harm the

adverse party, as it could be elicited by a proper question.

Cobler, Admr. v. Prudential Life Ins. Co. 108 Ind. App. 641, 31 N.E. (2d) 678 (1940), holds that one who relies upon the fact of survivorship where two persons are killed in a common disaster has the burden of proving survivorship.

(The Uniform Act on Simultaneous Death was enacted in Acts 1941, Ch. 49, p. 132, Sec. 6-2356 to 63, Burns Stat. Supp. It creates certain presumptions on the subject.)

Western & Southern Life Ins. Co. v. McCann 112 Ind. App. 113, 40 N.E. (2d) 987 (1942). Acc. Cobler v. Prudential Life immediately above.

Fardy v. Mayerstein 221 Ind. 339, 47 N.E. (2d) 966. (1942), holds that the Uniform Judicial Notice Act (Sec. 2-4804 Burns Stat.) is not self-executing, and a party relying on judicial notice of the law of a sister state must give notice in his pleadings "or otherwise".

Revlett v. Louisville & Nashville Rd. Co. 114 Ind. App. 187, 51 N.E. (2d) 95, 500 (1943), holds that where a complaint alleged facts showing that the claim arose in Kentucky and referred to a pertinent Kentucky statute the notice required by Sec. 2-4804, Burns Stat. was given, and the plaintiff's complaint was sufficient as against the objection that the Kentucky law was not pleaded in detail, the purpose of the Judicial Notice Act being to relieve a party of pleading and proving the law of a sister state. (The Act applies only to the laws of the other states and territories. If the law of a foreign country is involved the old rules prevail.)

Prudential Ins. Co. of America v. Van Wey et al —— Ind. ——, 59 N.E. (2d) 721 (1945), holds that where the evidence as to the cause of death is equally conclusive as between accident and non-accident one who has the burden of proof as to accident cannot recover.

JURY TRIAL

Struck jury.

Pfister v. Key 218 Ind. 521, 33 N.E. (2d) 330 (1941), holds that a struck jury is properly refused if the party demanding it does not tender the costs.

Time of trial.

Freimann v. Gallmeier —— Ind. App. ——, 63 N.E. (2d) 150 (1945), holds that a trial court has discretionary control

of its calendar, the statutes on the subject not being mandatory, and it was not error to set for trial a case on change of venue within 10 days after the transcript was filed.

American Lead Corporation v. Davis 111 Ind. App. 242, 38 N.E. (2d) 281 (1941), holds that a trial court has inherent power to consolidate actions for trial, and in this case enjoins the separate prosecution of 150 actions for nuisance arising out of the operation of the plaintiff's plant.

Kizer v. Hazelett 221 Ind. 575, 49 N.E. (2d) 543 (1943), holds that in an action brought under the guest statute against the driver of the guest car and also against a second defendant for negligence the defendants are entitled to a separate trial on a timely motion demanding separate trial.

Misconduct.

King v. Ransburg 111 Ind. App. 523, 39 N.E. (2d) 822 (1942), holds that where a defending insurance company is actively represented at the trial by its agent it is not improper for the plaintiff on his examination of the jurors to make inquiry as to their relationship and acquaintance with him, and to identify him as a claim agent for his company.

Helton v. Mann 111 Ind. App. 487, 40 N.E. (2d) 395 (1941), holds that while it is proper to question the jurors as to an interest in a defending insurance company it is improper to attempt to introduce evidence on the point, and to refer to the matter in final argument, and the situation presented in this case called for a reversal.

Riechmann v. Reasner 221 Ind. 628, 51 N.E. (2d) 10 (1943), holds that on voir dire examination the plaintiff is entitled to inquire as to the interest of the jurors in an insurance company. (In this case the plaintiff stated to the court at the beginning of the trial out of the presence of the jury that the defendant was insured, and the fact was not disputed.)

Instructions.

Bradford Homes Inc. v. Long 221 Ind. 309, 47 N.E. (2d) 609 (1942), holds that under Rule 1-7 no question is preserved as to the giving of instructions unless the record discloses specific objections to them.

Keeshin Motor Express Co. v. Sowers 221 Ind. 440, 48 N.E. (2d) 459 (1942), holds that under Rule 1-7 general objections to instruction save no question; and if the objections

are specific additional grounds cannot be urged on appeal.

Indianapolis Railways Inc. v. Williams —— Ind. App. ——, 59 N.E. (2d) 586 (1945). Acc. two cases immediately above.

Mackey v. Niemeyer 113 Ind. App. 10, 44 N.E. (2d) 520 (1942). Acc.

Ford et al v. Cleveland 112 Ind. App. 420, 44 N.E. (2d) 244 (1942), holds that in an action to quiet title it is error to leave to the jury the interpretation or meaning of a will.

New York Life Ins. Co. v. Kuhlenschmidt 218 Ind. 404, 33 N.E. (2d) 340, 135 A. L. R. 397 (1941), holds that an instruction which in effect advises the jury to give no effect to the final argument is erroneous.

Lincoln National Bank & Trust Co. of Fort Wayne v. Parker 110 Ind. App. 1, 37 N.E. (2d) 5 (1941). This case contains an excellent re-statement of the rules as to the power of a court to direct a verdict in favor of a plaintiff, and appellate review on the subject.

Verdicts.

Inter State Motor Freight System v. Henry 111 Ind. App. 179, 38 N.E. (2d) 909 (1941), holds that a verdict against two of three defendants which is silent as to the third is a verdict in favor of the third; that verdicts in favor of a servant and against the master are inconsistent only if the master's liability is necessarily based only on the liability of the servant.

COURT TRIAL

Lane v. Gugsell 113 Ind. App. 676, 47 N.E. (2d) 835 (1943), holds that Rule 1-8 does not require the court to reopen a case on motion of a party.

Elliott v. Gardner 113 Ind. App. 47, 46 N.E. (2d) 702 (1943), holds that Rule 1-8 is applicable to a general finding.

Owen County State Bank v. Guard 217 Ind. 75, 26 N.E. (2d) 395 (1940), holds that a conclusion that "the law is with the plaintiff" is sufficient.

RE-OPENING TRIAL

Sanders v. Ryan et al 112 Ind. App. 470, 41 N.E. (2d) 833 (1942), holds that it was error for the trial court to refuse the plaintiff's request to re-open the case and introduce

additional evidence to defeat a motion to direct a verdict by proof of an omitted fact.

MOTION FOR NEW TRIAL

Indianapolis Life Ins. Co. v. Lundquist 222 Ind. 359, 53 N.E. (2d) 338 (1943), holds that a trial court has power to grant a new trial on its own initiative, and for reasons beyond those contained in the statute. (In this case the reporter's notes were lost and the party could not therefore secure a complete and accurate bill of exceptions.)

Lyon v. Aetna Life Ins. Co. 112 Ind. App. 573, 44 N.E. (2d) 186 (1942), holds, in accord with a long line of cases, that conclusions of law may not be challenged by a motion for a new trial. The error must be assigned separately in the assignment of errors.

Berning v. Scheuman 111 Ind. App. 156, 40 N.E. (2d) 1005 (1941), holds that an amended motion for a new trial, filed more than 30 days after decision presents no question, and its overruling cannot be made the basis for appellate review.

Cole v. Bassett's Estate 111 Ind. App. 63, 40 N.E. (2d) 373 (1942), holds that an adverse ruling on an application for a change of venue may be challenged by a motion for a new trial, and therefore cannot be challenged by a separate assignment of error.

New York Life Ins. Co. v. Kuhlenschmidt 218 Ind. 404, 33 N.E. (2d) 340, 135 A. L. R. 397 (1941), holds that where multiple (including legal and equitable) but related issues are tried at the same time a general motion for a new trial raises questions as to the separate issues.

Heekin Can Co. v. Porter 221 Ind. 69, 46 N.E. (2d) 486 (1942), holds that in a case not tried by jury a motion for a new trial attacking the "verdict" rather than the "decision" or "finding" is sufficient (overruling previous cases.)

Bartley v. Chicago & Eastern Illinois Ry. Co. 220 Ind. 354, 41 N.E. (2d) 805 (1942), repeats and follows the rule that error cannot be assigned on sustaining a motion to direct a verdict as the error is in directing the verdict. (Semble as to the overruling such a motion—the error is in refusing to direct.)

(Note: The court concedes in this and other cases that an attack on the verdict by motion for a new trial because it is

not sustained by sufficient evidence and is contrary to law raises the desired question.)

Holds also that action directing a verdict may only be shown by a bill of exceptions. This is now repudiated by Rule 1-7.

Note that the holding that an adverse ruling must be followed by an exception is now repudiated by Rule 1-6.

Waltermire v. State —— Ind. ——, 60 N.E. (2d) 526 (1945), holds that under Rule 1-7 (1943 Revision) error may properly be "predicated on the overruling of a motion for a directed verdict." (But, quaere? The language of the Rule is: "The Court's action *in directing or refusing* to direct a verdict shall be shown by order book entry. Error may be predicated *upon such ruling.*")

French v. National Refining Co. 217 Ind. 121, 26 N.E. (2d) 47 (1940), holds that where the trial court directed a verdict and this action is not specifically assigned as error the question is still presented for review under a motion for a new trial attacking the verdict as being contrary to law.

Kimmick v. Linn 217 Ind. 485, 29 N.E. (2d) 207 (1940), holds that error assigned as to a ruling on the evidence is insufficient unless the motion for a new trial sets out the question and answer, if any, or their substance, and the objection made and the ruling.

Greek v. Seward 222 Ind. 211, 51 N.E. (2d) 3 (1943). Acc.

Henschen v. N. Y. Central R. Co. —— Ind. ——, 60 N.E. (2d) 738 (1945), holds that a motion for a new trial on the ground that a verdict is not sustained by sufficient evidence and is contrary to law, and that the damages are insufficient, raises no question as to damages, but that an assignment substantially in the language of Sec. 2-2406, Burns Stat. Supp. (Ch. 68, Sec. 2, Acts 1937, p. 333) raises the question. (Presumably this statute repeals Sec. 2-2402, Burns Stat. unless punitive damages are involved.)

Holds that a verdict of $1,000 in a wrongful death case, under the facts of the case, was not inadequate to the extent that the Supreme Court should order a new trial.

McKee v. Mutual Life Ins. Co. of N.Y. 222 Ind. 10, 51 N.E. (2d) 476 (1943), holds (in accord with a number of other cases) that if a verdict or decision is against the party having the burden of proof a motion for a new trial on the

ground that the verdict or decision is not sustained by sufficient evidence raises no question. It is conceded that an assignment that the verdict or decision is contrary to law raises the desired question.

Warren Co. Inc. v. Exodus 114 Ind. App. 651, 54 N.E. (2d) 775 (1944). Acc.

Rowe v. Johnson et al —— Ind. ——, 60 N.E. (2d) 529 (1945). Acc.

Southern Ry. Co. of Indiana et al v. Ingle —— Ind. App. ——, (1944), holds that on a motion for a new trial for misconduct of the jury in rendering a quotient verdict the fact may not be proved by the affidavit of one whose source of information was from one of the jurors, as a juror may not directly or indirectly impeach a verdict.

Venire de novo.

Burkhart et al v. Simms —— Ind. App. ——, 60 N.E. (2d) 141 (1945), holds that a motion for a venire de novo filed after final judgment presents no question.

Motion to modify.

Blagetz v. Blagetz 109 Ind. App. 662, 37 N.E. (2d) 318 (1941), holds that a motion to modify a judgment is properly overruled where the judgment follows the findings.

Writ of error coram nobis.

State ex rel. Cutsinger v. Spencer, Judge 219 Ind. 148, 41 N.E. (2d) 601 (1941), holds that if after conviction the defendant files a petition for a writ of error coram nobis he is not entitled to a transcript of the record at public expense, as the action is not an appeal from or review of the judgment, but in effect a motion for a new trial.

State v. Richardson —— Ind. ——, 63 N.E. (2d) 195 (1945), holds that a defendant had sustained an application for a writ of error coram nobis by alleging and proving that his conviction was based upon an unauthorized plea of guilty made by his attorney.

APPELLATE JURISDICTION AND PROCEDURE

Warren v. Indiana Telephone Co. 217 Ind. 93, 26 N.E. (2d) 399 (1940), holds that under the Indiana Constitution the Supreme Court may not be deprived of final jurisdiction in all appeals. The Court overrules a previous case sustaining

a statute giving the Appellate Court final jurisdiction in appeals from the Industrial Board. The Court states that the $50 statute is invalid but has in effect been accepted as a Rule of Court. Sustains a petition to transfer as a writ of error. See comment in 16 *Ind. L. J.* 397.

Beamer, Attorney General v. Waddell 221 Ind. 232, 279, 45 N.E. (2d) 1020, 47 N.E. (2d) 608 (1942), holds that the Supreme Court has power to discipline any member of the bar of the state, the statutes giving a similar power to the trial courts not being exclusive.

(Following this case the Supreme Court promulgated Rules 3-22 to 3-26.)

In Re Lane —— Ind. ——, 57 N.E. (2d) 773 (1944). In this case, brought under Rule 3-22, the defendant is disbarred.

In Re Hardy 217 Ind. 159, 26 N.E. (2d) 921 (1940), holds that in disbarment proceedings in the Supreme Court an attorney may make proof of his good character and standing.

Zimmerman et al v. Zumpee et al 218 Ind. 476, 33 N.E. (2d) 102 (1941), holds that if Supreme Court has no jurisdiction of an appeal the assigning of cross-errors does not waive the question, or confer jurisdiction.

Jones v. Dowd, Warden 219 Ind. 114, 37 N.E. (2d) 68 (1941), holds that Supreme Court has no "original" jurisdiction of an action for habeas corpus.

Hawkins v. Wheat et al —— Ind. ——, 59 N.E. (2d) 728 (1945), holds that the statute requiring transfer of an appeal filed in the wrong court does not apply to an "original" action and therefore an action for mandate filed in the Supreme Court which should have been filed in the Appellate Court must be dismissed.

Montgomery v. State 222 Ind. 607, 56 N.E. (2d) 854 (1944), holds that the Appellate Court has jurisdiction to decide whether or not a statute limiting the extent of the review on appeal from the juvenile court is constitutional.

Montgomery v. State —— Ind. App. ——, 57 N.E. (2d) 943 (1944), holds that the Appellate Court has power to determine its own constitutional jurisdiction and that a statute limiting appellate review in an appeal from a juvenile court is unconstitutional.

State ex rel. Seaton v. Industrial Board 222 Ind. 526, 54

N.E. (2d) 944 (1944), holds that the Supreme Court has no jurisdiction to prohibit the Industrial Board.

State ex rel. Miller v. Appellate Court 220 Ind. 538, 45 N.E. (2d) 206 (1942), holds that the Supreme Court has no jurisdiction to mandate or prohibit the Appellate Court, as its statutory authority on the subject is limited to trial courts.

State ex rel. Guckenberger et al v. Franklin Circuit Court 108 Ind. App. 428, 29 N.E. (2d) 423 (1940), holds that the Appellate Court may prohibit the prosecution of another action involving the subject-matter of an appeal pending in that Court.

State ex rel. Dawson, Lt. Governor et al v. Marion Circuit Court et al 218 Ind. 451, 33 N.E. (2d) 515, 582 (1941), holds that the Supreme Court may not issue a writ of prohibition against a trial court unless there is no jurisdiction in the strict sense. (I.e. a trial court has jurisdiction in the field of injunction against state officers and if an injunction is erroneously granted the remedy is by appeal.)

State ex rel. Kist v. Randolph Circuit Court 218 Ind. 40, 29 N.E. (2d) 989 (1940), holds that the writ of prohibition will not issue on the fear that a court will not respect a plea of res judicata, as the remedy is by appeal, the court having jurisdiction to decide such an issue.

(See also, accord, as between the federal and state courts, Toucey v. New York Life (1941) 314 U.S. 118, 582, 585, 62 Sup. Ct. 139, 86 L. Ed. 100, 472.

State ex rel. Emmert, Attorney General et al v. Hamilton Circuit Court —— Ind. ——, 61 N.E. (2d) 182 (1945), holds that a trial court has jurisdiction of a writ of error coram nobis and the possibility of its wrongful issuance is not ground for prohibition.

The Supreme Court promulgates Rule 2-40 permitting an appeal from a ruling either way on a writ of error coram nobis to be governed by the rules applicable to appeals from interlocutory order, even although the writ is denied. See Note on this case, 20 *Ind. L. J.* 334 (July, 1945.)

Rules 2-35 to 2-39, 1943 Revision, provide for the first time express rules governing the procedure for actions of mandate and prohibition in the Supreme Court (and presumably the Appellate Court?)

First Merchants Nat. Bank & Trust Co. v. Crawley 221 Ind. 682, 50 N.E. (2d) 918 (1943), holds that under the facts

presented a writ of certiorari seeking a review of a decision by the Appellate Court should be dismissed. The Court leaves open the question as to whether or not the writ might be an available remedy where an appeal would be held to be an inadequate remedy, or no appeal was available.

Written Opinions.

State ex rel. Dowd, Warden v. Superior Court of LaPorte Co., etc. 219 Ind. 17, 36 N.E. (2d) 765 (1941), holds that a written opinion is required in original actions.

City of Indianapolis v. Butzke 217 Ind. 203, 26 N.E. (2d) 754 (1940), holds that the constitutional requirement as to the writing of an opinion by the Supreme Court does not apply to questions as to the compliance with the Rules on briefing.

Appealable Orders and Judgments.

Thomas v. Kelly —— Ind. App. ——, 58 N.E. (2d) 942 (1945), holds, following a long line of cases, that a judgment vacating a prior judgment is not a final judgment for the purpose of appeal.

Pisarski v. Glowiszyn 220 Ind. 128, 41 N.E. (2d) 358 (1941), holds that a final order in proceedings supplemental to execution is not an interlocutory order and that jurisdiction of an appeal therefrom is in the Appellate Court.

Thomas v. O'Connell's Estate 111 Ind. App. 423, 41 N.E. (2d) 656 (1941), holds that after a ruling sustaining a demurrer to a complaint there is no appealable judgment until the trial court enters a formal judgment against the plaintiff.

(Under Rule 2-3, 1943 Revision, the Appellate or Supreme Court now has power to stay dismissal of an appeal in this type of case and permit the appellant to take care of the difficulty.)

Greathouse v. McKinney 220 Ind. 462, 44 N.E. (2d) 344 (1942), holds that an order annulling final approval of an administrator's final report and ordering an amended report is not a final judgment.

Poston v. Akin et al 218 Ind. 142, 31 N.E. (2d) 638 (1941), holds that a ruling refusing to remove a receiver is not such an interlocutory order as is appealable.

Parfenoff et al v. Kozlowski et al 218 Ind. 154, 31 N.E. (2d) 206 (1941). Acc. Poston v. Akin, above, holding further

that there is no appeal from the appointment of a substitute receiver.

Time for Appeal; Bonds.

Reasor v. Reasor —— Ind. App. ——, 60 N.E. (2d) 536 (1945), holds that the delivery of a transcript of the record to the post office for mailing is not a filing in the office of the clerk, and if delivered to the clerk after the time for appeal has expired the appeal must be dismissed.

Wimberg, Admx. v. Kroemer 108 Ind. App. 65, 27 N.E. (2d) 115. (1939), holds that under Rule 1 (1937 Revision) trial court no longer had any power to extend the time for taking appeal as the Rule allowed only 90 days. (Rule 2-2 now provides that an extension may be granted by the court to which the appeal is sought.)

Anderson v. Lagow 220 Ind. 363, 41 N.E. (2d) 798 (1942), holds that Rule 2-2, 1940 Revision, did not supersede the statute requiring an appeal to be perfected within sixty days after the filing of an appeal bond.

(Note: Does the 1943 Revision change this result? Caution requires that the above case be respected.)

Zimmerman v. Zumpee 218 Ind. 476, 33 N.E. (2d) 102 (1941), holds that the pendency of a motion to modify the judgment, or in arrest of judgment, does not toll the time for taking appeal.

City of Michigan City v. Williamson 217 Ind. 598, 28 N.E. (2d) 961 (1940), holds that the pendency of a motion to modify a judgment does not toll the time for taking an appeal.

Barr v. Allen 217 Ind. 489, 29 N.E. (2d) 316 (1940), holds that statute allowing 30 days for appeal in flood control proceedings was not repudiated by the Supreme Court Rules of 1937 and 1940. (The 1943 Revision allows 90 days "unless the statute under which the appeal or review is taken fixes a shorter time." Rule 2-2.)

Smith v. Zumpfe 217 Ind. 431, 27 N.E. (2d) 878 (1940), holds that if an order for the sale of real estate in a receivership proceeding in which the court made the sale is contingent on its approval the order is interlocutory and not final. Appeal not perfected within 30 days dismissed.

Western & So. Life Ins. Co. v. Lottes —— Ind. App. ——, 63 N.E. (2d) 146 (1945), holds that under Rule 2-3 (1943 Revision) it is unnecessary to file an appeal bond, and

therefore failure to file a bond in conformity with an allowance of time in the trial court does not require a dismissal. (Quaere? Does the new Rule supersede the statutes previously construed as making the filing of an appeal bond a jurisdictional prerequisite, as, e.g., in appeals from interlocutory orders, or was it intended simply to permit the filing at any time before the appeal is perfected and after term, without any allowance of time?)

Weber v. Fohl 111 Ind. App. 388, 41 N.E. (2d) 648 (1941), holds that a trial court may (by statute) accept a certified check as an appeal bond.

Western Wheeled Scraper Co. v. Scott Const. Co. 217 Ind. 408, 27 N.E. (2d) 879 (1940), holds that an assignment of cross-errors must be filed within the time allowed for an appeal. (This rule is changed by Rule 2-6, and an appellee is now permitted to assign cross-errors within 30 days after the filing of the appellant's brief.)

Assignment of Errors; Parties.

Carr v. Schneider's Estate 114 Ind. App. 149, 51 N.E. (2d) 392 (1943), holds that a decedent's estate is not a legal person and an assignment of errors which names an estate as appellee does not designate an appellee and the appeal is dismissed.

(But, quaere? If the administrator or executor defended the action in the trial court without raising the question, is it not only a misnomer which was waived?)

Rogowski v. Kaelin 111 Ind. App. 535, 41 N.E. (2d) 954 (1942). Appeal is dismissed for failure to name co-defendants in the assignment of errors. (Under Rule 2-6, 1943 Revision, the Court may now permit the appellant to cure the defect by amendment.)

State ex rel. Scher v. Ayres 217 Ind. 179, 26 N.E. (2d) 1002 (1940), holds that the caption and body of an assignment of errors are construed together in determining who the parties on appeal are and the capacity in which they have been made parties.

State ex rel. Johnson v. Boyd, v. Viets, v. Krack 217 Ind. 348, 28 N.E. (2d) 256 (1940), holds that a joint assignment of error as to several conclusions of law is bad if any one conclusion is correct. (Rule 2-6 literally construed does not change this result, as it relates only to the situation where two or more parties join. Cf. Rule 1-6.)

Holds further, in accord with a long line of cases (and the 1943 Revision does not change the law) that, 1. a motion for a new trial can not challenge conclusions of law, and the error must be separately assigned in the assignment of error; 2. a motion for a new trial challenging the "judgment" as being contrary to law, etc., raises no question (the verdict, decision or findings must be challenged, not the judgment); 3. conclusions of law included in special findings, and conversely, are disregarded; 4. a failure to find a material fact is a finding on the fact against the party having the burden of proof. (cf. Rule 1-8. The defect could have been amended. Is it deemed amended on appeal under Sec. 2-3231, Burns Stat.?)

Gardner v. Lohmann Constr. Co. —— Ind. App. ——, 62 N.E. (2d) 867 (1945), holds that the Employment Security Act of 1943, which provides for a review in the Superior Court of Marion County of orders and decisions of the Employment Security Division, and an appeal from the Court to the Appellate Court is valid; that the proceedings in the Superior Court are not a trial, and therefore a motion for a new trial raises no question, and its overruling cannot be assigned as error on appeal.

Tyler v. State —— Ind. App. ——, 63 N.E. (2d) 145 (1945), holds that in an appeal from the juvenile court the only proper assignment of error is that "the decision of the court is contrary to law."

Koss v. Continental Oil Co. 222 Ind. 224, 52 N.E. (2d) 614 (1943), holds that in an appeal from the denial of a motion for a temporary injunction an assignment that the court erred in denying the injunction presents all questions as the validity of the court's action.

Pisarski v. Glowiszyn 220 Ind. 128, 41 N.E. (2d) 358 (1941), holds that a motion for a new trial is not necessary to preserve an effective appeal from an interlocutory order.

Carson, Receiver v. Perkins 217 Ind. 543, 29 N.E. (2d) 772 (1940), holds that an adverse ruling on a motion for change of venue must be assigned as grounds for new trial, and cannot be separately assigned in the assignment of error.

Long v. Archer 221 Ind. 186, 46 N.E. (2d) 818 (1942), holds that a party may only preserve a question on a motion to direct a verdict by tendering a written peremptory instruction. (This is repudiated by Rule 1-7, 1943 Revision.)

Record on Appeal.

Smith v. American Creosoting Co. 221 Ind. 613, 50 N.E. (2d) 619 (1943), holds that under Rule 2-3, 1943 Revision, no extension of time for filing bills of exception by the trial court is now necessary and a bill filed any time before the appeal is perfected is properly in the record. Cf. Kubisz v. Pomorski (1943) 221 Ind. 655, 51 N.E. (2d) 82, decided under the old law.

Michigan City News Inc. v. Dept. of Treasury et al —— Ind. App. ——, 61 N.E. (2d) 470 (1945), holds that under Rules 2-2, 2-3 (1943 Revision) a bill of exceptions may be filed within 90 days, although the court allowed only 30 days.

Tinkham v. Tinkham 112 Ind. App. 532, 45 N.E. (2d) 357 (1942), holds that a bill of exceptions is not properly in the record unless signed by the judge and the fact of filing is shown by the certificate of the clerk or an order book entry. Holds further that an amended certificate may not be filed after the time for perfecting an appeal has expired.

(Rule 2-3, 1943 Revision provides that the filing of a bill of exceptions may be evidenced by an order book entry or the clerk's certificate. The Rules do not fix a time for the correction of the record (Rule 2-28). The language is similar to that of previous Rules, and the principal case is in accord with previous cases. What was sought, however, was an amendment to and not a correction of the record. It is suggested that the judge did file the bill when he delivered it to the clerk and had the appellant by motion for a nunc pro tunc entry obtained an order book entry the order could have been incorporated in to the record under Rule 2-28. See, N.O. Nelson Mfg. Corp. v. Dickson (1943) 114 Ind. App. 229, 51 N.E. (2d) 895, holding that this procedure is proper.)

Keeshin Motor Express Co. Inc. et al v. Glassman 219 Ind. 538, 38 N.E. (2d) 847 (1942), holds that a bill of exceptions is validated only by the signature of the judge, and not by the signature of the clerk or reporter.

(There is nothing in the new Rules changing this result.)

Kist et al v. Coughlin et al —— Ind. ——, 57 N.E. (2d) 199 (1944), holds that if the judge's certificate to a bill of exception containing the evidence does not contain an express statement that all of the evidence is included but the record otherwise discloses that the bill is complete the fact may be thus established.

Levy v. Winget —— Ind. App. ——, 57 N.E. (2d) 629 (1944), holds that Rule 2-3 permits proof of the filing of a bill of exceptions either by order book entry or the certificate of the clerk, but in the absence of either form of proof a bill cannot be considered a part of the record on appeal.

Cook v. State of Indiana 219 Ind. 234, 37 N.E. (2d) 63 (1941), holds that if the fact that the record entries are incomplete or inaccurate is indicated by some memorandum (in this case the court's minute book) the proof of what a correct record would be may be by parol. (Indianapolis Life Ins. Co. v. Lundquist (1943) 222 Ind. 359, 53 N.E. (2d) 338, acc.)

Conner v. Jones —— Ind. App. ——, 54 N.E. (2d) 283 59 N.E. (2d) 577, 60 N.E. (2d) 534 (1945), holds that it is presumed on appeal the trial court in ruling on a motion for a new trial performed its duty and weighed the evidence, and the contrary may not be proved by the attempted inclusion in the record by a bill of exceptions of a letter written by the judge to the attorneys in explanation of his ruling.

Hosel v. Cain; Kahler v. Cain 222 Ind. 330, 53 N.E. (2d) 769 (1944), holds that under the 1940 Revision an original bill of exceptions containing oral objections to the instruction may be included in the record. (Rule 2-3, 1943 Revision, expressly provides that an original bill may be used without copying.)

Department of Financial Institutions v. Neumann 217 Ind. 85, 26 N.E. (2d) 388 (1940), holds that original documents introduced in evidence may be included in a bill of exceptions.

Soucie v. State of Indiana 218 Ind. 215, 31 N.E. (2d) 1018 (1941), holds that where a motion for new trial raises an issue of fact not proved by the record (i.e. newly discovered evidence) no question is presented unless the record contains a bill of exceptions on the hearing on that issue.

(The practice here contemplates a formal hearing, and the party should introduce in evidence the affidavits supporting the motion. The adverse part may dispute this evidence and the court may hear oral evidence. See, Hauk v. Allen (1890) 126 Ind. 568, 25 N.E. 879.)

Gerking v. Johnson 220 Ind. 501, 44 N.E. (2d) 90 (1942). Acc. above case as to necessity of bill of exceptions as to the hearing on a motion for a new trial.

Messersmith v. State of Indiana 217 Ind. 132, 26 N.E.

(2d) 908 (1940), holds that a bill of exceptions containing only part of the evidence does not support a review as to the sufficiency of the evidence to support the judgment.

Briefs, Their Filing and Service.

James C. Curtis & Co. v. Emmerling et al 218 Ind. 172, 31 N.E. (2d) 986 (1941), holds that service of appellant's brief after the time allowed for filing the brief requires dismissal of appeal.

Elliott et al v. Gardner 113 Ind. App. 47, 46 N.E. (2d) 702 (1943), holds that briefs left in the clerk's office after office hours though the aid of the janitor were properly filed.

Indiana Service Corporation et al v. Town of Flora 218 Ind. 208, 31 N.E. (2d) 1015 (1941), holds that an appeal from the overruling of defendant's objections in eminent domain proceedings under Sec. 2-3218, Burns Stat. is not from an interlocutory order and time for filing briefs is not governed by the rules on interlocutory appeals.

Gary Rwys. Co. v. Kleinknight 110 Ind. App. 72, 36 N.E. (2d) 939 (1941), holds that the mailing of a copy of appellant's brief on the last day for filing, where the brief is not received by the appellee until after the time for filing, does not comply with Rule 2-19, which requires the filing of proof of service at the time of filing.

Wright v. Hines —— Ind. App. ——, 62 N.E. (2d) 884 (1945).

Acc. above case.

Judicial Notice.

Board of Com'rs of Allen County et al v. Gable et al —— Ind. App. ——, 57 N.E. (2d) 69 (1944), holds that the Appellate Court does not take judicial notice of the records of the Industrial Board, and therefore a judgment against an insurance carrier must be reversed where there is no evidence as to its liability and the Board did not expressly find that according to its records it had insured the employer.

Zimmerman v. Zumpee 218 Ind. 476, 33 N.E. (2d) 102 (1941), holds that the Supreme Court may take judicial notice of the record in a former appeal in the same case.

Decision on the Merits.

Cooper et al v. Tarpley et al 112 Ind. App. 1, 41 N.E. (2d) 640 (1942), holds that if a fact omitted from special findings was established by undisputed evidence the findings will be deemed amended to include that fact.

Petition to Transfer.

Long et al v. Van Osdale et al 218 Ind. 483, 29 N.E. (2d) 953 (1940), holds that if a petitioner represents that the Appellate Court opinion does not fully and fairly state the record a petition to transfer is granted.

(Rule 2-23, 1943 Revision, states the substance of this decision.)

Smith v. Am. Creosoting Co. 221 Ind. 613, 50 N.E. (2d) 619 (1943), holds that the Supreme Court may review a decision of the Appellate Court under Rule 2-2 denying an extension of time for perfecting an appeal.

L. S. Ayres & Co. v. Hicks 219 Ind. 348, 38 N.E. (2d) 577 (1942), holds that if four judges of the Appellate Court fail to agree on a petition for a rehearing there is no authority for a transfer to the Supreme Court, as the pertinent statute applies only as to the original decision of the case by the Appellate Court.

Burroughs Adding Machine Co. v. Dehn 219 Ind. 350, 38 N. E. (2d) 569 (1942). Applies the result of Ayres & Co. v. Hicks, above, to an "appeal" from the Industrial Board. (This is on the theory that the Board not being a Court the "appeal" is a review; jurisdiction is placed in the Appellate Court and therefore until that court decides the case there is nothing to transfer.) But, quaere? See, Gavit, Pleading & Practice, Sec. 502.

Fardy v. Mayerstein 221 Ind. 339, 47 N.E. (2d) 966 (1942), holds that the denial of a petition to transfer is not an approval of the language of the Appellate Court decision.

THE ENFORCEMENT OF JUDGMENTS

Fraudulent Conveyances.

Bellin v. Bloom 217 Ind. 656, 28 N.E. (2d) 53 (1940), holds (overruling some previous cases) that where an owner of real estate conveys in fraud of creditors and the grantee orally agrees to reconvey there is no constructive trust which the grantor can enforce.

Exemptions.

Tomlinson et al v. Miller et al —— Ind. App. ——, 58 N.E. (2d) 358 (1944), holds that the conveyance of property exempt from execution creates in the grantee an estate free from the lien or enforcement of a judgment against the

grantor.

Clay v. Hamilton —— Ind. App. ——, 63 N.E. (2d) 207 (1945), holds that a judgment for alimony is not a contract judgment and the judgment debtor is not entitled to an exemption.

Proceedings Supplemental to Execution.

Ettinger v. Robbins et al —— Ind. ——, 59 N.E. (2d) 118 (1945), holds that the general statutes on service of process are applicable to proceedings supplemental to execution, and service on a defendant at his residence is therefore proper.

Mitchell v. Godsey, Adm'x 222 Ind. 527, 53 N.E. (2d) 150 (1944), holds that proceedings supplemental to execution may be filed in the original cause, and a formal complaint is not necessary; the trial court may take judicial notice of the records, including the writ of execution, in the original case; and it may declare a lien on the defendant's salary although the employer is not a party, and order the defendant to make specified payments out of his salary.

Property Subject to Exemptions.

First National Bank of Goodland v. Pothuisje 217 Ind. 1, 25 N.E. (2d) 436, 130 A. L. R. 1238 (1940), holds that the separate bankruptcies of a husband and wife do not prevent the enforcement of a joint liability against them out of property owned by them as tenants by the entireties. Cf. Shabaz v. Lazar (1945) —— Ind. App. ——, 60 N.E. (2d) 748, holding that if the property is subsequently acquired and the result of the husband's earnings the above case does not apply.

Execution.

Williams et ux v. Lyddick —— Ind. App. ——, 61 N.E. (2d) 186 (1945), holds that in the situation presented by the Pothuisje case the judgment creditor is not entitled to the issuance of a general writ of execution, as it may be levied on separate property not subject to exemption because of the discharges in bankruptcy.

PROPERTY

REAL PROPERTY

Deeds.

Leroy v. Wood 113 Ind. App. 397, 47 N.E. (2d) 604 (1943), holds that a deed to a person in an assumed or fictitious name is valid.

(This is in keeping with the general rule that, in the absence of fraud, one's name is what he chooses, even for a specific transaction. There is no law against one changing his name as often as he chooses. The statutes on the subject of change of name by court action simply provide a method of securing a record on the matter.)

Easements.

N.Y. Central Rd. Co. v. Yarian 219 Ind. 477, 39 N.E. (2d) 604, 139 A. L. R. 455 (1942). Deals with the law of easements by necessity, and the extent of the easement. The opinion contains an excellent statement and discussion of the law on this subject.

Tenants by the Entireties.

French v. National Refining Co. 217 Ind. 121, 26 N.E. (2d) 47 (1940), holds that where husband and wife, owning real estate as tenants by the entireties entered into a lease, such a lease could not be cancelled by the husband alone. The facts were held not to conclude the wife on the grounds of estoppel.

Ch. 234, Acts 1943, p. 667, Sec. 56-901, 2, Burns Stat., extends the law of survivorship to contracts of purchase of real estate where the purchasers are husband and wife, unless a different intent is expressed, and provides that in the event of divorce they shall own "equal shares."

(Is it a joint tenancy or a tenancy by the entireties? May they sell separately during their lives, and does the survivorship operate to the prejudice of the creditors of the decedent? Ch. 30, Acts 1945, p. 51, amends the above statute to provide that they own the contract as tenants by the entireties.)

Partition.

Myers et al v. Brane —— Ind. App. ——, 57 N.E. (2d) 594 (1944), holds that where one co-tenant acquires an interest in real estate from the owner during his life-time, without restriction as to sale or partition, such a co-tenant is

not bound by a restrictive devise to others, and can compel partition.

Estates and Future Interests. (See also, Wills)

Chapter 216, Acts 1945, p. 983, repeals the previous statutes on the "Rule against Perpetuties." The bill was prepared by a committee of the State Bar Association and approved and sponsored by that organization. It revives the Common Law Rule and thus permits the creation of future contingent interests if they will vest within lives in being plus 21 years. It deals in detail with the law of accumulations. Undoubtedly it has the effect of placing the law on express restraints on alienation on its common law basis. In general this permitted restraints if under the circumstances they were reasonable.

(It is suggested that a draftsman may solve any problem as to remote vesting by including in a will or deed creating future contingent interests the following clause: "Each and every contingent future interest created by this instrument is subject to the following further limitation and condition; the condition or limitation upon which its vesting depends must happen or be satisfied within the lives of a, b, c, d, e, etc., plus 21 years after the death of the last to survive."

It is very well settled that the lives designated need not be those of parties interested in the property and by selecting a group of ascertainable younger persons one can insure a very substantial time for the vesting of the interests involved. The above clause, of course, need not be used where the gift is from one charity to another as in that situation the rule against remote vesting does not apply.)

Alig, Exec. v. Levey, Trustee 219 Ind. 618, 39 N.E. (2d) 137 (1942), holds that income received during the administration of a decedent's estate is income belonging to a life tenant of the trust established and is not corpus belonging to the remaindermen.

Rouse v. Paidrick 221 Ind. 517, 49 N.E. (2d) 528 (1943), holds that a contingent remainder may not be destroyed by merger.

(This is a far-reaching decision as it is based on the proposition that the law of seisin is a dead letter. Logically it follows that the repudiation of a life estate does not destroy a contingent remainder, and that in any event it can always take effect as an executory interest, unless as a matter of

interpretation it is held that a contingent remainder, with all of its common law incidents, was intended. A careful draftsman can settle the question by expressly providing that a contingent remainder is not intended.)

Lefler et al v. Hoffman et al 112 Ind. App. 387, 44 N.E. (2d) 1022 (1942), holds that where a testator created a trust for the support of his nephew, the property to be distributed to his children upon his death, the nephew's renunciation of the gift did not accelerate the remainder.

Scobey v. Beckman 111 Ind. App. 574, 41 N.E. (2d) 847 (1942). The testatrix made a present gift to a church of her home property to be used as a parsonage, on condition that a memorial plate be placed and maintained on the property. The property was sold to pay debts and the question was whether the balance remaining after debts were paid belonged to the church or the residuary legatee. The court states that the Rule against Perpetuties does not apply to a charitable gift (but it never applies to a present gift of any character.) The church's interest was described as a "determinable" or "qualified" fee, and the court refers to the condition both as a conditional limitation and a condition subsequent. (Strictly, a determinable fee is on a conditional limitation and not a condition subsequent.) On the only point in issue the court held that the church was entitled to the proceeds of the sale, the condition as to use and the condition subsequent as to the plate having become impossible of performance.

Trusts.

Lehman et al v. Pierce et al 109 Ind. App. 497, 36 N.E. (2d) 952 (1941), holds that an unenforceable parol trust becomes enforceable if the grantee later executes a written agreement to be bound by the original agreement.

Clay v. Hamilton —— Ind. App. ——, 63 N.E. (2d) 207 (1945), holds that the accruing income of a spendthrift trust can be reached in proceedings supplemental to execution to satisfy a judgment for alimony.

Quinn et al v. Peoples Trust & Savings Co. et al —— Ind. ——, 60 N.E. (2d) 281 (1945), holds that a will creating a trust for the education of a limited class of persons is a charitable trust; that specific language which limited the trust to one beneficiary at a time, in the light of the entire will, was not so intended, and that under the will in question

there was an intention to devote all of the property in question to an educational trust.

Ebenezer's Old People's Home of Evangelical Assn. of Ebenezer, New York et al v. South Bend Old People's Home, Inc. et al 113 Ind. App. 382, 48 N.E. (2d) 851 (1943), holds that a gift to a charitable corporation is not a charitable trust. (This is good law and straightens out a common confusion arising out of the assumption that every gift to a charitable corporation creates a charitable trust. But it is the law of corporations which imposes on its officers the duty to use the property for charitable purposes, and there is no trust.)

City Nat'l Bank & Trust Co. v. American Nat'l Bank 217 Ind. 305, 27 N.E. (2d) 764 (1940), deals with the right of the beneficiaries of a trust to charge the trust estate with attorney's fees incurred in an action brought to preserve the trust estate. Held, under the facts, that recovery should not be allowed.

Bray et al v. Old Nat'l Bank in Evansville et al 113 Ind. App. 506, 48 N.E. (2d) 846 (1943), holds that unless it is clear that the settlor imposed personal confidence in his trustee powers granted to the trustee pass to his successor.

Robison et al v. Elston Bank & Tr. Co. et al 113 Ind. App. 633, 48 N.E. (2d) 181 (1943), recognizes that an ex parte order in the administration of a trust estate is not binding on the beneficiaries.

Personal Property; Fixtures.

Michael v. Holland 111 Ind. App. 34, 40 N.E. (2d) 362 (1942), holds that proof that a creditor orally forgave part of an indebtedness does not prove a gift, for lack of delivery.

Calwell et al v. Bankers Tr. Co. 113 Ind. App. 345, 47 N.E. (2d) 170 (1943), holds that where a lease gave the landlord an option to purchase a new boiler installed by the tenant, and the tenant a privilege to remove if the option was not exercised, the agreement continued binding on the parties where at the termination of the lease the lease was renewed from month to month.

Home Owners' Loan Corp. v. Eyanson et al 113 Ind. App. 52, 46 N.E. (2d) 711 (1943), holds that a conditional sales vendor (who did not record) may remove a furnace as against a prior mortgagee who had foreclosed and purchased at foreclosure sale, as the conditional sales act protects only subsequent purchasers, if the contract is not recorded. It was

also held that removal without substantial injury means physical injury, and not as improved by the fixture.

MORTGAGES

Thurston v. Buxton, Admtrx et al 218 Ind. 585, 34 N.E. (2d) 549 (1941), holds that the interest of a remainderman is subject to mortgage and such a mortgage is valid against the creditors of his estate, including funeral and last illness expenses.

Fletcher Avenue Savings & Loan Ass'n v. Zeller 217 Ind. 244, 27 N.E. (2d) 351, 128 A. L. R. 793 (1940), holds that if a mortgagor, or one claiming under him, redeems from a foreclosure sale the mortgagee may resell under the order of sale as to any balance due on the judgment.

DESCENT

Phillips v. Townsend —— Ind. ——, 62 N.E. (2d) 860 (1945), holds that an illegitimate but acknowledged son does not become the heir of the father's sister.

Hall v. Fivecoat et al 110 Ind. App. 704, 38 N.E. (2d) 905 (1942), holds that an illegitimate but acknowledged child becomes the heir of his father, but not the heir of his father's father.

WILLS AND THEIR INTERPRETATION

Lawrence et al v. Ashba et al —— Ind. App. ——, 59 N.E. (2d) 568 (1945), holds that the fact that a husband and wife have made reciprocal wills only tends to prove a contract not to revoke, but the contract may be proved by that fact plus other admissible evidence; that the contract in question included property owned by a surviving spouse as tenant by the entireties.

(Note that the court assumes that the State of Frauds was satisfied by the wills involved, plus parol evidence. Note also that it was assumed that the revocation was effective, and that the beneficiaries' remedy was for specific performance, or the enforcement of a constructive trust.)

Manrow et al v. Deveney et al 109 Ind. App. 264, 33 N.E. (2d) 371 (1941), holds that a mutual will is revoked by a later will, even although the first will was made pursuant to a contract not to revoke, and the beneficiaries' remedies are by claim for damages or in equity (to enforce a trust).

Weppler et al v. Hoffine et al 218 Ind. 31, 30 N.E. (2d) 549 (1940), holds that a devise to the testator's wife for life and a residuary devise of "all my property" to his children, and if any die before the wife without issue, created in the children a "determinable" fee; that the latter clause was not substitutionary; that the estate of a child who died during the lifetime of the widow without children was divested in favor of the balance of the class; that the child's interest was conveyable but the grantee took subject to the condition.

Martin et al v. Raff et al 114 Ind. App. 507, 52 N.E. (2d) 839 (1944), holds that a devise to a daughter and "if she die without issue" then over means if she die without issue during the testator's lifetime.

Hamilton v. Williams 111 Ind. App. 148, 37 N.E. (2d) 695 (1941), holds that where testator gave to his wife for life, and to his nephews and nieces then living, the latter referred to the death of the wife and not the death of the testator and a nephew who survived the testator but not the widow could not take. (Previous cases have erroneously applied the substitutionary rule to this type of will.)

Koch, Executor v. Wix 108 Ind. App. 20, 25 N.E. (2d) 277 (1939). Testator gave a legacy of $1,000 to each of his employees who had been in his employ for ten or more years, and $500 to each who had served from five to ten years. In an action brought to construe the will, held, that only those employed at the time of the testator's death were beneficiaries.

Pierce v. Farmers State Bank of Valparaiso 222 Ind. 116, 51 N.E. (2d) 480 (1943), holds that a will giving property to an unmarried son for life, and after his death "if he shall have married and leave surviving him children" then to the children is unambiguous, and an adopted child of the son could not take. Evidence was inadmissible to prove that the father knew the son was sterile and planning to marry a widow with one child. (99 Ind. App. 463 disapproved.)

Kaiser et al v. Happel et al 219 Ind. 28, 36 N.E. (2d) 784 (1941), holds that in an action to contest after ex parte probate the burden of proof is on the plaintiff, but that in an action resisting probate the burden of proof is on the defendant.

Holds further that an instruction to the effect that a testator is presumed to be of sound mind is erroneous.

PROBATE

Hamilton v. Huntington et al —— Ind. ——, 58 N.E. (2d) 349, 59 N.E. (2d) 122 (1944), holds that Sec. 6-308, Burns Stat. providing for the appointment of a special administrator pending the contest of a will applies only where objections have been filed and probate prevented, and does not apply where the will has been probated ex parte, an executor appointed, and a will contest action begun. Disapproves *In re Barger's Est.* 114 Ind. App. 129, 51 N.E. (2d) 104 (1943).

Pettibone et al v. Moore —— Ind. ——, 59 N.E. (2d) 114 (1945). Superseding (Ind. App.) 57 N.E. (2d) 65, and holding that if a general administrator closes an estate without prosecuting an action for wrongful death a special administrator may be appointed for that purpose.

(N.B. In this case the defendant in the action for wrongful death went into the probate court and moved to vacate the appointment. The law is well settled that the question of the validity of the appointment of an administrator cannot be litigated in a collateral proceeding; the question must be raised in the probate court making the appointment.)

Tinkham v. Tinkham 112 Ind. App. 532, 45 N.E. (2d) 357 (1942), holds that where money jointly owned was deposited in the joint name of husband and wife the surviving wife might recover her share in an action brought against the bank and the executor of the husband's estate, as the executor had not acquired possession of the property involved.

(Is not the decision questionable? If it was the husband's property title passes to the executor by operation of law, and whether he makes his claim against the bank prior or subsequent to an action brought by the claimant is immaterial. Cf. Isbell v. Heiny (1941) 218 Ind. 579, 33 N.E. (2d) 106; Williams v. Williams (1940) 217 Ind. 581, 29 N.E. (2d) 557.)

Isbell v. Heiny, Admr. 218 Ind. 579, 33 N.E. (2d) 106 (1941), holds that an action against an administrator to replevin property which the latter claims as assets of the estate may not be maintained; the claimant must proceed in the probate court.

Williams v. Williams, Admr. 217 Ind. 581, 29 N.E. (2d) 557 (1940), holds that the statute creating a limited liability against the estate of a decedent for his tortious conduct, and Sec. 2-6001, Burns Stat. require that the claim be filed in the

probate proceedings, and a separate action against the administrator is prohibited.

Sense v. Roach 222 Ind. 323, 53 N.E. (2d) 784 (1944), holds that a claim filed more than six months after notice and after a final report has been filed is too late, and the fact that the administrator knew of the claim is immaterial.

Coats v. Veedersburg State Bank et al 219 Ind. 675, 38 N.E. (2d) 243 (1941), holds that where the administrator does not within the first year file an action to sell real estate to pay debts a judgment creditor may then proceed to sell the property on execution.

Lockridge et al v. Citizens Trust Co. of Greencastle et al 110 Ind. App. 253, 37 N.E. (2d) 728 (1941). Contains an excellent discussion of the right to rent as between an executor, or trustee and the heirs.

In re Stahl's Estate First Nat. Bk & Tr. Co. of LaPorte et al v. Smith et al 113 Ind. App. 29, 44 N.E. (2d) 529 (1942), holds that where a testator appoints as executor A, and if A resigns, B, on A's resignation the probate court must appoint B unless he is ineligible; that a probate court or a testator may not control an executor's employment of legal counsel.