SUPREME COURT SYLLABI

In re application of Eugene Burton for admission to the bar. Motion for admission sustained. Sedgwick, C. J.

1. Section 9 of chapter III of the Revised Statutes of 1866 was not repealed as a whole by chapter VI, Laws of 1905, but the power of the district court to admit attorneys of other states to practice in this state was taken away by that act. In re Admission to the Bar, 61 Neb., 58, 84 N. W., 611, distinguished.

13962. Central Granaries Co. against Ault, administrator. Error from Gage. On motion for rehearing, former opinion modified. Motion for rehearing overruled. Duffie, C. Division No. 2.

14004. Westerfield against South Omaha Loan and Building Association. Error from Douglas. Motion for rehearing overruled. Sedgwick, C. J.

1. The statute, prior to the recent amendment, allowed the supersedeas of a decree confirming a sale upon foreclosure of mortgage by giving a waste and cost bond only, and the purchaser at such sale could not recover for the use of the premises while the order of confirmation was so superseded pending an appeal, even though the appeal was voluntarily dismissed by the appellant.

14104. Nichols & Shepard Co. against Miller. Error from Stanton. Reversed and remanded. Epperson, C. Division No. 1.

1. Instructions examined and held erroneous.

14146. In re Estate of Calista E. Scott, deceased. Brown against Harmon. Error from Lancaster. Motion for rehearing overruled. Sedgwick, C. J.

1. When the next of kin disagree as to the selection of an administrator, and the court appoints one requested by one of the next of kin, it will not be presumed upon appeal, in the absence of any evidence upon that point in the record, that the court has abused its discretion in making the appointment.

14149. Jordan against Jackson. Error from Dakota. On motion for rehearing, former judgment of this court and decree of district court vacated and cause remanded with directions. Motion for rehearing overruled. Jackson, C. Division No. 2.

14161. Branson against Branson. Appeal from Hamilton. Affirmed. Ames, C. Division No. 1.

1. An agreement between the parties to a pending suit for a divorce for the collusive rendition of a decree therefor, will defeat the action, and it is immaterial that one of the parties may have supposed such agreement to be free from legal or moral wrong.

14172. Cizek against Cizek. Error from Lancaster. Affirmed. Oldham, C. Division No. 1.

1. Jurisdiction relative to divorce and alimony is given by statute and every power exercised by the court with reference thereto must look for its source in the statute or it does not exist. Cizek against Cizek, Neb., 99 N. W., 28, followed and approved.

2. Under section 27, chapter XXV, Compiled Statutes, the district court has a continuing power, after a decree of divorce and alimony has been granted, to review and revise the provisions for alimony at its subsequent terms on petition of either of the parties.

3. If the decree of the trial court awarding alimony in a divorce proceeding is void for want of jurisdiction, the court may, at a subsequent term, award suitable alimony upon application and a sufficient showing.

14195. County of Lancaster against Whedon. Error from Lancaster. Reversed and remanded. Barnes, J.

1. Where a taxpayer appeals from the action of the Board of Equalization in the matter of the assessment of property for taxation, the burden is on the appellant to show that the decision of the board is erroneous.

2. The statement of a witness that he would not have increased the assessed valuation of the real estate of a certain precinct or ward, and that such increase did not tend to equalize the values of real estate throughout the city, without stating any facts as a basis for his opinion, is not sufficient to overthrow the judgment of the board of Equalization.

3. Where the value of property, as returned by the assessor, as to an entire precinct is relatively too low, it may be raised by the Board of Equalization without notice previously given to property owners.

4. The statute requires no formal finding by the Board of Equalization as a basis for its action in equalizing assessments between precincts, and a finding that it is necessary to a just and proper equalization of the assessments of the various precincts and wards of a county that the aggregate assessment of certain precincts and wards be raised, and that others be lowered, is sufficient to sustain an order equalizing such assessments.

14239. Brown against the Chicago, Rock Island & Pacific Railway Company. Error from Lancaster. Affirmed. Ames, C. Division No. 1.

If a creditor to whom two persons are obligated, one as principal and the other as surety, release the former he also discharges the latter, and the same principle is applicable when the person released is, as to the creditor, a surety only, if he is known to be ultimately liable to the party not formally discharged. The creditor cannot intentionally deprive his debtor of his indemnity and still hold him to his obligation.

14238. British American Insurance Company against Columbian Optical Company. Error from Douglas. Reversed and remanded. Epperson, C. Division No. 1.

Evidence examined and held insufficient to sustain the verdict.

14210. State against McCright. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14211. State against Jansen. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14212. State against Anderson. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14213. State against Sinclair. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14214. State against Nelson. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14215. State against Hedlund. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14216. State against Blair. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

14217. State against Laprath. Original. Dismissed at cost of plaintiff. Sedgwick, C. J.

1. By the act of 1875, entitled "an act authorizing parties on school lands selected in lieu of sections 16 and 36 to purchase the same when the state acquires title," Compiled Statutes, 1897, page 1029, section 4, persons who complied with the act had a preference right of purchase or lease of land known as indemnity school land, and had title to the improvements made by them thereon.

2. Occupants of indemnity school lands who had complied with the act of 1875 before the repeal thereof were entitled to have the land appraised separately from the improvements, and to be given an opportunity to lease the land upon such appraisement before being ejected therefrom.

3. The fact that the occupant of indemnity school land has attempted to make entry thereof under the homestead laws of the United States and has in good faith contested the right of the state to the same as indemnity school lands will not estop him to assert his right under the act of 1875 relating to the improvements of actual settlers upon lands so obtained by the state.

14252. Chicago, Burlington & Quincy Railroad Company against Healy. Error from Douglas. Reversed and remanded. Ames, C. Division No. 1.

A suit by an administrator of a deceased employe of the Chicago, Burlington & Quincy Railroad company, who was a member of the relief department of that company, to recover damages under the statute for wrongfully or negligently causing the death of such employe is a bar to a subsequent action upon the membership certificate in said department when the administrator is the same person named as beneficiary in the contract.

14239. Hahn against Bonsenm. Appeal from Lancaster. Reversed with directions. Albert, C. Division No. 2.

1. In an action to foreclose a mechanic's lien for labor performed on a building under a contract, relief will not be denied the plaintiff because of a trifling omission in the performance of a contract, where there has been a substantial performance on his part.

2. Evidence examined and held to show a substantial performance on the part of the plaintiff and sufficient to entitle him to the relief granted.

3. Evidence, as between the owner and a defendant lien holder, examined and held sufficient to justify a finding in favor of the latter for a greater sum than that found by the trial court.

4. A mechanic's or material man's lien, duly filed within the time required by law, takes precedence over a mortgage subsequently executed by the owner.

14250. Van Burg against Van Eugen. Error from Lancaster. Affirmed. Epperson, C. Division No. 1.

1. In an action to recover an amount alleged to be due upon a verbal contract the burden of proof is upon the defendant to prove that plaintiff's cause of action was barred by the statute of limitations, when that defense is at issue.

2. The trial court's instructions and rulings denying instructions requested, examined and held without error.

3. The rulings of the trial court on the admission and rejection of evidence offered examined and found not erroneous.

14255. Watters against City of Omaha. Appeal from Douglas. Reversed. Jackson, C. Division No. 2.

1. Where a city, in the erection of a public work, exercises reasonable care and judgment and adopts plans approved and recommended by engineers having all the knowledge that skill and experience in such work would naturally give them, it should not be held liable in damages on account of an alleged defect in the plan, unless the construction is so manifestly dangerous that all reasonable minds must agree that it was unsafe.

14257. Lahrman against Bauman. Appeal from Holt. Affirmed. Albert, C. Division No. 2.

1. In an action by the indorsee against the maker, where fraud in the inception of the note is relied upon as a defense and shown by the evidence, the burden is upon the plaintiff to show that he is a bona fide holder.

14258. Farmers and Merchants Bank against Carlson. Appeal from Polk. Affirmed. Duffie, C. Division No. 2.

1. Evidence examined and held to support the judgment of the district court.

14305. Isaac against Halderman. Error from Pawnee. Affirmed. Duffie, C. Division No. 2.

1. A testator, being unable to write his own name, said to the draftsman of his will, in the presence of two witnesses, "You know I cannot write—you will have to sign it for me." Held, that this was a sufficient request to authorize the draftsman to sign the testator's name.

2. Non-expert witnesses called upon the question of the mental capacity of a testator must state the facts upon which their opinion of incapacity is based.

3. Evidence examined and held insufficient to show either mental incapacity or undue influence.

14307. First National Bank of Humboldt against Heim. Appeal from Richardson. Affirmed. Duffie, C. Division No. 2.

1. A party went to the banking house of the defendant bank to make a time deposit and asked the president of the bank what interest they were paying on money. His own testimony is to the effect that he asked the party what amount she had and how long it would be left. The reply was about $1,000, to be left for six months. He replied, "The bank is paying 3 per cent, but since you have come up here so far I will pay you 4." The party then handed him an eastern draft for an amount exceeding $1,000, and he wrote out and returned a time check for the amount payable at the bank in six months with interest at 4 per cent. This time check was signed by the president in his individual capacity and it contained nothing to indicate that the money was deposited with the bank or that the bank assumed any obligation for its repayment. Held, that the depositor might recover from the bank in an action for money had and received.

14368. Lincoln Traction Company against McCarty. Error from Lancaster. Affirmed. Epperson, C. Division No. 1.

1. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence a question for determination of the matter is for the jury.

14371. Citizens' Bank of Stanton against Emley. Appeal from Stanton. Affirmed. Ames, C. Division No. 1.

1. A trial judge does not commit prejudicial error by refusing to strike from a reply allegations of new matter already embraced in the issues raised by the petition and answer and therefore admissible in evidence without further pleading.

2. Where the issue is as to whether a certificate of deposit was issued against a deposit in a bank and the general verdict is for the plaintiff, based upon his denial that such instrument ever existed, the court need not require indemnity against such alleged outstanding instrument.

3. A cross-examination should be confined to the subject matter of the examination in chief.

14373. Wrigley against Farmers and Merchants State Bank of Beatrice. Appeal from Gage. Affirmed. Jackson, C. Division No. 2. Letton, J., not sitting.

Where the holder of a bank draft neither demands payment of the bank on which it is drawn or takes any other step to secure payment within five years from the time it came into his possession his right of action against the bank issuing the draft because of the failure of the bank on which it was drawn to pay the same when it was presented is barred by the statute of limitations.

14376. The Byron Reed Company against Klaubunde. Appeal from Douglas. Affirmed. Oldham, C. Division No. 1.

1. A purchaser of real estate, who takes by quitclaim deed, takes subject to all existing equities against the grantor.

2. The county court has original jurisdiction in the probate of a will and its order admitting a will to probate is conclusive unless by a direct proceeding, by appeal or otherwise, it is reversed. Loosemore against Smith, 12 Neb., 343, followed and approved.

3. Where a trust is created for the support and maintenance of the beneficiary neither the trustee nor the beneficiary has the power to assign or mortgage the trust estate, without such power, is expressly conferred in the instrument creating the trust.

14372. Kearney County against Chicago, Burlington & Quincy Railway Company. Appeal from Kearney. Affirmed. Jackson, C. Division No. 2.

1. In an action for damages for negligently setting out a fire, the origin of the fire may be proven by circumstantial evidence.

2. Evidence examined, and held, that the circumstances proven are sufficient to sustain the verdict of the jury as to the origin of the fire, by reason of which the plaintiff sustained damages.

14379. Salisbury against Press Publishing Company. Appeal from Lancaster. Affirmed. Albert, C. Division No. 2.

1. Ordinarily it is the duty of an employer to use reasonable care that the tools and appliances which he furnishes his employes are reasonably fit and safe for the use for which they are furnished; but this does not relieve the employe from the exercise of his own judgment in the use thereof, and if he puts them to a use for which they are not designed or furnished or subjects them to a strain beyond their capacity to bear and is injured in consequence the employer, in the absence of special circumstances, is not liable. Standard Distilling and Distributing Company against Harris, 106 N. W., Neb., 583.

2. The statute requiring instructions to the jury to be in writing has no application to a mandatory direction to return a verdict in favor of one of the parties to the litigation.

3. On the facts stated, held that the trial court properly directed a verdict for the defendant.

14406. Whedon against County of Lancaster. Appeal from Lancaster. Affirmed. Barnes, J.

The statutes of this state make no provision for an appeal from the order of the county board in making the tax levy provided for by section 10635, Cobbey's Annotated Statutes, 1903, and an attempt to prosecute such an appeal confers no jurisdiction on the district court to review such order.

14592. Parker against State. Error from Thurston. Reversed and remanded. Barnes, J.

Instructions to the jury must be made upon and applicable to the evidence, and where, in the trial of a criminal case an instruction is given without testimony to sustain it and prejudice results thereby, a new trial will be granted.

14613. State against Dailey. Error from Douglas. Affirmed. Letton, J.

The provisions of a penal statute will not be extended by construction so as to apply to persons not clearly within its terms.

14628. State, ex relator Thomas, against Board of Fire and Police Commissioners. Appeal from Douglas. Reversed and remanded. Sedgwick, C. J. Letton, J., concurring separately.

1. Upon contests of applications for liquor license, the board hearing the contest is not bound by the stipulations of the parties providing a method of taking and transcribing the evidence not prescribed by statute, and involving greater expense in reducing the evidence to writing than is necessarily incurred in the manner of trial contemplated by statute. If the evidence is taken pursuant to such stipulations, the board will not be compelled by mandamus to reduce the evidence to writing in the manner provided for by such stipulation of the parties without payment of the extra expense of so doing made necessary by the unusual manner of taking the evidence. (Letton, J., dissents.)

2. An appeal from the decision of the board in granting a liquor license is taken by giving notice of intended appeal, and procuring a transcript of the record of the proceedings before the board, and filing the same in the appellate court. When such appeal has been taken the court may compel the board to furnish a duly certified transcript of the new evidence taken before the board upon the hearing. A peremptory mandamus to compel the board to reduce the evidence to writing and file the same in the office of the board is not necessary.

3. A party desiring to appeal from the decision of the Board of Fire and Police Commissioners of Omaha granting a liquor license is entitled to a certified transcript of the record of the proceedings before such board upon demand and the payment of reasonable fees for making such transcript. The board is not required to furnish such transcript without the payment of fees therefor.

1456. In re application of Schwarting for writ of habeas corpus. Application for writ of habeas corpus denied. Letton, J.

1. The provisions of chapter lxxxii, Session Laws of 1905, section 9650a to 9650h, Cobbey's Annotated Supplement, 1906, known as the dipsomaniac law, are in part materia with other laws providing for the detention, care and discharge of persons committed to the Hospital for the Insane, and must be construed in connection therewith.

2. A person who has been confined in the Hospital for the Insane under the provisions of said act until he has been cured, may not be subjected to further restraint without new cause.

3. Section 7 of chapter lxxxii, Sessions Laws of 1905, section 9650a to 9650h, Cobbey's Supplement, 1905, held, unconstitutional as in violation of the right to personal liberty.

14391. Foster against Murphy. Error, Douglas. Affirmed. Albert, C. Division No. 2.

1. An order of a probate court, requiring one who had formerly been administrator of an estate to turn over to his successor certain money, claimed by the former to have been given to him as a gift from the intestate, but by the latter, that it came to him as administrator of the estate, is appealable to the district court.

2. Evidence examined and held sufficient to sustain a finding that the money in question had come into the hands of the former administrator personally as a gift by the intestate, and not as a part of the assets of the estate.

3. The interest of the former administrator's wife in the result of such contest is not a direct legal interest, within the meaning of the statute which prohibits a person from testifying to any transaction or conversation had with a deceased person where the adverse party is the representative of such deceased person.

4. The endorsement and delivery of a certificate of deposit, with the intention of making a gift of the deposit thereby represented to the party to whom the certificate is thus delivered, operates as a gift of the fund itself.

14664. State, ex relator Mickey, against Selleck. Original. Peremptory writ allowed. Sedgwick, C. J.

1. Under section 2 of the laws of 1881 as amended by sections 6, chapter lxii, laws of 1899, state officers, living in Lincoln during their terms of office, may send their children of school age to the public schools of the Lincoln district without paying tuition, even though they retain their legal residence elsewhere.

2. If a family, or the person or persons having the legal custody and control of children of school age, remove to and live in a school district other than the district of their legal residence, and such removal is not for the purpose of obtaining school privileges, but is principally from other motives, such children are entitled to free school privileges while so living in the district.

14394. Modern Woodmen of America against Talbot. Error, Polk. Reversed and remanded for dismissal. Jackson, C. Division No. 2.

1. A life insurance certificate issued by a fraternal benefit society, which provides that if the member should engage in an occupation prohibited by the bylaws of the society the certificate should become ipso facto void as to any claim on account of the death of the member traceable to employment in such hazardous occupation, does not become void for all purposes in case the member engages in a prohibited occupation, but the society is exempted in such case from all liability on account of the death of the member by accident directly traceable to such prohibited employment, and the certificate remains in full force except as to the hazards of such occupation.

2. The society is not estopped from insisting upon its exemption from liability for the death of the member due to his engaging in a prohibited occupation, by accepting his dues and assessments, with knowledge that he had entered upon such occupation.

3. In such case the same consideration remained for the payment of dues and assessments as would have existed had the member not engaged in a hazardous and prohibited occupation.

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