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Supreme Court Syllabi

9154.

The State of Kansas vs. A. D. Cullins.

Appeal from Marion County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

The purchaser of intoxicating liquor, which is sold in violation of law, is not a participant with the seller, and, therefore, is not guilty as the principal offender.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

8779.

The State of Kansas vs H. H. Obert, et al.

Error from Rawlins County.

MODIFIED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Fees received by county treasurers for issuing school land receipts must be accounted for by such treasurers and deducted from the quarterly installments of their salary the same as other fees. County commissioners vs. Van Slyck, 52 Kas.

2. Where treasurer receives compensation for making and certifying abstracts of title and for writing letters and giving information concerning taxes, etc., he is not required to report or account for the same as fees arising in the performance of official duties.

3. Where a judgment is properly rendered against a county, and the board of county commissioners order the payment thereof from the funds of the county in the hands of the county treasurer and such county treasurer in pursuance of the order of county commissioners make such payment in good faith, he cannot be compelled to return or replace the same into the county treasury.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6993.

Daniel L. Chipman and Ephraim Mower vs. Jennie C. Carroll, et al.

Error from Miami County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. Where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and in fulfillment of this agreement the mortgagor takes out a policy of insurance in his own name, which is not assigned to the mortgagee, or made payable to him in any way, the mortgagee is regarded as having an equitable lien upon the proceeds of the policy, and where the mortgagee obtains judgment upon his mortgage, but before there is any sale of conveyance, the mortgagor takes out a policy of insurance in his own name and a loss occurs before any sale, the mortgagee is entitled to recover the loss, as the judgment does not extinguish his debt.

2. Where the husband and wife jointly execute a mortgage upon their homestead, and there is an agreement that the premises shall be insured for the benefit of the mortgagee, and subsequently the husband takes out a policy of insurance upon the premises in his own name, and soon after a loss occurs, the mortgagee has an equitable lien on the proceeds of the policy and such proceeds are not exempt upon the ground that the policy was upon the homestead of the parties.

3. After a loss, the insurance company may be garnisheed, where the payment of the loss is not conditional on anything remaining to be done.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6982.

V. M. Gray vs. Reuben Delay, as Sheriff.

Error from Rooks County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON C. J

1. "A bill of sale of personal property, absolute upon its face, if taken as security, is only a chattel mortgage." Butts vs. Privett, 36 Kas. 711.

2. The jury are the judges of the weight and credibility of a witness, and where the plaintiff's statements concerning material facts are contradicted by another witness the jury are at liberty to reject his evidence altogether.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7008.

George L. Parkhurst vs. First National Bank of Clyde.

Error from Cloud County.

AFFIRMED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. The case of Thomas vs. Reynolds, 39 Kas., 304, followed.

2. Where the maker of a promissory note has paid usurious interest to a national bank and has recovered a judgment against the bank for twice the amount of the interest thus paid, he cannot, in an action for penalty against the bank for not satisfying a chattel mortgage given to secure the note, demand that the usurious interest paid by him shall be applied in satisfaction of the principal of note.

3. Where in an action brought by the mortgagee against the mortgagor to recover the statutory penalty for refusing to enter satisfaction of the chattel mortgage, it is shown that there is a *bona fide* controversy between the mortgagor and mortgagee whether the chattel mortgage is paid or not, and it is further shown that the mortgagee refused in good faith to satisfy the mortgage because he believed it was not paid. *Held*, the mortgagee will not be liable for the penalty.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7013.

Patrick McDonough vs. H. H. Merten.

Error from Clay County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

1. A tax deed is void upon its face if it fails to state by description, acres, or otherwise the property bid for at the tax sale and the granting clause of the deed fails to cure or supply such defect. In such a case, the description of the land, purporting to have been bid off at the tax sale and conveyed in a tax deed, is not sufficiently specific or definite, and, therefore, is not designated with "ordinary and reasonable certainty."

2. Dodge vs. Emmons, 34 Kas., 732, referred to and distinguished.

All the justices concurring.

A true copy.

Attest: C. J. BROWN.
[SEAL] Clerk Supreme Court.

7000.

Ed. McCormick vs. James H. Dalton.

Error from Rawlins County.

REVERSED.

SYLLABUS. BY THE COURT. HORTON, C. J

What will constitute duress must depend upon the circumstances of each particular case, but where D claims he had a parol contract with M for the grading of a mile of the road bed of a railway at a stated price per cubic yard and that M, desiring to abrogate the verbal contract, demanded of him the signing of a written contract for one-half mile only of the heaviest work of the grading at the same price per cubic yard and upon his refusing so to do because the written contract did not correspond with the verbal agreement, M said to the men working for him, "I will stand good for no more work you do for D, and D can stop at once," and D on account of his financial condition was unable to carry on the work unless M paid the men and after studying over the matter a few days signed the written contract, *Held*, that the contract cannot be said to have been signed by D under duress.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6903.

The Chicago, Kansas and Western Railroad Company vs. Benjamin R Sheldon et al.

Error from Saline County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. In condemnation procedings to obtain a right of way for a railroad, no personal notice is required to be served upon mortgagees of the land over which the right of way is to be taken, nor need they be named in the award which is made.

2. The mortgagee is not an owner within the meaning of the statute relating to condemnation proceedings, and when full compensation is awarded for the right of way and the award is deposited with the county treasurer, a complete easement vests in the railroad company as against the owner as well as any others who may have liens upon the lands.

3. When the award is paid into the county treasury any one having an interest in the land or a lien on the same may where equity warrants it resort to the fund awarded for the right of way.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6948.

The City of Horton vs. Joseph Trompeter, Administrator of the estate of Frona Trompeter.

Error from Brown County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J

1. The probate court is presumed to have lawfully exercised its jurisdiction; and where the steps taken in that court in granting administration upon the estate of a minor appear to be regular, it makes a prima facie showing of authority to issue the letters of administration.

2. The deceased was eight years of age and an inhabitant of the state, owning property of the value of $235, at the time of her death. *Held*, That upon a proper application by the father of the deceased the probate court had jurisdiction to grant letters of administration.

3. A person who has knowledge that a sidewalk had previously been overturned by the wind and had since been repaired has a right to assume in the absence of knowledge to the contrary that it had been properly repaired and safely anchored to the ground by the city authorities. Even a knowledge that it was somewhat defective would not bar him from the use of the street; nor is notice that it is unsafe o out of repair necessarily negligence in one who travels over it.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6674.

Toof, McGown & Co. vs John A. Cragun.

Error from Kingman County.

DISMISSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. The appellate jurisdiction of this court is subject to the regulation of the legislature, and unless a party brings himself within the requirements of the statute prescribing the time and manner of removing a case to this court he is not entitled to a review.

2. While this court may exercise auxiliary authority in aid of appellate jurisdiction once obtained, it cannot in the absence of any jurisdiction in the proceeding before it afford a remedy for the loss of a case-made before the same was settled and signed by the trial judge.

3. The loss of an unsigned case-made which had been duly served will not prevent the trial judge from requiring its reproduction nor from signing and settling the same upon due notice at any time within the year allowed for taking cases to the supreme court.

All the justices concurring.

A true copy.

Attest. C. J. BROWN,
[SEAL] Clerk Supreme Court.

6995.

The City of Mound City vs. James D. Snoddy.

Error from Linn County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

A mayor of a city, by virtue of his office alone, cannot employ an attorney and create a liability against the city for the services of such attorney; but if such employment is made, and an action is begun in the name of the city, and the city council has knowledge of the institution and pendency of the suit, and allows the attorney to proceed with the litigation for a considerable time, without protest or repudiation, and afterward acquiesces in and accepts the fruits of the service, it will operate as a ratification of the employment and render the city liable for the value of the services.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7045.

Sarah Gillett vs. The Burlington Insurance Company.

Error from Greenwood County.

AFFIRMED.

SYLLABUS. BY THE COURT. JOHNSTON J.

1. Where a party seeking to recover on a contract of insurance relies upon a waiver of an important condition of the contract by the insurer, he should definitely set forth such waiver in his pleadings, and unless this is done proof to establish the same cannot be received.

2. Where incompetent testimony is received over objection it is within the province of the court to correct such error at any time before the final disposition of the case, and upon a demurrer to plaintiff's evidence it is not improper for the court to strike out or to disregard such incompetent testimony.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL.] Clerk Supreme Court.

9377.

The State of Kansas vs. George B. Frazier.

Appeal from Saline County.

REVERSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

1. A defendant charged with a substantive offense may be convicted under that charge of an attempt to commit the offense; but where the prosecutor relies upon a specific charge of attempt, good pleading requires that he should set forth the acts done toward the commission of the offense.

2. An averment that the defendant "unlawfully and feloniously did attempt to commit a rape by then an there attempting to carnally and unlawfully know the said Y." is defective in failing to set forth any physical act or acts done toward the commission of the offense, and is held to be insufficient as against a motion to quash.

3. Under an information containing two counts, the first of which charged the consummated offense of rape, and the second charged an attempt to commit rape, the jury returned two findings, one of which was that the defendant was "not guilty as charged in the first count of the information," and the other that the defendant was "guilty as charged in second count of the information." *Held*, That all parts of the verdict should be considered in determing its effect, and that when the findings are so considered it is plain that the jury only intended to acquit of the crime of rape, and did not intend to acquit of an attemp to commit rape, and that therefore the defendant is not entitled to an absolute discharge because of the finding upon the first count.

Allen, J. concurring.

Horton, C. J., dissenting.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7033.

Geo. W. Stinson vs. Gus. Cook.

Error from Norton County.

DISMISSED.

SYLLABUS. BY THE COURT. JOHNSTON, J.

She plaintiff brought an action to recover the possession of two horses, a buggy and harness, and recovered a judgment for the possession of the horses, but judgment was awarded to the defendant for the possession of the buggy and harness, which were of the value of $70. The plaintiff brought the case to the supreme court and asked a reversal of so much of the judgment as awarded the buggy and harness to the defendant. *Held*, That as the amount or value in controversy is less than $100 the supreme court has no jurisdiction to review the case.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

6868.

William T. English vs. Alexander English.

Error from Atchison County.

AFFIRMED.

SYLLABUS. BY THE COURT. ALLEN, J

1. In an action for partition of one tract of land where the defendant claims title to the whole under an agreement with plaintiff's father with reference to the tract of which partition is asked by plaintiff, and also to two other tracts, it is not error for the court to consider and determine the rights of the parties with reference to all of the lands included in the agreement, even though some portions of them had been conveyed away by the defendant, and the court did not err in refusing to strike out averments in the answer with reference to such other tracts.

2. *Held*, That the findings in this case are supported by the evidence, and show that all the lands in controversy were in equity the property of the defendant, and that so much of the legal title thereto as rested in the plaintiff's father at the time of his death was by him held in trust for the defendant.

3. It is not error for the trial court to call on the attorney of the successful party to write out findings of fact in the case in accordance with the decision of the court as announced orally, where after the findings are so prepared the court examined approves and adopts them as the findings of the court.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

7005.

G. H. Hulme and R. C. Bailey vs. C. F. Diffenbacher.

Error from Barton County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

1. The successor in office of the judge before whom an action was tried has the power either at chambers, or sitting in court, to grant an extension of time for making a case for this court in such action.

2. The action of the district court on a motion to strike out part of a pleading may be reviewed in this court where proceedings to reverse the final judgment are commenced in due time, notwithstanding the fact, that more than one year elapsed after the ruling complained of before the filing of a petition in error, as such action is not separately reviewable, but can only be considered as an intermediate order involving the merits of the action or a proportion thereof.

3. Where a stock of merchandise is delivered by the plaintiff in certain replevin actions to three persons, who are his sureties on undertakings, given by him in the actions, to secure them against loss, and afterwards two of them are released from liability on such undertakings, the other surety cannot maintain an action against them in his own name, to which the principal is not a party, for the purpose of obtaining an accounting of the matters connected with the trust, and to compel delivery to him of the balance of the trust property and monies in the hands of his cosureties. The principal is an indispensable party to the determination of any disputed matter relating to the trust property.

4. In such an action it is error for the court to strike from the answer averments as to the disposition that had been made by the plaintiff of a large portion of the trust property.

5. It is also error for the court to refuse to submit to the jury material questions asked by the defendant pertinent of the issues in the case.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.

9216.

W. M. Stewart, et al. vs. John Steffins, et al.

Error from Wyandotte County.

REVERSED.

SYLLABUS. BY THE COURT. ALLEN, J

A wife has no such interest in the lands of her husband, other than the homestead, as will support an action by her alone in her own name to enjoin the collection of special taxes assessed against such lands.

All the justices concurring.

A true copy.

Attest: C. J. BROWN,
[SEAL] Clerk Supreme Court.