

SUPREME COURT DECISIONS.

SYLLABI.
Ms. F. No. 933.—In Bank.—Filed November 16, 1898.
Estate of John B. Herbert, insolvent debtor. Appeal from assignee against order setting apart homestead. Order reversed, McFarland, J. dissenting.
Section 1476, C. C. P., provides that "if the homestead selected and recorded is returned in the inventory appraised at more than \$5,000 the appraisers must before they make return ascertain and appraise the value of the homestead at the time the same was selected, and, if such value exceeded \$5,000, the appraisers must determine whether the premises can be divided without material injury. If so they can set apart a portion not to exceed in value \$5,000; otherwise, provision is made for sale. Held, that by virtue of the foregoing sections of the code the homestead of the insolvent debtor should be dealt with exactly as if that of a deceased person. The probate procedure must be followed.
Section 1476, quoted, applies to homesteads created by declaration made and recorded.

(Crim., No. 404.—Department One.—Filed November 19, 1898.)
People, respondents; Frank Roberts and E. Roberts, appellants. Grand larceny. Reversed.

Under the Constitution of the State a Judge may state to the jury what evidence introduced at the trial is, but the power thus granted gives him no right to declare as a matter of law that certain facts are established by the evidence.

When a jury is told that any particular fact must be established to their satisfaction, such statement can only mean that such fact must be established at least by a preponderance of evidence; but this is not so with regard to an alibi. The element of an alibi is included in the element of reasonable doubt, and if the evidence offered by the defense tends to establish an alibi to the extent that it is sufficient to raise a reasonable doubt in the minds of the jurors as to the defendant's guilt, he should be acquitted.

(S. F., No. 885.—Department One.—Filed November 19, 1898.)
Morton et al., respondents; Pacific Coast Steamship Company, appellant. Action between common carriers as to use of water front piers. Affirmed.

The authority and control of the Harbor Commissioners over the water front is found in Section 2524 of the Political Code. Held, that the power and control over the water front delegated by the statute to the Commissioners may be exercised by them and that they may delegate none of those powers, and no part of that control, to third parties.

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The power of the Harbor Commissioners of San Francisco to lease piers to steamship companies was revoked by express enactment of the Legislature. The Harbor Commissioners may set apart to particular parties wharves and landings for the exclusive use of the vessels of those parties, so that other vessels can have no right to use such wharves and landings; but this rule must not be construed as giving the entire control and occupancy of those wharves and landings to the assignees. So, when a steamship company may hold the exclusive privilege of landing its vessels at a certain wharf, it cannot hold that wharf sacred against other companies for the right to solicit business thereon for the carrying of baggage, even at the time when its vessels arrive in port.

(Crim., No. 472.—Department One.—Filed November 19, 1898.)
People; H. W. Knowlton, appellant. Prosecution under Section 332, P. C., for information. Affirmed.

Held, the information being in the general form held sufficient in People vs. Frigiero, 107, Cal. 152, was clearly sufficient.

(S. F., No. 890.—Department One.—Filed Nov. 21, 1898.)
Jessie Pyle, respondent; Edward M. Piercy, appellant. Damages for breach of promise of marriage. Reversed.

Where there has been no adjudication of the cause upon its merits, the appellate court will not hold as a rule, a judgment of dismissal is the equivalent of a judgment or order adjudicating upon the facts. Nor can such a judgment be pleaded as a bar to another action, nor in abatement or avoidance.

Admission of evidence regarding the character of a person employed by the defendant as a detective is erroneous, where the detective is not a witness in the case. It is an indirect attack upon the honesty and integrity of the defendant and his case, and wholly unauthorized by any principle of law. A witness cannot be impeached by the evidence showing that she lived with her husband prior to their marriage.

(S. F., No. 887.—Department One.—Filed Nov. 22, 1898.)
A. Frassl, respondent; Thomas McDonald, appellant. Damages for personal injuries. Reversed.

The contracts entered into by the defendant owner with his contractors provided that the work should be done "under the direction and to the entire satisfaction of the architect"; that the owner should have the right at any time during the progress of the work to make any alterations, deviations, additions or omissions from the said contract, and the cost of the same should be added to or deducted from the amount of said contract price by a fair valuation by the architect. Held, that these provisions were the ordinary and usual proceedings placed in building contracts, and that the men doing the work were independent contractors and not servants of the owner.

The owner of property fronting on the street is not an absolute guarantor that no opening may be found in his sidewalk. The law does not demand that he shall guard his sidewalk at night, lest some evil-doer shall make an opening therein to the great danger of the belated traveler. Before liability attaches to the owner in such a case he must have known of its defective condition, or as a careful, prudent man should have known it.

As to the law governing extensions of time expiring on Sundays, see Mull v. Galloway, 61 Cal., 498.

(Crim., 393.—In Bank.—Filed Nov. 25, 1898.)
People, respondent; A. L. Knott, appellant. Murder. Affirmed.

Section 1291 of the Penal Code, under which a motion to suspend judgment is made, provides that "if in the opinion of the court there is reasonable ground for believing him to be insane, the question of insanity must be tried," etc. Where the court declares that "no doubt has arisen in the mind of the court," etc., the appellate court is powerless to review such order.

Evidence that the deceased was in the habit of traveling the street on which he was killed is proper as tending to support the claim that he was killed by means of "lying in wait."

(S. F., No. 713.—In Bank.—Filed Nov. 25, 1898.)
People, ex rel. Roger G. Dean, appellant; Board of Supervisors of Contra Costa County, respondent. Review of action of the board granting a franchise for the construction and maintenance of a wharf. Proceeding dismissed.

The granting of a franchise is a legislative act. When legislative power is vested in a municipal board, acts done in the exercise of that power are acts of the board, and should be reviewed as such by the courts. Held, that the Act of the Legislature, approved March 23, 1886, contains nothing calling for the exercise of judicial functions on the part of the Supervisors; that the grant of a franchise under it is purely a legislative act; that, therefore, the board is not the proper remedy to annul the granting of a franchise thereunder.

(Crim., No. 467.—Department One.—Filed November 26, 1898.)
People, respondent; Colonel L. Tupper, appellant. Felony. Reversed.

The Judge is a component part of the court. There can be no court without the Judge. The argument of the case to the jury is as much a part of the trial as the introduction of evidence. So, where a Judge absented himself for some minutes, and the defendant in the case a defendant convicted under such circumstances has been deprived of his liberty without due process of law.

(S. F., No. 827.—Department One.—Filed November 26, 1898.)
W. W. McDonald, respondent; Gilmore Agnew, appellant. Appeal by Justice of the Peace from Superior Court order prohibiting him from proceeding in action in his court. Order reversed.

A defendant appears in an action when he answers, demurs or gives written notice of his appearance, or where an attorney gives notice of an appearance for him. So, where a defendant demurs, he submits himself to the jurisdiction of the court.

(Crim., No. 257.—In Bank.—Filed November 26, 1898.)
People, respondent; E. J. Dole, appellant. Forgery. Reversed. Garoutte and Harrison, J. J. dissenting.

Aside from the person who directly commits a criminal offense, no other person is liable as principal unless he aids and abets. (Penal Code, Sections 31 and 97.) A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment; as, for instance, he may pass a

forged instrument without knowledge that it is forged. The word "aid" does not imply guilty knowledge, or felonious intent, whereas the definition of the word "abet" includes knowledge of the perpetrator, and counsel and encouragement in the crime. Held, therefore, that the instruction "If you believe from the evidence that the defendant committed the offense charged in the information, or aided, abetted or assisted," etc., etc., is erroneous. "Aid or abet" is not the same as "aid and abet."

The giving of the instruction "Where weaker evidence is produced when in the power of the party to produce higher, it is presumed that the higher evidence would have been adverse if it had been produced," is erroneous. The word "weaker" is substituted for "inferior," a word of different meaning. (C. C. P., Section 1963, sub. 6.) A witness cannot be cross-examined as to matters not testified to in his direct examination.

Monthly Weather Report.

Following are the meteorological observations taken at the United States Weather Bureau office, Sacramento, Cal., for the month of November, 1898, James A. Barwick, observer and official in charge.

Mean barometer, 30.08 inches. Highest barometer and date, 30.31 inches on the 21st. Lowest barometer and date, 29.78 inches on the 19th. Mean temperature, 53 degrees. Highest temperature and date, 51 degrees on the 5th. Lowest temperature and date, 42 degrees on the 23d. Average daily range and date, 49 degrees. Greatest daily range and date, 53 degrees on the 2d. Least daily range and date, 7 degrees on the 28th. Total rainfall, 0.61 of an inch. Total wind velocity, 5,791 miles. Prevailing wind direction, southeast. Highest wind velocity, direction and date, 36 miles, north, on the 8th. Total clear days, 18; fair days, 5; cloudy days, 7, and rainy, 3 days. Mean dry thermometer, 54 degrees. Mean wet thermometer, 45 degrees. Mean dew point, 55 degrees. Mean humidity, 54 per cent. Mean maximum temperature, 65 degrees. Mean minimum temperature, 42 degrees. Mean vapor pressure, 0.215 of an inch. Light frosts on the 2d, 10th, 13th, 14th, 16th, 17th, 21st, 30th. Heavy frosts on the 20th and 26th. Killing frost on the 23d. Average date of first killing frost in the month, November 15th. Average date of last killing frost in spring, February 16th.

There is danger to the health in sudden changes of weather, decaying vegetation, low water, and prevalence of malarial germs. Hood's Sarsaparilla is needed to purify and enrich the blood.

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