PRIVATE CAR LINES

Given a Slight Reduction by State Tax Commission.

Among the appeals in assessment made to the tax commission which will be heard this week is that of the Kansas City Stock Yards Company, which claim that their personal property was given in correctly at $31,700 and that the assessor added $50,000 to that amount without warrant or authority in the way of property to additional property to cover any part of that sum.

The tax commission will hear complaints from the various counties from the 8th to the 17th. Some fifteen cases have already been filed, most of them from lumber companies and private corporations. From the 17th to the end of the month the commission will sit as a board of equalization proper and hear the appeals of private individuals.

The commission today fixed the assessment against the private car line companies of the state. The total assessment of these companies is $1,047,170 this year as against $1,063,207 last year. There are 69 companies now as against 81 last year. The big ones are the Santa Fe line, assessed at $274,410 and the Pacific Fruit Express Company at $151,740. These car line companies include refrigerator, fruit and stock car lines.

CARRIERS GET A RAISE.

Twenty-Seven Topeka Postoffice Employes to Be Paid More.

Twenty-seven city mail carriers at the local postoffice have received a raise in salary of $100 a year. This means $2,700 more next year sent to the Topeka office for carrier benefits. The salaries at the office are raised according to work and merits of the employes. There are 35 carriers in the office but the rest of them have had raises within the last year.

The annual payroll at the local postoffice amounts to about $100,000. "The office is growing as fast as the city," said Postmaster A. K. Rodgers, this morning.

The following carriers are on the honor roll for the salary increases: J. P. Bauer, Theo O. Blank, Calvin Conron, John J. Curry, George Dagg, E. P. Daniels, Fred C. Farnsworth, S. S. Ferguson, Howard Hannah, A. H. Kinne, M. McNerney, Oscar R. Molz, James H. Murphy, O. C. Myers, Frank Palmer, Eugene Pollard, J. T. Porter, Sam M. Robinson, A. M. Roush, John Ryan, Allan P. Smith, Charles H. Stewart, Charles Summers, Charles Swearinger, John W. Swickard, John P. Towner, Thomas A. Widener.

CHASED UP TREES.

People Driven From Homes by Wall of Water 6 Feet High.

Chillicothe, Mo., July 7.—A great wall of water six feet high, sweeping down both forks of the Grand river, joined at Utica, in the west part of Livingston county today and the bottom lands here are now experiencing a flood far surpassing that of June. Railway tracks and bridges are washed out, stock is drowned and people in the country have been driven to the roofs of their houses and some to tree tops. Several have been rescued in boats and other rescue parties are at work.

Six section men are reported missing.

William Christian is reported drowned near Chillicothe.

Arthur Fiske, the station agent at Gault, was rescued from the depot today after being marooned 36 hours.

REAL ESTATE TRANSFERS.

H. Magill and wife to A. Neese, tract in n. w. ¼ 24-13-16	$3,000
G. T. Lawrence to Chas Wolf Packing Co., lots 126-28-30 and 32 Crane st., Crane's add	1
J. C. Harding to W. B. Foster and wife, lots 612-14 and 16 Highland ave., East Hill add	1,000
B. B. Giles and wife to W. J. Rickenbacker, pt. n. e. ¼ 7-12-16	9,600
M. Shull to The Shawnee Agency Realty Co., lot 812 Gilmore st., Irving Place add	20
G. E. Schooler and wife to D. V. McQuain, pt. lots 187 and 89 East First st., Harvey's sub	1,500
A. C. Seckrest and wife to S. J. Moeller, pt. lots 4 and 4½ blk. 2, Richland, also tract 1251 Richland	225
D. R. Jones and wife to M. Massey, lots 83 and 5 Locust st., Metsker's 2nd sub	900
R. J. Hibbard and wife to H. Magill, lot 545 and pt. 47 Lincoln st., Throop's 2nd add	1
M. S. Black to C. A. Black et al., pt. lots 186-8 and 90 and lots 221-3 and 5 and lots 322 and 24 Kansas ave	1
J. Chubb and wife to The Slavation Army, lots 116 and 18 Illinois ave., Sunnyside add to Highland Park	1
A. A. Gibb and husband to C. S. Elliott, lot 360 Kansas ave	2,500
C. S. Elliott and wife to P. G. Nuffer and wife, lot 360 Kansas ave	2,500
M. E. Worrall to M. B. Magoffin, lot 37 10th ave., west	1,750
M. S. Black to C. A. Black et al., pt. lots 186 and 88 Kansas ave	1
J. W. Ross and wife to W. Shoecraft, lot 2131 Buchanan st	10

LEGAL.

[Published in The Topeka State Journal July 7, 1909.]

SUPREME COURT SYLLABI.

No. 16,122.
G. M. Lewis
vs.
A. J. Norris.
Error from Lincoln County.
AFFIRMED.
Syllabus. By the Court. Porter, J.

1. A writing acknowledging the receipt of $500 as belonging to a person named, but which contains no statement of any fact from which the law implies an obligation or promise, is not an "agreement, contract or promise in writing" within the saving clause of the statute of limitations.

2. The following written instrument does not constitute an "agreement, contract or promise in writing," but is a mere receipt for money:

"Mount Vernon, Mo., December 9th 1903.
"I, Andrew J. Norris, do hereby acknowledge receipt of five hundred dollars, which amount I deduct from purchase price of the southeast quarter of section 29, except a strip three acres square in the southwest corner of south half of S. E. quarter, and the north half of the northeast quarter of section 29, all in township 29, range 25, as commission for the sale of said land to myself, as the commission belongs to my son-in-law George Lewis, and by agreement with all parties to be deducted from purchase price of said land this day bought from L. M. Farris.
"A. J. NORRIS."

Mason, J.
Johnston, C. J., Burch, J., Smith, J., Graves, J., concurring.
Benson, J. dissenting.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

LEGAL.

No. 15,809.
The Cincinnati Punch & Shear Company
vs.
A. W. Thompson.
Error from Atchison County.
REVERSED.
Syllabus. By the Court. Graves, J.

1. The construction of written instruments is a question of law for the court, and ordinarily it is error to submit such a question to the jury.

2. It is reversible error to submit irrelevant and immaterial testimony to a jury when it is materially prejudicial to the rights of the complaining party.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,122.
The Board of County Commissioners of the County of Jefferson
vs.
The City of Oskaloosa.
Error from Jefferson County.
AFFIRMED.
Syllabus. By the Court. Smith, J.

Where a block in a town plat is designated as a "Public Square" and in the certification to the plat, the street, alleys and square, designated on the plat, are dedicated to the use of the public and to the town, the legal title to the public square vests in the county; and where a county takes possession of such square by building a court-house thereon and continuously occupies the square for more than forty years, the county is liable for the payment of an assessment, made by an ordinance of the city, for the cost of macadamizing and curbing the streets abutting upon the public square.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,129.
The Wichita Sash & Door Company
vs.
Charles Weil and Anna Weil, His Wife, et al.
Error from Sedgwick County.
MODIFIED.
Syllabus. By the Court. Johnston, C. J.

1. In an action by a sub-contractor to recover a personal judgment against the contractor and to foreclose a mechanics' lien on the building and premises of the owner a judgment by default was first rendered against the contractor and the foreclosure of the lien was adjudged. Subsequently the owner moved for the vacation of the judgment and the motion was allowed but the personal judgment against the contractor was not formally set aside. No defense was made by the contractor and the court proceeded to try the case as if the entire judgment had been vacated and upon the trial allowed the owner to contest the amount due and the extent of the lien to be adjudged against his property. Held: That the court should have formally set aside the personal judgment against the contractor but that it was not prejudicial error to try the question of the amount due to the sub-contractor.

2. In an action brought by a sub-contractor where the original contractor does not defend against the claim the owner may defend and for the purpose of ascertaining the amount due and reducing the extent of the lien to be established against his premises may allege and prove damages resulting from defects and omissions in the work performed or the material furnished by the sub-contractor.

3. Where the owner asks for the withdrawal of an amount of money tendered and paid into court to meet the claim of the sub-contractor and which the sub-contractor declined to accept and the court grants his request and permits the withdrawal of the deposit such tender and deposit cannot be regarded as effecting a discharge of a lien properly perfected.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court

No. 16,143.
In the Matter of the Estate of William E. Jones, Deceased, Jane E. Thomas, et al.
vs.
Hugh Williams, Executor.
Error from Lyon County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. The provision that an action for relief not otherwise provided for in the statute of limitation can only be brought within five years after the cause of action shall have accrued has no application to a proceeding instituted in the probate court, by an executor for the sale of real estate to pay debts of the testator.

2. There being no statute of limitation relating to the matter the requirement of the law is that such a proceeding can be maintained only if begun within a reasonable time, in view of all the circumstances of the case.

3. A delay of six years by a foreign executor to petition for the sale of land in this state to pay the indebtedness of the testator is not unreasonable when it is occasioned by the pendency of litigation carried on in good faith to determine the validity and amount of such indebtedness.

4. The allowance of a claim against an estate by a court having jurisdiction is prima facie evidence of the debt, and of its due presentment, against the heirs or devisees, in a proceeding brought to subject real estate to its payment.

5. One who buys land in this state from the devisees, seven years after the death of the testator while a resident of another state, is not protected as an innocent purchaser against proceedings thereafter brought to subject it to the payments of debts of the estate.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,131.
The Chicago Lumber & Coal Company
vs.
J. H. Washington, et al.
Error from Wichita County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. The requirement of the mechanic's lien statute that the statement filed by one claiming a sub-contractor's lien must among other matters state the name of the contractor is not met by a recital that the material was sold to a designated person and by him used in constructing a building upon land belonging to another, although the person so designated was in fact the contractor. Such lien-statement is fatally defective unless it shows by express averment or by reasonable implication that the purchaser of the material made the improvement under contract with the owner.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,124.
W. W. Goodrow
vs.
G. W. Stober.
Error from Graham County.
AFFIRMED.
Syllabus. By the Court. Graves, J.

1. A tax deed is not void merely because the description of the land is not technically accurate. If sufficiently definite and certain to enable those familiar with it to readily recognize the land intended and to enable it to be easily ascertained, this will be sufficient.

2. A town plat was filed in the office of the register of deeds, and designated "the town of Fremont." Soon afterwards the town was by common consent called, and was generally thereafter known as, the town of Morland,—the railroad station and post-office being so named. The taxing officers described the town lots upon the tax roll as being situated in the town of Morland. A lot so described was sold to the county for delinquent taxes. Four years afterwards the county conveyed the lot by what is known as a compromise tax deed. The grantee immediately recorded the deed and took possession of the lot. Held that nine years afterwards, the tax deed can not be deemed void merely because of the irregular description of the lot.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,063.
The People's State Bank of Michigan Valley, et al.
vs.
G. W. Brown.
Error from Osage County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. When a bargain is completed for the sale of a specific personal property for cash, and delivery is made, if the buyer fails to pay the price promptly the seller has a right as between the parties or against an attaching creditor to reclaim the property, which is not lost by delay to assert it, unless an intention on his part is shown that the title should pass absolutely, and whether that is the case is ordinarily a question of fact to be determined in view of all the circumstances.

2. In an action for conversion the evidence tended to show these facts: a farmer residing some miles from a town delivered wheat to a buyer there with the understanding that it was to be paid for at once; he received therefor a check on a local bank, which he took home with him, it being after banking hours; he did not present the check until his next trip to town, between two and three weeks later, when payment was refused; the buyer had no funds on deposit when the check was drawn but had an arrangement with the bank under which it paid his checks and took bills of lading on the shipment of grain as security; a week after the issuance of the check the buyer became insolvent and the bank attached the wheat; after the dishonor of the check the seller sued the bank for the value of the wheat. Held, that his failure to make an earlier presentment of the check did not conclusively show a waiver of his right to reclaim the wheat.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,832.
George T. Hughes and Charles F. Hughes
vs.
Laura V., Nicholson, et al.
Error from Shawnee County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. The issue being whether a deed from a parent to a child was made as an advancement, a statement made by the grantee as a witness that no consideration was paid for it is testimony relating to the transaction between him and the grantor, and if brought out by the questions of his opponent in the litigation, qualifies him to narrate all the attendant circumstances, notwithstanding he would otherwise be rendered incompetent to do so by the statute regarding evidence concerning personal transactions with persons since deceased.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,095.
G. G. Shellabarger
vs.
Joseph D. Sexsmith and Emma J. Sexsmith.
Error from Cloud County.
REVERSED.
Syllabus. By the Court. Burch, J.

In a mortgage foreclosure suit judgment was taken by default against the mortgagor, who was served personally. At the same time it appeared that a person claiming an interest in the land had been omitted and an order was included in the foreclosure decree allowing him to be made a party. The petition was amended and he was duly served. He answered setting up a second mortgage given by the defaulting defendant, and prayed a personal judgment against him which in due time was entered without further notice or appearance. Held, the defendant in default was bound to take notice of the proceedings and the judgment against him is not void.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
(Seal) Clerk Supreme Court.

No. 16,120.
Union Pacific Railroad Company
vs.
O. L. Thisler.
Error from Dickinson County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. Where in an action against a railroad company for horses killed on the track there was evidence tending to show that the engineer (whose engine was running forty-five miles an hour) must have seen the animals a quarter of a mile away, if they were then on the track, a finding that he did see them at this distance is supported by testimony of a witness that the appearance of manure and tracks of the horses between the rails indicated that they had stood for some time at the point where they were struck.

Johnston, C. J., Smith, J., Graves, J., and Benson, J. concurring.
Burch, J., and Porter, J., dissenting.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,099.
The Atchison, Topeka & Santa Fe Railway Company
vs.
P. D. Schriver, Administrator.
Error from Chase County.
REVERSED.
Syllabus. By the Court. Graves, J.

1. In an action against a railroad company, to recover damages on account of a death caused by it at an ordinary country crossing, the court instructed the jury, in substance, that a person about to cross a railroad track upon a public highway in front of an approaching passenger train which he sees, may assume that the train is not moving at a speed greater than usual; and if, with this assumption, the situation is such that a man of ordinary care would not regard an attempt to cross the track ahead of the train dangerous, it will not be deemed contributory negligence to make such an attempt. Held error.

2. Where a traveler is at an ordinary country railroad crossing, and sees an approaching train, he must assume that such train may be running at any rate of speed which the business or necessities of the company require, and act accordingly.

3. Instructions given in this case examined and found misleading and erroneous.

All the justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,898.
The State of Kansas
vs.
Charles W. Bowman.
Appeal from Phillips County.
AFFIRMED.
Syllabus. By the Court. Benson, J.

1. Where a defendant in a criminal action files a plea in abatement and when arraigned and required to plead to the information pleads not guilty without calling attention to the plea in abatement and without referring to it in any manner, and goes to trial upon the issue of not guilty without objection, he thereby waives such plea in abatement.

2. Where a warrant upon which a preliminary examination was waived charged in one count the forging and uttering of a bank check, the county attorney properly filed an information charging such offenses in separate counts, and was not precluded from doing so by the fact that he had previously filed an information in the same case charging the defendant with the forgery of the check only, such first information having been quashed on the motion of the defendant.

3. The testimony concerning the introduction in evidence of an alleged forged check is examined and it is held that the check was properly considered and treated as being in evidence.

4. In considering a motion for a new trial the court properly excluded that part of the affidavit of jurors impeaching their verdict upon grounds essentially necessary to consider in making up the verdict. (State v. Horne, 9 Kan. 119.)

All the justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,369.
The State of Kansas
vs.
L. W. Labore.
Appeal from Decatur County.
AFFIRMED.
Syllabus. By the Court. Benson, J.

1. Contradictory answers of a juror while under examination concerning his qualifications do not necessarily prove his unfitness to serve, and if after proper instruction by the court he appears to be duly qualified, it is not error to overrule a challenge based upon such answers.

2. The unlawful acts specified in the prohibitory law in defining a common nuisance may be charged conjunctively in one county, and it is not error to overrule a motion of the defendant to require the prosecuting attorney to elect upon which of the acts so charged he relies for conviction.

3. The oral repetition of an instruction to the effect that no inference of guilt can be drawn from the omission of the defendant to testify, which was one of the instructions properly given in writing, is not a material error, if error at all.

4. A statement by the prosecuting attorney in the closing argument that there was no testimony to contradict the evidence of a sale of liquor on a certain day, if warranted by the proof, does not afford a ground of reversal although the defendant did not testify on the trial.

5. An instruction requested although stating a correct proposition of law should be refused if not pertinent to the evidence, or if it be included in substance in the others given.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court

No. 15,978.
H. V. Tucker
vs.
Ezra Shorb and Ida Shorb.
Error from Seward County.
AFFIRMED.
Syllabus. By the Court. Johnston, C. J.

1. It may be fairly inferred from the recitals in a tax deed of record more than five years purporting to convey several lots consecutively numbered in a certain block of a city bid in by the county for a gross sum and where a single charge was made for the subsequent taxes of each following year that the lots were contiguous and comprised only a single parcel for purposes of taxation.

2. In effecting a compromise of taxes on lots bid in by the county and which have stood unredeemed for three years without any one offering to purchase the same for the amount of the taxes, interest and penalties due thereon the purchaser to whom the certificate is assigned under the order of the county commissioners may be required to pay all subsequent taxes due on the land at the time of the compromise.

All the justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,916.
Augustine Scott, et al.,
vs.
Eva. G. Scott.
Error from Greenwood County.
REVERSED.
Syllabus. By the Court. Mason, J.

1. Notwithstanding the statute making judgments liens on the real estate of the debtor within the county, an allowance of permanent alimony payable in installments does not create a lien on any property of the husband unless the record affirmatively discloses that the court intended it to have that effect.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,963.
Ben A. Wood
vs.
Ira M. Cobe, et al.
Error from Morton County.
AFFIRMED.
Syllabus. By the Court. Johnson, C. J.

1. An indispensable prerequisite of the right to open up a judgment under Section 77 of the code (Section 83 new code) is that the applicant shall make it appear to the satisfaction of the court that during the pendency of the action he had no actual notice thereof in time to appear and make his defense.

2. Mere oversight and inadvertence of a party in failing to make his defense at the trial of an action of which he had actual notice does not justify the opening up of the judgment under that provision of the code.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court

No. 15,965.
W. D. Shup
vs.
J. F. Moon, et al.
Error from Anderson County.
AFFIRMED.
Syllabus. By the Court. Burch, J.

1. Two parties, one as principal and the other as surety, borrowed money at a bank to promote a business transaction in which they were both interested. The money was used to discharge the obligation of a third person who indemnified the principal with a real estate mortgage, the principal expressly agreeing with the surety that the proceeds of the mortgage should be used to satisfy their obligation to the bank. It became necessary to realize on the mortgage and the prinicpal placed it in the surety's hands for foreclosure. Suit was brought in the principal's name, a judgment foreclosing the mortgage was duly rendered, at the sheriff's sale the land was bid in for the surety, and in due time a sheriff's deed issued to the surety. The surety entertained no purpose to defraud the principal and immediately upon receiving the sheriff's deed offered to vest full title in the principal if the principal would satisfy the bank. This the prinicipal refused to do, whereupon the surety paid the bank. Held, the surety was not a mere agent of the prinicipal to foreclose the mortgage, was not compelled by any legal duty to bid or take a conveyance in the name of the principal, committed no fraud in taking title in himself and any equitable remedy the principal may have to obtain title to the land includes the necessity of doing equity by reimbursing the surety.

2. The evidence considered and held to support the finding of fact.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court

No. 16,223.
The State of Kansas
vs.
W. H. Dixon.
Appeal from Reno County.
REVERSED.
Syllabus. By the Court. Mason, J.

1. In a prosecution under a statute making wilful and malicious misconduct in office a misdemeanor the omission of the word "malicious" from the information is immaterial, when the acts complained of necessarily involve a wilful disregard of the obligations owed by the officer to the public.

2. An information alleging that a city marshal whose duty was to see that certain offenses were prevented or punshed, wilfully permitted them to be committed, fairly implies that knowing of their commission he failed to attempt to enforce the law, and therefore states facts sufficient to constitute a violation of the statute making wilful and malicious misconduct in office a misdemeanor.

3. An allegation that a city marshal failed and refused to perform the duties enjoined upon him by the laws of the city, by failing to make certain arrests, fairly implies that it was his duty under the ordinance to make such arrests.

4. A charge that city marshal gave "aid, comfort, protection and assistance" to certain keepers of bawdy houses, who in return therefor presented him with a gold star, which he accepted, must be construed to mean that the protection referred to was protection against an effort of the public officers to enforce the law against them, and it is not necessary to the sufficiency of the information that such conduct be expressly charaterized as either wilful or malicious.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,146.
Jennie Blodgett, et al.
vs.
Mary Yocum.
Error from Reno County.
REVERSED.
Syllabus. By the Court. Porter, J.

1. In an action between the heirs of a deceased person for the recovery of real estate to which the defendants claimed title by virtue of conveyances executed by the deceased in her lifetime, the court instructed the jury that, in deciding whether or not the deceased was of sound mind or was unduly influenced at the time of making the deeds in question, they had the right to take into consideration the reasonableness or unreasonableness of her act in making the deeds; and if they believed that a woman of sound mind would not have been likely to do such an act in the free exercise of her judgment, discriminating against one daughter in favor of another daughter and her family, then they had the right to infer from the act itself that undue influence was used to secure the deeds, though not bound to do so, Held error. A person of sound mind who is not unduly influenced may make such disposition of his property as he desires without regard to its fairness or unfairness.

2. In an action of ejectment brought for the recovery of several distinct and separate parcels of land, where the plaintiff's title as to all the defendants is the same, and the answer sets up a misjoinder of causes of action because some of the defendants claim separate interests in separate portions of the real estate, but admits that all the defendants are in possession of all the real estate, the misjoinder furnishes no ground for objection to the introduction of testimony on the trial nor for a demurrer to the evidence; and where in such a case none of the defendants ask for a severance or a separate trial, and the action proceeds as though there was no misjoinder, it will be regarded as immaterial.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,145.
School District No. 127, of Reno County, Kansas,
vs.
School District No. 45, of Reno County, Kansas, et al.
Error from Reno County.
AFFIRMED.
Syllabus. By the Court. Smith, J.

1. Where the electors of a school district, at a regular annual school meeting therein, vote a tax on the taxable property in the district at a rate authorized by law and such as the meeting deems sufficient for the various school purposes and the district clerk of said school district certifies the amount so levied to the county clerk of the county this constitues the levy of a school tax at such rate on all the real and personal property in said school district.—General Statutes of 1901, Sections, 6127, 6172 and 6191.

2. The power of levying taxes is a legislative function and such power abides only in the annual school meeting to determine the rate of taxation sufficient for the various school purposes.

3. The duty of the county clerk of extending the taxes so levied upon the assessment rolls of the county is purely a ministerial function and, until such levy is made, the extension of an assessment upon a tax roll affords no authority for the collection of the tax.

4. A mistake of the county clerk in extending upon the tax rolls an assessment against the property in a school district at a less rate than that levied at the annual school meeting in the district and certified by the clerk thereof does not deprive the school district of its right to the aggregate sum collected through such erroneous assessment.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,910.
The State of Kansas
vs.
Ransom Piggs.
Appeal from Shawnee County.
AFFIRMED.
Syllabus. By the Court. Porter, J.

1. The purpose of a preliminary examination is: (1) To inquire concerning the commission of crime and the connection of the accused with it in order that he may be informed of the nature and character of the crime charged against him, and, if there is probable cause for believing him guilty, that the state may take the necessary steps to bring him to trial; (2) to perpetuate testimony; (3) to determine the amount of bail which will probably secure the attendance of the accused to answer the charge.

The right of the state to introduce evidence at a preliminary examination can not be defeated by the accused waiving an examination.

2. The act creating the court of Topeka (Laws 1899, chapter 129) confers upon the judge of that court the power and jurisdiction of a justice of the peace in preliminary examinations of persons accused of felony.

3. Where the clerk of a city court has failed to sign the certificate attached to the transcript of a preliminary examination held before the judge of such court it is proper for the district court to permit the certificate to be amended by having the clerk attach his signature.

4. In a prosecution for larceny, where the money described in the information and claimed to have been stolen is introduced in evidence and exhibited to the jury, it is not necessary that the particular bills should be identified as the ones described in the information.

5. Courts take judicial cognizance of the value of money. In a prosecution for larceny of certain United States treasury notes and national bank notes, where the particular bills which it is claimed were stolen are offered in evidence, proof of their value is unnecessary.

6. The actual status of the legal title to stolen property is no concern of the thief. In an information charging larceny the title to the property may be laid either in the owner or the person in whose possession it was when it was taken even though that person has stolen it from some one else.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,123.
M. E. Johnson, etc.,
vs.
D. S. Huber.
Error from Cowley County.
REVERSED.
Syllabus. By the Court. Porter, J.

1. A letter written by a real estate agent to the owner of land asking if the land was for sale and at what price and stating the commission the agent would charge to procure a sale together with the letter of the landowner in reply, construed and held to constitute a contract authorizing the agent to list the land for sale at a certain price, and binding the owner to pay a commission in case the agent procured a purchaser able and willing to buy at the terms stated.

2. In an action to recover a real estate commission a petition which sets forth the written correspondence of the parties showing the making of a contract of the nature referred to in the foregoing paragraph, and alleges that the plaintiff procured a purchaser able and willing to take the land at the defendant's terms but defendant declined to convey the land and refused to pay the plaintiff's commission, states a cause of action.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,119.
German American Insurance Company of New York
vs.
C. M. Darrin.
Error from Linn County.
AFFIRMED.
Syllabus. By the Court. Burch, J.

1. It is the duty of a fire insurance company which accepts a signed application for insurance written on a blank furnished by the company which provides that it shall be the basis on which insurance is to be effected, to write the policy in accordance with the application.

2. If in such an application the applicant state that he will agree carefully to preserve his last inventory in an iron safe at night or in some place secure against fire in another building, the company is authorized to insert an iron-safe clause in the policy extending to the last inventory only and not also to books of account.

3. The recipient of a policy issued in response to an application of the character described may assume that the company has discharged its duty and has written the policy on the basis of the application and he is not obliged to read the policy to see if it conforms to the application.

4. If such an application be received and retained by the company a policy be written and delivered and the premium be paid by the applicant and kept by the company, a binding contract of insurance is effected on the basis of the application.

5. If through inadvertence, mistaka or design such a policy be written on a basis different from that contained in the application, it may be reformed to correspond with the application.

All the justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,118.
James P. Richardson, as Administrator, Etc.
vs.
Bettie C. Painter.
Error from Morris County.
REVERSED.
Syllabus. By the Court. Johnston, C. J.

1. A personal Judgment against two defendants is a joint and several obligation which the plaintiff may enforce against either of them at his option.

2. The fact that one of two judgment debtors dies and there is no revivor or proceeding had to keep the judgment alive as to his estate does not extinguish the liability of the other, nor bar a proceeding to revive the judgment as against such surviving defendant.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

LEGAL.

No. 16,096.
J. M. Schott,
vs.
F. M. Linscott.
Error from Atchison County.
AFFIRMED.
Syllabus. By the Court. Smith, J.

1. A personal judgment, rendered without legal notice to the defendant and without any appearance on his part, is rendered without jurisdiction and is consequently void.

2. A sale of personal property, made under an excution issued upon a void judgment, conveys no title to the purchaser.

3. The mere failure of an owner of personal property, which he knows has been advertised for sale at a certain time and place, to attend the sale and warn intending purchasers of his rights does not estop such owner from recovering from a purchaser at such sale the value of the property bid in thereat by the purchaser and converted to his own use, the sale being held without authority of law.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court

No. 16,102.
O. W. Sparks et al.
vs.
C. A. McAllister.
Error from Cherokee County.
REVERSED.
Syllabus. By the Court. Benson, J.

Upon an examination of the pleadings in this action it is held that a motion of the plaintiff for judgment thereon in his favor was erroneously sustained.

All the justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,107.
M. Toffler
vs.
C. C. Kessinger.
Error from Leavenworth County.
AFFIRMED.
Syllabus. By the Court. Burch, J.

An administrator with the will annexed died in office without having accounted for money which he had collected belonging to the testator's estate. His successor obtained judgment in the district court against his administrator for the sum found to be due. The judgment was presented, allowed and classified in the probate court as a claim against his estate, but no order was issued upon his administrator for its payment and it was not paid. Held, such an order is not a condition precedent to recovery against the sureties on his bond.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 15,353.
The Grand Lodge of the Independent Order of Odd Fellows of the State of Kansas
vs.
James A. Troutman and Robert Stone.
Error from Osage County.
AFFIRMED.
Syllabus. By the Court. Smith, J.

1. A and B entered into a contract for the mutual purpose of establishing and perpetually maintaining a private charity. A agreed to and did execute a deed purporting to convey a large tract of land to trustees for the purpose. B agreed to and did pay off an equitable lien on the land and agreed to and did pay for the erection of buildings thereon for the purpose. After the death of A, his sole heir brought an action to set aside the deed, alleging that it was void. B was made a party defendant to the action and filed an answer or cross-petition for the money paid for the betterment of the estate and prayed that it be adjudged a lien upon the land. Such proceedings were thereafter had in the action that B was discharged as a party thereto. Judgment was finally rendered therein adjudging the deed of A void as against the rule prohibiting perpetuities of titles in estates. Held, that B's cause of action, to have his money, which was contributed to the betterment of the estate, adjudged a lien thereon, became absolute upon the bringing of the action to avoid the deed and was not contingent upon the rendition of judgment therein; held, further, that this action, brought by B more than five years after the action was brought to set aside the deed and more than five years after B was discharged as a party thereto is barred by the statutes of limitations.

2. The quit claim deed pleaded as a defense in this case is held to convey all rights the plaintiff may have had prior to the execution and delivery thereof in the lands upon which an equitable lien is sought, and, interpreted with the resolution embodied therein, conclusively evidences an intention of the plaintiff to abandon and sever its connection with the enterprise known as the De Boissierre Odd Fellows Orphans' Home.

All the Justices concurring except Benson, J., who did not sit.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,110.
Theodore R. Converse, Receiver, et al.,
vs.
J. H. Elward.
Error from Reno County.
REVERSED.
Syllabus. By the Court. Smith, J.

The second count of the petition in this case is sufficient as against a demurrer on the grounds that the facts stated are not sufficient to state a cause of action and that it shows upon its face that the cause of action therein stated is barred by the statute of limitations.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,111.
J. M. Walbridge
vs.
Christiann Walbridge.
Error from Jefferson County.
AFFIRMED.
Syllabus. By the Court. Porter, J.

1. In civil actions for damages the motive, design or intent of the defendant becomes material only where the act which occasions the injury is not unlawful, or where it affects the amount of recovery.

2. In an action for damages for assault and battery the defendant is liable for all the natural and proximate consequences of his wrongful act, whether the consequences have been foreseen or the injuries are more serious than were intended.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,363.
N. A. Yeager
vs.
Granville P. Aikman.
Original Proceeding in Quo Warranto.
DISMISSED.
Syllabus. By the Court. Smith, J.

1. Article 6, Chapter 36, General Statues of 1901, constitutes the officers and members of the State Senate as a tribunal to hear and finally determine a contest of the election of any person declared elected a judge of a district court in the state, and is valid.

2. When, in such case, a contestor invokes the jurisdiction of such tribunal and the contest is begun therein but is finally dismissed on the order of the tribunal for the failure of the contestor to state the grounds of contest as required by a previous order of the tribunal, the order of dismissal is analogous to sustaining a general demurrer to a petition in court and is a final determination of the contest on its merits.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 15,880.
The State of Kansas
vs.
Oliver Smith.
Appeal from Shawnee County.
AFFIRMED.
Syllabus. By the Court. Smith, J.

For the purpose of showing that the defendant was insane and not accountable for his action at the time of the admitted killing of deceased, evidence was offered and admitted that about three months prior to the tragedy the appellant had been informed that his daughter was pregnant and that the deceased had accomplished her ruin under the promise of marriage. Held: that under the circumstances shown by all the evidence in this case, it was not error for the court to instruct the jury that such evidence was not to be considered for any other purpose than to determine defendant's mental responsibility for the act.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 15,977.
Leo N. Leslie
vs.
Charles E. Gibson.
Error from Seward County.
AFFIRMED.
Syllabus. By the Court. Benson, J.

1. A person whose interest in real estate has been barred by judgment quieting title rendered in an action to which he was not a party, wherein service was made by publication only, has the same right to have the judgment opened and to make his defense that the party from whom he obtained such interest has under sec. 77 of the civil code. (Gen. Stat. 1901, sec. 4511.)

2. This rule should be applied to a person who holds title under a conveyance or assignment made after the judgment in such a proceeding has been entered, if there is no imputation of bad faith and no intervening equities are effected.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,109.
Fetzer & Co.
vs.
F. N. Williams.
Error from Smith County.
AFFIRMED.
Syllabus. By the Court. Mason, J.

1. A party cannot rely at the same time on inconsistent defenses, but inconsistent allegations do not render a pleading demurrable.

2. No violation of the rule that the adoption of one of two inconsistent remedies irrevocably bars a resort to the other is shown by a journal entry which describes a proceeding as the allowance by the court of a change of election between inconsistent remedies, where it appears that what actually took place was that a party was permitted, immediately after amending his pleading so that it declared that prior to the commencement of the action he had adopted one of two repugnant theories, to change the amendment so as to make it allege the adoption of the other theory.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,351.
The State of Kansas
vs.
Milo Chafin.
Appeal from Stafford County.
AFFIRMED.
Syllabus. By the Court. Graves, J.

Under section 2221 Gen. Stat. 1901, the crime of adultery can not be committed by an unmarried person.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,433.
J. McCabe Moore,
vs.
James M. Nation.
Original Proceeding in Mandamus.
WRIT DENIED.
Syllabus. By the Court. Burch, J.

1. The duties of a public office include all those which fairly lie within its scope: those which are essential to the accomplishment of the main purposes for which the office was created and those which, although incidental and collateral, are germane to or serve to promote or benefit the accomplishment of the principal purposes. All such duties are official and the incumbent is obliged to perform them. Duties not so related to an office are unofficial, cannot rightfully be attached to it and the incumbent is not obliged to perform them.

2. To make effectual the constitutional guaranty of the right of trial by jury the district court possesses, by virtue of the soverignty reposed in its, inherent power to provide itself with a jury. The legislature may aid and regulate the exercise of this power, but the selecting of jurors from the inhabitants of the proper territory to determine issues of fact in court is a court function cognate with that of hearing and deciding and is not administrative in origin, purpose or character in the true sense of that term.

3. Chapter 232 of the laws of 1907 requires the judge of the district court in certain counties to perform the duties of jury commissioner and authorizes him to appoint a jury clerk to assist him in the performance of such duties. Held, the duties prescribed are not administrative in character, fall within the scope of the office of judge of the district court and do not appertain to another office within the meaning of section 13 of article 3 of the Constitution forbidding a judge of the district court to hold any other office of profit or trust.

4. When a public official takes office he undertakes to perform all its duties although some of them may be called into activity for the first time by legislation occurring after he enters upon his term. In such an event he must perform the increased service without increased compensation unless the legislature has the power and sees fit to grant him additional pay.

5. The act of 1907 referred to contains a provision increasing the salaries of district judges performing the services specified from $3000 to $3500 per annum. Section 13 of artcle 3 of the constitution provides that judges of the district courts shall receive such compensation for their services as may be provided by law, which shall not be increased during their terms of office, and that they shall receive no fees or perquisites. Held, that district judges in office when the statute took effect were obliged to render the increased service without increased compensation for the remainder of their terms.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.

No. 16,422.
The State of Kansas ex rel
vs.
School District Number One, Edwards County, Kansas, et al.
Error from Edwards County.
AFFIRMED.
Syllabus. By the Court. Johnston, C. J.

1. Primarily and as ordinarily used in a statute the word may is permissive rather than peremptory. It may be given the imperative meaning if that was the obvious intention of the legislature but the sense in which the word is used must always be determined by the context of the act.

2. In the statute relating to school district meetings which provides that "special meetings may be called by the district board or upon a petition signed by ten resident tax payers of the district" the word may is used in its permissive sense.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal.] Clerk Supreme Court.

No. 16,128.
W. H. Millikin
vs.
L. A. Lockwood.
Error from Chautauqua County.
AFFIRMED.
Syllabus. By the Court. Benson, J.

1. Where a tax title and the original patent title are united in the same person, an outstanding lease previously made by the holder of the tax title while in possession under a tax deed valid upon its face and of record more than five years, is not merged if the interest of the lease holder had become vested before such titles were united.

2. The assignee of a lease in the situation stated above is not bound to yield to the demands of the grantee of the titles so united and if he does so voluntarily, and accepts another lease from such grantee, he is not thereby relieved from paying the rents and performing the conditions stipulated in the assignment.

3. In the situation stated, such lessee might have availed himself of the protection afforded by section 141 of the tax law (Gen. Stat. 1901, sec. 7680) in defense of the claims made upon him by such grantee.

4. The voluntary relinquishment of an assignee of a lease to claims asserted under a title inferior to that of the lessor, whose better title has not been extinguished, will not avail against a claim for rent.

All the Justices concurring.
A true copy.
Attest: D. A. VALENTINE,
[Seal] Clerk Supreme Court.