(Published December 15, 1897.)

Supreme Court Syllabi.

No. 10372.

The State of Kansas
vs.
William Shive and B. Underwood.

Error from Reno County.

REVERSED.

Syllabus. By the Court. Doster, C. J.

Where two persons jointly accused of a crime defend upon the ground of absence at the time of its commission, but testimony is offered tending to prove their presence at a point a few miles from the scene of its occurrence a few hours previous to its commission, it is error to receive in evidence a mailed envelope addressed to one of them and having upon it the return card of the other, where its genuineness as sent by one and received by the other is not shown, nor the connection of the receiver with it shown by proof of its previous possession by him, or inferable from any other fact than his name and address written thereon.

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

No. 10321.

Jessie Davis
vs.
George O. Threlkeld, et al.

Error from Wyandotte County.

AFFIRMED.

Syllabus. By the Court. Doster, C. J.

1. The running of the statute of limitations in favor of persons in adverse possession of land, is not suspended by the death of the opposing claimant and the descent of his cause of action for the recovery of the land to his minor heirs.

2. A general verdict of a jury in favor of a person claiming land by adverse possession, made in disregard of an erroneous instruction as to the time when the statute of limitations began to run, does not constitute reversible error upon the theory that such instruction, though erroneous, is the law of the case to the jury, where all the facts in regard to possession and other matters material to the rights of the parties were either admitted, proved by uncontradicted documentary evidence, or were specially found by the jury, and where judgment cannot be entered according to the right of the case upon the fact so admitted, proved or found, without prejudice from the erroneous instruction.

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

No. 10296.

R. B. Ward
vs.
Edward Ryba.

Error from Republic County.

REVERSED.

Syllabus. By the Court. Doster, C. J.

An agent who takes in his own name a bill of sale of personal property in payment of a debt due to his principal and who upon taking possession of the property for his principal is dispossessed of it by third parties, cannot maintain replevin in his own name for its re-possession under a general allegation of ownership in himself, without stating the facts in relation to his special interest and right of possession.

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

No. 10243.

Charles Eaton Keith
vs.
William Eaton, et al.

Error from Johnson County.

AFFIRMED.

Syllabus. By the Court. Doster, C. J.

1. The interpretation of a foreign will as to the meaning of words used in it is to be ascertained by the law of the testator's domicile, unless the circumstances surrounding the testator or the language of the instrument as a whole requires a different interpretation, or unless an interpretation by the law of the testator's domicile will contravene the law of the State in which it is offered for record and probate.

2. The statutes of Missouri disables an illegitimate child from inheriting from the father, except under conditions of intermarriage by the parents and recognition of the child by the father, but the statute of this State invests an illegitimate with the quality of inheritance from the father, if the child has been recognized by him as his: Held, that where a will executed in Missouri, by a person domiciled there, devises a life estate in lands in that and three other States, including Kansas, to the testator's son, with remainder "to the heirs of his, the son's, body," the testator will be presumed to have used the words "heirs of his body" in accordance with the laws of his domicile, and hence that an illegitimate child of his son, born after the testator's death, though duly recognized by the father in compliance with the laws of this State, is not entitled under the will to take the lands in this State along with the legitimate lineal descendants of the son.

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

No. 10228.

J. W. Reinhart, et al., as receivers of the A., T. & S. F. R. R. Co.,
vs.
Rachel V. Sutton.

Error from Lyon County.

AFFIRMED.

Syllabus. By the Court. Doster, C. J.

1. Under sections two and three of the act of Congress of August 13, 1888, amendatory of the Federal Judiciary act, receivers over property appointed by the United States courts are required to manage or operate the trust property according to the laws of the State in which it is situated, and they may be sued in respect to its management or operation in the courts of such State, without the previous leave of the court appointing them; and in such cases a judgment rendered in the State court is conclusive upon the Federal court as to the existence and the amount of the plaintiff's claim; but the time and manner of its payment are to be controlled by the court under whose orders the receiver acts.

2. A railway company has no right to dig a ditch on its right of way for the drainage of surface water so near to the line of a street in a town as to encroach upon the street by the erosion of the soil of its banks, and if it does so the owner of lots abutting upon the opposite side of the street, who keeps hotel upon them, and whose use of them for such purpose is materially interfered with by the widening of the ditch into the street, may maintain an action for the abatement of the ditch as a private nuisance, and for damages caused by it.

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

No. 10941.

In the Matter of the Petition of Frank Palmeter for the Writ of Habeas Corpus.

ORIGINAL PROCEEDING IN HABEAS CORPUS.

Petitioner discharged.

Syllabus. By the Court. Johnston, J.

1. The power of a Police Judge to imprison for contempt cannot rest on a mere implication or inference, but must be clearly expressed in the statute.

2. The general welfare clause, which authorizes a City Council to enact such ordinances as may be deemed expedient for maintaining the peace, good government and welfare of the city and its trade and commerce, does not authorize the City Council to confer power upon the Police Judge to adjudge a person guilty of contempt and to imprison him therefor.

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

No. 10031.

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

Error from Shawnee County.

REVERSED.

Syllabus. By the Court. Johnston, J.

Receivers are not agents within the meaning of section 88 of the crimes act, and are not subject to prosecution under the latter part of that section, which provides in effect that if any agent shall neglect or refuse to deliver to his employer on demand money or property which comes into his possession by virtue of such employment, office or trust after deducting lawful fees or charges, unless the same has been lost by means beyond his control, or his employers have permitted him to use the same, shall upon conviction be punished as for embezzlement.

Doster, C. J., concurring.
Allen, J., concurring specially.
Johnston, J., dissenting.
A true copy.
Attest: JNO. MARTIN,
[Seal.] Clerk Supreme Court.

No. 10876.

F. G. Hentig
vs.
H. Pipher, et al.

Error from the Court of Appeals, Northern Department.

AFFIRMED.

Syllabus. By the Court. Johnston, J.

1. A person who holds possession of real estate under a claim of ownership is entitled to recover the same as against one who has no right or title to the same.

2. Where a leasehold interest in land is sold at judicial sale the purchaser acquires no greater right than the tenant held, and, like the tenant, he will not be permitted to dispute the title of the landlord under whom he holds.

3. K. purchased land at a tax sale and a deed thereto was issued to him without his knowledge. A few months afterward he accepted the full amount of his claim for taxes from the owner, and a written release or writing of redemption was given by him. About sixteen years afterward he was informed by H. that a tax deed had been made to him, and upon the request of H., and believing that it would be an act of justice to the real owner, he made a quit-claim deed to H., telling him at the same time that he had no interest in the land: Held, that K. had no title or interest to convey, and that H. acquired none through the quit-claim deed.

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

No. 10223.

The Atchison, Topeka & Santa Fe Railroad Company
vs.
M. H. Osburn.

Error from Harper County.

REVERSED.

Syllabus. By the Court. Johnston, J.

1. In showing the quantity and value of wheat alleged to have been destroyed by fire, a witness should be confined to his individual knowledge and judgment, and not permitted to give the estimate or conclusion of another who also made an examination as to quantity and value.

2. When it is claimed that a certain engine, in charge of a particular engineer, was defective and was so negligently managed as to unnecessarily throw out fire, from which damage resulted, testimony of the condition of another engine or of the careless conduct of other engineers is ordinarily not admissable.

3. The declarations of the section foreman and depot agent of the railroad company, made after the fire occurred, in regard to the condition and management of the engine, and which had no connection with the business committed to them, are mere hearsay.

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

No. 10297.

Mary W. Johnson
vs.
C. J. Jones, et al.

Error from Finney County.

REVERSED.

Syllabus. By the Court. Johnston, J.

1. A judgment by default based upon personal service of summons on one of the defendants is as conclusive against such defendant upon every matter admitted by the default as any other kind of judgment.

2. Such a judgment having been duly rendered and entered of record, and the term at which it was rendered having passed, can only be vacated or set aside at the times and in the manner provided by law.

3. So long as the judgment stands the defendant has no right to file answers raising issues finally determined by the judgment, and the court has no power to re-try them.

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

No. 9654.

Joel B. Mayes, as principal Chief of the Cherokee Nation, etc.,
vs.
The Cherokee Strip Live Stock Association, et al.

Error from Sumner County.

AFFIRMED.

Syllabus. By the Court. Johnston, J.

A lease of lands in the Cherokee Outlet was made by the Cherokee Nation to the defendants in violation of section 2116 of the Revised Statutes of the United States. Possession was taken under the lease, and the defendants failing to pay a part of the stipulated rent, an action was brought in behalf of the Cherokee Nation to recover the same: Held, that as the lease was prohibited by law and illegal, no action can be maintained thereon.

Doster, C. J., concurring.
Allen, J., dissenting.
A true copy.
Attest: JNO. MARTIN,
[Seal.] Clerk Supreme Court.

No. 9296.

The State of Kansas, ex rel.,
vs.
E. G. Barton, as County Clerk of Gray county, Kansas, et al.

Error from Gray County.

REVERSED.

Syllabus. By the Court. Johnston, J.

1. In a mandamus proceeding to contest a county seat election brought after the election is held and the result declared, every matter affecting the validity of the election, including the sufficiency of the petition on which the election was ordered, may be investigated and determined.

2. Electors of the county who participated in the election are not estopped from instituting the statutory contest questioning the validity of the election.

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

No. 10332.

The State of Kansas
vs.
George H. Thomas.

Appeal from Anderson County.

AFFIRMED.

Syllabus. By the Court. Allen, J.

1. The testimony examined and held sufficient to sustain a conviction of rape on a female under the age of 18 years.

2. In such case the venue as well as the criminal act may be established by circumstantial evidence.

3. Flight by a person accused of a crime, though not of itself sufficient to support a conviction, is a circumstance that may be shown against him and given such weight, as the jury deem it entitled to, and it is not error for the court in the instructions to the jury to mention the fact that evidence tending to prove flight has been offered, and may be considered by them as a circumstance bearing on the guilt of the accused, with all the other evidence in the case.

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

No. 10881.

The First National Bank of Topeka
vs.
David H. Heflebower as State Treasurer.

Original Proceeding in Mandamus.

JUDGMENT FOR DEFENDANT.

Syllabus. By the Court. Allen, J.

The State Treasurer will not be compelled by mandamus to register and pay orders drawn upon the permanent school fund by the State School Fund Commissioners to pay for bonds purchased by them, where it appears that the price agreed to be paid is more than the actual market price thereof at the time of the purchase, even though the excess above the market price be so small that the purchase cannot be declared an improvident one.

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

No. 10857.

The Marysville Investment Company
vs.
Wilhelm Holle, et al.

Error from Court of Appeals, Northern Department, Central Division.

REVERSED.

Syllabus. By the Court. Allen, J.

1. The townsite of Palmetto was entered by the Probate Judge of Marshall county for the benefit of the occupants thereof, under the act of Congress of May 23, 1844. He thereafter conveyed the property to M. and eleven other parties named as members of the Palmetto Town Company, which was a corporation. M. and several of the others conveyed their interests to the plaintiff which brought this suit to recover certain lots occupied by the defendants. The defendants claimed by virtue of adverse possession under a void tax deed for a period of about ten years:

Held: First—That the deed from the Probate Judge to M. and the others conveyed a valid title as against the defendants.

Second—That uncertainty as to the respective rights of the Palmetto Town Company and the persons named in the deed from the Probate Judge, neither enlarged or diminished the rights of the defendants under their tax title.

Third—That mere failure to assert his title for a long period of time will not estop the owner from maintaining an action against one claiming under a void tax deed, whose possession has never ripened into a title by prescription, and is not protected by any statute of limitations.

Fourth—One who claims under a tax title is chargeable with notice of the existence of the original patent title as an adverse claim, and it is important under the facts in a case like this whether he is rightly or wrongly informed as to who the holder of that title may be.

Fifth—Estoppel by conduct arises only where the person claiming the estoppel is influenced in some degree by the conduct set up as constituting the estoppel, and the failure of the owner of town lots to pay the taxes on them does not operate by way of estoppel to strengthen or validate a void tax deed.

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

No. 10329.

John Schrimpcher, et al.,
vs.
John S. Stockton, et al.

Error from the Court of Common Pleas of Wyandotte County.

AFFIRMED.

Syllabus. By the Court. Allen, J.

After restrictions on the alienation of lands patented to incompetent Wyandotte Indians were removed by the treaty of 1867, title thereto might be gained by occupancy under claim of ownershop; and where the defendants were in the actual

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