[Published November 24, 1897.]

Appellate Court Syllabi.

Kansas Court of Appeals, Northern Department, Eastern Division.

No. 99.

Filed November 5, 1897.

W. B. Gleason, et al., plaintiffs in error,
vs.
William H. KeHog, et al., defendants in error.

Error from the District Court of Jackson county.

Per Curiam.

This action was submitted to this court and an opinion filed January 9th, 1897, affirming the judgment of the court below, for the reason "that the record does not affirmatively show that it contains a full and complete statement of all the proceedings that have a bearing upon the correctness of the rulings complained of." A rehearing was ordered and the case submitted in June, 1897.

We have examined the record and are satisfied that the former judgment of this court is correct. The judgment of the court below will be affirmed.

All the Judges concurring.
A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

partment, Eastern Division.
Kansas Court of Appeals, Northern De-

No. 208.

Barber Asphalt Paving Company, plaintiff in error,
vs.
City of Topeka, defendant in error.

Error from Shawnee County District Court.

REVERSED.

Syllabus. By the Court. Mahan, P. J.

In an action on a paving contract, in writing, against a city to recover a balance alleged to be due thereon, an answer that alleges that "the balance so sued for is for paving an eight-foot strip on Quincy street extending through two blocks on said street, which two blocks constituted two separate special taxing districts in the city of Topeka, and said paving being a special improvement, for which under the law the said taxing districts were alone liable; that the cost of such improvement is therefore chargeable against the real property in said taxing districts, and not in any manner chargeable against the city at large," does not state a defense and it was error for the court to overrule a demurrer thereto.

A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

Kansas Court of Appeals, Northern Department, Eastern Division.

No. 247.

Filed November 5, 1897.

V. J. Lane, plaintiff in error,
vs.
The State of Kansas, defendant in error.

Error from the Court of Common Pleas, Wyandotte County.

REVERSED.

Syllabus. By the Court. McElroy, J.

1. "The conditions of this recognizance is such that if the above bonden, Isaac H. LaVeen, shall personally be and appear before the District court in and for said county of Wyandotte, on the first day of the next term thereof, it being the second day of June, 1890, then and there to answer the charge of having at the county of Wyandotte and State of Kansas, on or about the 13th day of April, A. D. 1890, committed the crime of ——, and abide the order of such court, and do not depart without leave, then this recognizance shall be void, otherwise it shall be and remain in full force and effect in law:" Held, that a criminal recognizance conditioned as above is not a continuing bond and that the surety is entitled to be discharged at the end of the term designated therein.

A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

Kansas Court of Appeals, Northern Department, Eastern Division.

No. 250.

Filed November 11, 1897.

Oliver N. Schee, plaintiff in error,
vs.
E. H. Shore, by J. M. Shore, his next friend, defendant in error.

Error from Court of Common Pleas, Wyandotte County.

AFFIRMED.

Syllabus. By the Court. Wells, J.

1. Where an action upon a contract for the sale and warranty of a horse was brought against two persons jointly, and the verdict upon the evidence was against only one, there is not such a variance between the pleading and the verdict as to require the setting aside of the verdict.

2. Where a person sells another a horse and assures the purchaser that it is as sound as a dollar, and the purchaser relies upon such representation and makes the purchase, and it develops that at the time of the sale the horse was diseased with the glanders and afterwards had to be killed, the seller is responsible to the buyer for the damage the buyer actually and necessarily sustained by reason of said horse having been so diseased.

3. The objection made to the evidence received and rejected and the instructions to the jury given and refused, were examined and found to contain no reversible error.

A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

Kansas Court of Appeals, Northern Department, Eastern Division.

No. 529.

Filed November 5, 1897.

The State of Kansas, appellee,
vs.
Martin E. Lowe, appellant.

Appeal from Wabaunsee County.

AFFIRMED.

Syllabus. By the Court. McElroy, J.

1. It is not error for the trial court to overrule a motion to quash an indictment for irregularity in selecting the grand jury where such irregularity, in the opinion of the court, does not amount to corruption.

2. It is within the discretion of the trial court to permit the names of additional witnesses to be indorsed on an indictment at the commencement of the trial, and a judgment should not be reversed on account of such permission, unless it appears that such indorsement was an abuse of such discretion.

3. Evidence tending to prove the accused guilty of an offense not charged in the indictment, is not, on that account, incompetent, if it tends to prove any fact constituting an element in the offense that is charged in the indictment. If intent is material, any fact is incompetent against the accused which tends to show the motive of the criminal act charged. In such case the evidence is not incompetent because it may tend to show the accused guilty of another offense than the one charged.

A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

Kansas Court of Appeals, Northern Department, Eastern Division.

No. 530.

Filed November 5, 1897.

The State of Kansas, appellee,
vs.
Samuel A. Johnson, appellant.

Error from Wabaunsee County District Court.

REVERSED.

Syllabus. By the Court. Wells, J.

1. A motion to quash an indictment for irregularities in the selection and proceedings of the grand jury that returned it, can only be sustained under Par. 5144, G. S. 1889, when such irregularities, in the opinion of the court, amounts to corruption, and where the evidence upon that question is conflicting, the judgment of the court below will not be disturbed.

2. The unexplained possession of the fruits of crime, recently after its commission, is prima facie evidence of guilty possession, and applies equally to a person charged with receiving and to one charged with taking it, and such possession need not be exclusive, but a joint possession may, in connection with other circumstances, justify a conviction.

3. Besides the formal matter of venue, etc., to lawfully convict the defendant in this case, it was necessary for the jury to have found from the evidence, beyond a reasonable doubt, the following facts, only: First, that the body of Amelia Van Fleet was unlawfully removed from its grave for the purpose of dissection, and

Second, that the defendant received said body, knowing that it had been so unlawfully removed for such purpose, or knowingly aided, counseled, abetted, or assisted some other person or persons in so doing.

4. It was not error for the court to refuse to give the jury an instruction, in substance, that the proof of the good character of the defendant completely removed the presumption of guilt arising from the possession of the stolen body, but it was the duty of the jury to consider the evidence upon each of these subjects and give it such weight as they thought it entitled to under all the circumstances of the case.

5. It is reversible error for a court to assume a material controverted question, as a fact proven, and instruct the jury as to their duty under such assumption.

A true copy.
Attest: W. H. THOMPSON,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 159.

George W. Markley, plaintiff in error,
vs.
Mary H. Kirby, administratrix, defendant in error.

Error from Osage District Court.

REVERSED.

Syllabus. By the Court. Dennison, P. J.

The Courts of Appeals derive their jurisdiction from chapter 96 of the Session Laws of 1895, and when the record of case within their jurisdiction which was originally brought in the Supreme court, is received by the Court of Appeals, it immediately has as full and complete jurisdiction of such case as though it had been originally commenced in such Court of Appeals.

2. A case which remains undecided in a court is pending therein.

3. Upon the passage of the act creating the Kansas Court of Appeals, the Supreme court was divested of all jurisdiction of the cases "pending therein," which they were directed to transfer to the courts of Appeals, except such reviewing supervision as is provided for in said act, and could make no valid order in such cases except the order transferring them as directed.

4. Where the record shows that a party objects at the time and saves an exception to the instructions given by the court as a whole, and to each and every instruction separately, and to each and every part thereof, such exceptions are sufficient to obtain a review of any part of such instructions.

5. In an action for malicious prosecution, the question of probable cause is one of law for the court to determine. If the undisputed facts show that there either was, or was not probable cause, the court should so find, and should instruct the jury that there was or was not probable cause shown. If, however, there is a substantial dispute about the facts which constitute the probable cause or the want thereof, it is for the jury to determine what facts are proved, and for the court to say whether they amount to probable cause.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 170.

E. McGrath, plaintiff in error,
vs.
Frank Crouse, administrator, defendant in error.

Error from Franklin District Court.

AFFIRMED.

Syllabus. By the Court. Dennison, P. J.

1. Where a written contract contains a stipulation that "all disputes or questions that may arise in regard to prices of stock, shall be settled by a reliable and competent person agreed upon by the parties to this contract:" Held, that such a stipulation is not a condition precedent to the maintenance of a suit and is a matter of defense.

2. Where a written contract provides that the goods shall be listed at "cost in market" with 5 per cent. added, parol testimony is admissible to show the meaning given to the terms, by the parties to the contract.

3. Where a written contract fails to provide a means by which the price of fixtures and tools are to be determined, proof of an oral contract as to their price is admissible.

4. Where the trial court erroneously permits the introduction of testimony which contradicts or varies the terms of a written contract as to the price of certain goods, and where the jury in their answers to special questions state that they allow the plaintiff nothing on account of such goods: Held, that the substantial rights of the defendant are not prejudiced thereby, and the error is immaterial.

5. The instructions refused and given and the special questions refused and given, examined, and no error found in the rulings of the trial court theron.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 136.

The Kansas & Texas Coal Company, plaintiff in error,
vs.
J. J. Judd and Mary Judd, defendants in error.

Error from Cherokee District Court.

AFFIRMED.

Syllabus. By the Court. Dennison, P. J.

1. Where the owner of a farm has established her homestead thereon, she may leave the same for a temporary purpose, with the intention of returning, and if during all the time of such absence she retains that intention and refrains from establishing a homestead elsewhere, she has not abandoned the farm as her homestead.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 186.

Atchison, Topeka & Santa Fe Railroad Company, plaintiff in error,
vs.
E. L. Owens, defendant in error.

Error from Montgomery District Court.

REVERSED.

Syllabus. By the Court. Schoonover, J.

1. The case of Railway Company vs. Lycan, 57 Kas. 635, followed as to proof of value of hedge fence and clover fields destroyed by fire resulting from negligence of a railroad company.

2. The proof and findings of the jury as a basis for their general verdict should correspond with the averments in the pleadings.

3. "The allegations of negligence in one particular does not warrant a recovery on proof of negligence in another and different matter." (54 Kas. 482.)

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 162.

The Phelps Bigelow Windmill Company, a corporation doing business under and by virtue of the laws of the State of Michigan, plaintiff in error,
vs.
C. G. Demming, O. S. McIntire and Margaret McIntire, defendants in error.

Error from Linn District Court.

DISMISSED.

Syllabus. By the Court. Dennison, P. J.

1. The first and second paragraphs of the syllabus in Farree vs. Walker, 54 Kas. 49, are adopted as the syllabus in this case.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

The Kansas Court of Appeals, Southern Department, Eastern Division.

No. 135.

The St. Louis & San Francisco Railway Company, plaintiff in error,
vs.
Mary E. Beadle, defendant in error.

Error from Crawford District Court.

AFFIRMED.

Syllabus. By the Court. Schoonover, J.

1. The instructions of the trial court which are not set forth in the opinion are approved and adopted, and held to contain the propositions of law applicable to the facts in this case.

2. The record examined: Held, that no error prejudicial to the defendant below was committed in the admission or rejection of testimony.

3. The special instructions submitted by the defendant below considered: Held, that so far as they are applicable to the issue and evidence in this case, they are covered by the instructions given.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 193.

The Missouri Pacific Railway Company, plaintiff in error,
vs.
W. H. Clark, defendant in error.

Error from Allen District Court.

AFFIRMED.

Syllabus. By the Court. Schoonover, J.

Where the question of negligence is submitted to a jury, under proper instructions as to the law, and the findings and verdict are sustained by competent evidence, and is approved by the trial court, the verdict will not be disturbed by this court. (Missouri Pacific Railway Company v. Clark, 49 Pac. 799.)

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

Kansas Court of Appeals, Southern Department, Eastern Division.

No. 222.

J. N. Winkler, plaintiff in error,
vs.
The Board of County Commissioners of Miami County, Kansas, defendant in error.

Error from Miami District Court.

DISMISSED.

Syllabus. By the Court. Schoonover, J.

"The pleadings and agreed statement of facts show that the amount in controversy, and for which judgment could have been legally rendered, exclusive of costs, in the court below does not exceed $100: Held, that this court has no jurisdiction to hear and determine the case, and that the case must be dismissed from this court, although no question of jurisdiction was raised by either party." (Thrall vs. Fairbrother, 1 Ks. Crt. App. 482.)

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.

The Kansas Court of Appeals, Southern Department, Eastern Division.

No. 156.

James A. Hutchings, plaintiff in error,
vs.
Geo. A. Eddy and H. C. Cross, as Receivers of the Missouri, Kansas & Texas Railway Company, defendants in error.

Error from Neosho District Court.

DISMISSED.

Syllabus. By the Court. Schoonover, J.

Where a case is commenced against the receivers of a railroad company and afterwards the receivers die, and a receiver de bonis non is appointed as their succesor, and no attempt is made to substitute or revive the action in the name of the receiver de bonis non, for more than one year after his appointment: Held, that a motion to abate the action for the reason that it has not been revived, will be sustained.

All the Judges concurring.
A true copy.
Attest: W. O. CHAMPE,
[Seal.] Clerk.